Int J Polit Cult Soc (2009) 22:465–484
DOI 10.1007/s10767-009-9075-7

Laws and Policies—Enabling or Withholding the Development of the Culture of Constitutional Democracy

Péter Molnár

Published online: 25 November 2009
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Abstract New regulations and policies can hardly change the attitude of people in former communist countries as fast as a law can be passed, but they can certainly have some influence on the development of the political culture of the society. Bad laws and policies can preserve long-standing tendencies of state secrecy, undue political influence in media, lack of civic courage, and fear of speaking really freely. Good laws and policies can have the opposite result. This article will analyze how international and national legislation and their application influence the development of fundamental elements of a constitutional democracy in newer democracies. I will provide a typology of how law can influence the cultural environment necessary for a well-functioning constitutional democracy, assuming that such a democracy is the best possible framework for human communities.

Keywords Freedom of speech · Freedom of the press · Freedom of information · Enabling law and policy · Culture of constitutional democracy · Language of the law and the policy discourse

Introduction

In former communist countries, people do not take it for granted that they have a right to free speech and to get all information they are interested in, or other fundamental elements of a constitutional democracy. New regulations and policies can hardly change this attitude as fast as a law can be passed, but they can certainly have some influence on the development of the political culture of the society. Bad laws and policies can preserve long-standing tendencies of state secrecy, undue political influence in media, lack of civic courage, and fear of speaking really freely. Good laws and policies can have the opposite

I would like to thank Monroe Price for introducing to me the term of "enabling" law and policy.
This article is a revised and extended version of Peter Molnar: *Law and the creation of free speech rights—the impact of international regulations in Central and Eastern Europe*, Global Media Journal, Polish Edition No 1 (4), 2008

P. Molnár (✉)
Center for Media and Communication Studies, Central European University, Budapest, Hungary
e-mail: molnarp@ceu.hu

result. They can enable people and their society as a whole to develop their faculties and gain a sense of freedom. My article will provide a few examples of such opportunities.

I will analyze how international and national legislation and their application influence the development of culture in newer democracies. For lack of space, it will not be possible to examine all the issues involved in these cases, but the fact remains that some recently adopted European regulations raise really serious concerns about freedom of speech and freedom of information. Besides examining the opportunities for national regulatory policy, the purpose of this essay includes to show how international regulations could impede the development of new democracies, instead of enabling them to develop faster. I will also offer what I see as opportunities at least to modify and eventually reverse the direction the European Union had started to move towards with its new Audiovisual Media Services (AVMS) Directive. My other international regulatory example is the Council of Europe's convention on access to information. Considerable broader pressure was exerted by international civil society and NGOs to strengthen the safeguards provided by the draft convention, but this effort proved to be disappointingly unsuccessful, notwithstanding the support of the Parliamentary Assembly of the Council of Europe.

Through my personal experiences as a lawmaker during the first two terms of the freely elected Parliament of the Republic of Hungary in the 1990s, I became convinced that legislation has limited opportunities to change the mindset of a society that lived under suppression for long decades, without being able to openly discuss public matters including such a horrible social catastrophe as the Holocaust. As András Sajó observes:

> After all, racism and incitement to hatred against ethnic (national) groups (primarily but not exclusively minorities) present a major social and regulatory problem in the post-communist period. Extremist nationalist propaganda was often part of the self-assertion of nationalist political movements and often became part of the official government ideology. Extremist nationalist speech played a major role in the escalation of the Yugoslav conflict, contributing ultimately to genocide. Given the strong endorsement of nationalism by many political actors, including some governments, in many countries, extremist speech, irrespective of the legal provisions, became socially normalized to an extent (Sajo 2004).

What can be done by enacting laws in countries where extremist speech can become socially normalized "irrespective of the legal provisions"? How much room is left for the law positively to influence social–cultural reality when in fact the impact of regulation is significantly weaker than in states where the rule of law is better established? I learnt that legislation has to be carefully drafted and worded in order to enable the political community to develop towards the liberal values of constitutional democracy in the fastest way possible under the circumstances, and I have been always convinced that the new democracies in Central and Eastern Europe and elsewhere need the maximum protection for freedom of speech in order to overcome the fear of speaking freely, a fear so deeply rooted in the political experience of countries with a long history of suppression.[1]

I hope that this article can contribute to the search for strengthening the sense and joy of freedom in new as well as longer standing democracies. In other words, it is about how to make people and their political communities in our countries happier. Building on the presumption that a constitutional democracy provides the best possible framework, we can

[1] See Molnar (2000). Of course, countries with the imminent threat of violent conflicts or countries where recent genocide took place require especially careful analyses of the media policy that should be followed in such situations.

create the following typology of how law can influence the cultural environment necessary for a well-functioning constitutional democracy:

1. Law that intentionally withholds the development of the culture of constitutional democracy,
2. Law that aims to support the development of the culture of constitutional democracy, but withholds it because it does not consider the cultural context,
3. Law that considers the cultural context but does not enable the development of the culture of constitutional democracy,
4. Law that enables the development of the culture of constitutional democracy, because it is in creative conversation with the existing culture.

In order to illustrate this typology, this article will provide several examples, either only shortly mentioning them or describing them in some details. I will indicate or leave it for the reader to decide into which boxes of the typology listed above the following examples will fall:

- Instances from the language of the law and the policy discourse,
- Laws that maintain authoritarian traditions,
- Laws that restrict public discourse,
- Laws that enable citizen participation, and the development of civil society, in the words of Istvan Bibo, “the small circles of freedom” (Bibo and Nagy 1991)

The Language of the Law and the Policy Discourse

Concerns regarding the new “media law” of the EU and the Council of Europe convention on FOI can be symbolized by few expressions, notably Heidegger’s “Language speaks us.[2]”

My first example of that phenomenon is the concept of “content regulation”. In my opinion, these two words unconsciously support censorship all around the world. The term probably originates from “media regulation”, as anyone who accepts the principle of free speech would be reluctant to talk about “speech regulation”. Using the term “media regulation” is justified by the constitutional justifications of media-specific regulations of radio and television, namely the scarcity of the analog airwaves and the push media effect of these traditional media. This “media regulation” could have included regulation of the content of radio and television to the extent that could not have been justified for communication in any other parts of the public sphere. Widespread, careless use of the term “content regulation” lends credence to the view that media-specific regulation of radio and television can be extended to new, interactive media without providing any sound justification for doing so. If instead of “content regulation” we were to use the term “content-based regulation”, then there would be no automatic assumption that the content of communication can be regulated, given the difficulty of justifying such regulation from a constitutional point of view. Following a public consultation in September 2007 at the Faculty of Law of the ELTE University about the National Media Strategy (NAMS),[3] produced by the Office of the Prime Minister, my long-standing effort to change the dictionary of the media discourse in Hungary finally received broad support: the NAMS

[2] Even Heidegger experts cannot track the source of this statement that is still referred as one certainly written by Heidegger.

[3] http://www.meh.hu/misc/letoltheto/NAMS_jogalk_konc_071213_final.pdf (available only in Hungarian)

and media politicians who provided written comments to it replaced "content regulation" with "content-based regulation".

My second example to show the significance of the words we use in laws and in media policy discourse has been provided by a recent amendment of the freedom of information law in Hungary.[4] According to the original text of the law, everyone could have asked public agencies for information. Following my proposal, the 2005 amendment of the law replaced the word "*ask*" with the word "*claim*" (in Hungarian).[5] It should be hard to miss the difference. Originally, the language of the law meant—though obviously that was not the intention—that people can only "*ask*" the public agencies for access to information, making it sound that it was a favor the agency could grant—or not. Since we have used the word "claim", the new language of the law—matching the constitutional meaning of the basic human right[6]—the implication has been that everyone has a right to know all information, with only a few narrowly tailored exceptions of state or business secrets, and of course with careful protection of personal data. That, however, does not cover personal data of public officials and other public figures if their personal data relate to their public activity. If we can *claim* information—instead of *asking* for it—the language of the law expresses that the state is not above citizens and other people, but it is there to serve us. This way, the constitutionally appropriate language forcefully educates all participants in the process that the state should be transparent.

Laws that Maintain Authoritarian Traditions

The nomination procedure of the National Radio–Television Board (ORTT) in the Republic of Hungary provides a good example for regulations that intentionally maintain authoritarian traditions. The ORTT was planned to be a highly politicized body (Molnar 1999). Except the liberal party, all other parliamentary parties pushed for a procedure that secures that each parliamentary group of the different political parties directly nominates the members of the board.[7] This system at least sometimes results in decisions that are driven by the interests of the political parties at the cost of public interests.

The discussion on the draft of the Council of Europe's convention on freedom of information provides a highly disturbing international example, the unfortunate outcome of which can have bad effects on the development of the culture of constitutional democracy not only in the member states of the human rights organization of Europe but far beyond. The drafting process of the first binding convention on access to information was a missed unique opportunity to create regulation that could have supported the development of the culture of state transparency all around the world with all necessary safeguards for freedom of information.

[4] For the text of the law, see www.obh.hu

[5] Majtényi (2007), the first Information Rights Ombudsman of the Republic of Hungary, also emphasizes the significance of this change in the language of the law in his recent book.

[6] See the first international court decision that recognized freedom of information as a basic human right under international law: Inter-American Court of Human Rights, Claude Reyes v. Chile Judgment of September 19, 2006. See also the friend of the court brief filed jointly by the OSJI, ARTICLE 19, Libertad de Información México, and the Lima-based Press and Society Institute with the Inter-American Commission in the Claude Reyes v. Chile case. www.justiceinitiative.org/db/resource2/fs/?file_id=15384

[7] I Law of 1996 on Radio and Television, section 33: (3) The Chairman of the Board shall be nominated jointly by the President of the Republic and the Prime Minister. (4) The other members of the Board shall be nominated by the Parliament factions. Each faction may nominate one member. If there is only one faction on the governing side or the opposition side, that faction may nominate two members.

Hundreds of NGOs and individual FOI experts from all around the world agreed that the draft fell short of established international principles of freedom of information.[8] The NGOs, in a letter submitted to the Council of Europe in October 2007, identified the following long list of serious problems in the draft:

- "Failure to include all official documents held by legislative bodies and judicial authorities within the mandatory scope of the treaty;
- Failure to include official documents held by natural and legal persons insofar as they perform public functions within the mandatory scope of the treaty;
- Failure to specify certain basic categories of official documents, such as those containing financial or procurement information, that must be published proactively.
- Absence of a guarantee that individuals will have access to an appeals body which has the power to order public authorities to disclose official documents.
- Absence of a guarantee that individuals will be able to appeal against violations of the right of access other than "denial" of a request (such as unjustified failures to provide access in a timely fashion or in the form preferred by the requester).
- Lax drafting of exceptions that permit withholding of official documents under the internal deliberations and commercial interest exemptions:
  - There are no time limits on the application of the internal deliberations exemption; such documents may be withheld indefinitely, even after a final decision on the matter has been taken;
  - The treaty should protect only "legitimate commercial interests", not all and any "commercial interests", as in the present draft.
- Absence of a requirement that states set statutory maximum time limits within which requests must be processed.[9]"

In November 2007, the Council of Europe's Steering Committee on Media and New Communication Services has also expressed its concerns about the draft Convention on Access to Official Documents.[10] It was an encouraging sign in the drafting process, that the criticism quoted above and supported by many states led the group of specialists that drafted the treaty to continue working on the Explanatory Memorandum, and further discussion on the substance of the text had been delayed until the next plenary meeting of the Steering Committee on Human Rights which took place in March 2008. [11] Thus, there was some more time to improve the draft. Unfortunately, Access Info Europe, ARTICLE 19, and the Open Society Justice initiative, the three NGOs that brought many organizations and individual experts together to support the suggested improvements of the draft identified in the letter, had to report in the beginning of March 2008 that almost none of the concerns raised—also backed by Information Commissioners of many countries and the OSCE Representative on Freedom of the Media—were adequately addressed during the extended drafting period.[12] On 27th March 2008, the three NGOs

[8] See ARTICLE XIX, London (1999) and the recommendations of the Open Society Justice Initiative in Transparency and Silence—A Survey of Access to Information Laws and Practices in 14 Countries, OSJI 2006.

[9] http://www.access-info.org/data/File/Council%20of%20Europe%20Treaty%20-%20Letter%20with%20signatories%20-%20Final%20-%205%20October%202007.doc

[10] http://www.access-info.org/data/File/CDMC%20Meeting%20November%202007.pdf

[11] http://www.access-info.org/

[12] http://www.access-info.org/data/File/Access%20Convention%20-%207%20Main%20Problems%20-%203%20March%202008%20-%20FINAL.pdf

wrote with "profound disappointment" in their news update about how the draft text of the treaty was adopted the previous day. The Steering Committee on Human Rights, instead of incorporating any of the additional safeguards quoted above, excluded the Heads of State access to information obligations. As the NGOs reported:

> The most shocking development was the introduction of an exception to exclude Heads of State from the scope of the right to information. This was achieved by extending the optional blanket exception for Royal Households to the heads of state.[13]

In early October of 2008, with a somewhat unexpected new turn, the Parliamentary Assembly of the Council of Europe decided to initiate the redrafting of the treaty, in order to bring it up to the highest possible standards.[14] Yet, with a last undesirable turn, the convention was accepted without further considering the civil society proposals, which cast a shadow not only on the convention, but also on the democratic structure of the Council of Europe. The human rights organization of Europe should had included all the important safeguards of access to information in the first binding international treaty on freedom of information. Unfortunately, with all the basic flaws listed above, the new treaty is also a step back besides being a step forward by its positive elements which include that "a limited list of exceptions (12 in total)… must be subject to public interest and harm tests".[15] In December 2008, the Budapest Declaration on the Right of Access to Information had to urge "States with right of access to information laws not to lower their standards on the basis of the Council of Europe treaty;" and to call "on all States and intergovernmental actors to promote full compliance with the right of access to information in a manner that is consistent with best international standards".[16]

Laws that Restrict Public Discourse

One example for regulations that impose backfiring limitations on the public discourse is the prohibition of the public display of certain totalitarian symbols in Hungary. The impact of this law can be well-illustrated by how riots on the streets of Budapest, on the 50th anniversary of the anti-Stalinist revolution in 1956, provided a convincing example for the argument that even unfettered "hate speech"[17] can contribute to democratic public opinion. On the 24th of October, the *New York Times*, in the center of its front page, displayed a photograph of the street riots on 23rd of October, the starting day of the revolution. The photo focused on a demonstrator whose face was distorted by hate, and who was holding a huge red and white striped flag. The article that followed did not mention the flag. No doubt, the overwhelming majority of the readers did not know what kind of flag was in the picture. Perhaps, many of them thought that it was the Hungarian national flag. The readers of the *New York Times* were able to learn about the flag 2 days later from a short, scarcely

[13] http://www.access-info.org

[14] http://www.access-info.org

[15] http://www.access-info.org/en/council-of-europe

[16] Budapest Declaration on the Right of Access to Information
http://www.cmcs.ceu.hu/files/u3/ration_ on_the_Right_to_Access_to_Information_0.pdf

[17] When used in legal parlance, the colloquial expression "hate speech" seems to presuppose that the state can define with legal precision the particular forms of content that should be regulated as "hate speech". Because I regard this implicit assumption as questionable, I shall use "hate speech" only in quotation marks. I do not mean to imply that many clear instances of obvious "hate speech" cannot be identified; I mean only to stress that a reliable definition of this term, if possible at all, cannot be taken for granted

noticeable letter to the editor that many readers probably missed, written by István Deák, a Hungarian emeritus professor of history at Columbia University:

Your caption did not mention that the demonstrator pictured in the foreground is not waving the Hungarian flag but the striped, so-called Arpad flag of the Arrow Cross, Hungary's extreme National Socialist party.

The Arrow Cross was in power for a few months beginning in October 1944, during which time Hungary was devastated by the war and thousands of Jews were rounded up and killed.

During the recent demonstrations in Budapest, the flag of the Hungarian Nazis has been conspicuous.[18]

This example is not about a mistake even the best newspapers can make when they fail to provide an accurate description of the relevant historical–cultural background of an event. The story of this photo is an instance of coded racism. It had to be coded because, in Hungary, the criminal law prohibits the public display of certain listed totalitarian symbols, among them the swastika and the arrow cross. The Constitutional Court took this provision of the Criminal Code as an exception, holding it constitutional with the thoroughly unconvincing argument that symbols are such special forms of expression that they can trigger specific criminal prohibition.[19] Section 269/B of the Criminal Code says that:

1. Anyone who
   (a) distributes;
   (b) uses in front of a large public gathering;
   (c) exhibits in public: a swastika, the SS sign, an arrow cross, the hammer and sickle, a five-pointed red star or a symbol depicting the above commits a misdemeanor—unless a graver crime is realized—and shall be punishable by fine.
2. The person who commits an act defined in paragraph (1) for the purposes of disseminating knowledge, education, science, or art, or for the purpose of information about the events of history or the present time shall not be punishable.[20]

Consequently, extreme right demonstrators could not have displayed the arrow cross or the swastika, or the red and white striped flag with an arrow cross in it, the flag of the Arrow Cross, the Hungarian Nazi Party. They can only use a red and white striped flag without the arrow cross on it. The Federation of Young Democrats—Civic Alliance, the leading right-wing party, after a short hesitation endorsed the use of the striped flag stating that it is just a historical Hungarian flag. But while some versions of the red and white striped flag are historic Hungarian flags indeed, in 1944–1945, the flag became strongly associated with the Arrow Cross Party, Hungary's extreme National Socialist party. Since then, the flag has been a symbol of the most horrible terror and cannot be separated from this meaning.[21]

The criminal prohibition of the public display of certain totalitarian symbols could not stop the use of one of the banned totalitarian symbols. The exceptional content-based criminal law ban on "hate speech" led to coded "hate speech" in Hungary. It deprived the global community of the opportunity to understand a profound aspect of the reported

[18] Deak (2006), 'To the Editor: Re "Clashes Disrupt Hungarians' Celebration of Anti-Soviet Revolt in '56" (front-page photograph, Oct. 24)' *The New York Times*, October 26.

[19] Decision 14/2000 (V. 12.) AB http://www.mkab.hu/content/en/en3/06079304.htm

[20] Act XLV of 1993 on the amendment of Act IV of 1978 on the Criminal Code introduced the following provision into the Criminal Code under the title "Use of Symbols of Despotism".

[21] The failure to accept that the red and white striped flag cannot be separated from the terror it symbolized is somewhat similar to the continued public display of the confederate flag—the flag of the Confederacy organized by the Southern states in 1861—that cannot be separated from slavery in the US.

political turmoil in a post-Holocaust, post-communist Central European democracy. The result of the regulation is that most non-Hungarian foreigners could not decode the message of the flag that they saw on the front page of one of the world's most respected newspapers.

Endorsing the use of the striped flag at anti-government demonstrations[22] by the Federation of Young Democrats—Civic Alliance provides a clear example of coded speech that is hard to understand abroad. This makes it much easier for the leading right-wing party of Hungary to engage in double speak, using democratic language when talking to foreigners, while mixing with extreme right groups and ideas when talking to a domestic audience. As this illustration shows, limiting public discourse by prohibiting totalitarian symbols significantly contributed to the spread of "hate speech" instead of reducing it.

The other example for regulations that restrict the freedom of the public discourse with good intentions but at least very likely has a bad impact is provided by the Audiovisual Media Services Directive of the European Union.

In June 2006, dozens of media scholars from many countries had signed a very critical Declaration that I drafted at a conference at the Central European University in Budapest on the then planned AVMS Directive that replaced the Television without Frontiers Directive of the European Union. The Declaration—finally signed not only by European media scholars—was sent to all members of the European Parliament.[23] It began as follows:

> As European media scholars we call the attention of the decision makers of the European Union and the Council of Europe that the revision of the Television without Frontiers Directive of the European Union and the European Convention on Transfrontier Television of the Council of Europe should not restrict freedom of expression and freedom of information on the internet, and should not impose undue, premature regulation on fast-changing new communication technologies.
>
> The extension of the scope of some rather burdensome part of the Television Directive to the internet—as the draft new directive of the European Commission suggests, with far too vague terms that would leave content providers and users uncertain in whether or not their various activities are regulated by the new directive—would be an unjustifiable restriction of freedom of speech and freedom of information. Neither the scarcity of frequencies, nor the push media character of television applies to the unique architecture of the Internet.[24]

When the Declaration was born, the scope of the directive was already narrower than had originally been proposed by the European Commission. The scope of the draft had been narrowed down to cover only audiovisual media services, instead of covering all audiovisual Internet content. The final text of the directive incorporated further significant changes in order to more narrowly define the scope of the directive.[25] But the line between content that is covered, or not covered, by the directive is still not clear, and some of the content-based rules apply to both the broadcast and the on-demand services. In this light,

[22] László Sólyom, the president of the Republic of Hungary—the first chief justice of the Constitutional Court—in a speech he gave at the opening meeting of the fall sessions of the Parliament on the 10th of September, 2007, at least asked demonstrators "to respect the victims and the pain of the survivors by not using this flag as a symbol, to be humane, to think about what they cause with this."

[23] István Szent-Iványi, a Hungarian liberal member of the European Parliament, helped me to send the Declaration to all other members of the Parliament.

[24] Budapest Declaration for Freedom of the Internet (06.15.2006). www.cmcs.ceu.hu, see also: http://www.edri.org/edrigram/number4.16/budapestdeclaration

[25] Among Member States, the British government—and OFCOM—argued the most for at least significantly narrowing down the scope of the new Directive if it covered on-demand/non-linear services at all.

the European Commission's claim that it is introducing lighter-touch regulation of on-demand services amounts to surprisingly misleading communication by one of the most powerful actors of European policy making. In my view, the following criticism expressed in the above-mentioned Declaration still stands:

> The unjustifiable restrictions suggested in the draft proposal of the European Commission would put freedom of speech and freedom of information at risk especially in Central-, and East European countries where arbitrary use of the state regulatory power is more likely than at least in some West-European democracies. At the same time, the draft proposal of the European Commission would withhold the development of the information society services, especially of the smaller enterprises, while the restrictive and undue regulations would not be enforceable.[26]

In December 2006, on behalf of Center for Media and Communication Studies (CMCS) at the Central European University (CEU), I co-organized an international workshop on the draft directive with the OSCE Representative on Freedom of the Media and the Rafto Foundation for Human Rights from Norway. The workshop produced Recommendations[27] to the European Parliament on the draft AVMS Directive. The recommendations that were later sent to all members of the European Parliament stated as it follows:

> The draft Directive on AVMS carries with it unintended harmful effects on the exercise of the right of freedom of expression. (…) Where sector specific content-based regulation is established this should be specifically justified on the basis of the technological features of the respective sector and done through minimum standards only and within the limits of article 10 ECHR. (…) The platform-neutral approach of the draft AVMS Directive targets a vast area of new and yet to be developed services, including those that differ considerably from 'classic' broadcast. This goes beyond regulatory necessities and the scope of the Directive should be limited and not include new media services. The Directive for the first time on the European level permits content-based restrictions of speech outside traditional broadcast, including content on the Internet, so-called non-linear audiovisual media services. This poses enormous regulatory challenges. The debate until now has shown that there is no sufficient level of common understanding on how to address this rapidly changing communication environment. Also, unlike in classic broadcast, audiovisual content delivered through services of the information society ('pull' media) offers the user a high degree of choice and control and thus requires a different regulatory approach.[28]

In my view, the new directive provides a strong example how regulation—that restricts the freedom of communicating ideas and information through a fast-growing part of the freest ever communication tool, the internet—can constrain freedom of speech, especially in less developed democracies. What will it mean in states where democracy is fragile, and particularly where the internet is almost the only free channel of communicating ideas and information?

[26] Budapest Declaration for Freedom of the Internet

[27] On 1 December 2006, the OSCE Representative on Freedom of the Media and the Center for Media and Communication Studies of the Central European University Budapest with support of the Rafto Foundation for Human Rights hosted a workshop on "non-linear audiovisual media services" and the draft EU AVMS directive. Following this workshop, these recommendations have been developed by the signatories.

[28] http://www.osce.org/documents/rfm/2006/12/22708_en.pdf

There is no question that at least some governments will see this as an easy opportunity to regulate speech, curtail the free flow of information and ideas. But if governments want to protect freedom of speech and freedom of information in their countries—what can they do? Should they risk an infringement procedure before the European Court of Justice?

Clearly, there is need to implement the AVMS Directive in a way to avoid as much of the unjustified regulation as possible. Below, I will use the example of Hungary—one of the countries where there has been at least some opposition to the extension of the scope of the "media law" of the EU—to analyze the chances of such a narrow implementation.[29]

In Hungary, there has not been enough discussion on the extension of the scope of the Television Without Frontiers Directive, or on the almost totally missing justification for it. Since the European Commission published the text of the proposed new Directive in December 2005, several presentations have criticized it and the following drafts for this reason at conferences and other events of the CMCS[30] at CEU,[31] all of which were held in English for an international audience. The Declaration, quoted above, was signed by Hungarian media scholars as well, but it was still not enough to make the Hungarian public aware of the subject. Some Hungarian experts, among them János Timár, a member of the ORTT[32] attended the international CMCS-FOM/OSCE-Rafto workshop mentioned above. The MTE also considered signing the recommendations produced during and following the workshop, although ultimately it was not able to do so before the text had been sent to members of the European Parliament. This event was also English-speaking, which limited its impact on public discourse in Hungary. Besides this workshop, only the Committee of European Affairs of the Parliament had one hearing that included critical analyses of the extension of the scope of the former Directive (at the beginning of 2007).[33]

In 2007, there were some other public discussions about the draft Directive in Hungary, and they included but did not specifically focus on the extension of the scope of the regulation.[34] The extension of the scope of the European "media law" somehow could not really be put on the agenda of the broader public discourse.[35] One reason for the failure to

[29] This part of the article is a slightly modified version of the country report on Hungary that I wrote for a project of the South East European Network for Professionalization of Media on "The Impact of the EU Audiovisual Media Services (AVMS) Directive on Freedom of Speech in some Post-Communist Democracies of Central and South Eastern Europe." The research project was implemented in October 2007–March 2008 with the support of the Danish Royal Ministry of Foreign Affairs.

[30] See www.cmcs.ceu.hu.

[31] I focused on criticizing the draft for this reason; Eva Simon, the lawyer of the Association of Hungarian Content Providers (MTE, www.mte.hu), also criticized this part of the draft in her presentations.

[32] www.ortt.hu

[33] Following my initiative to hold such a hearing, I was able to present a critical view on this part of the Directive.

[34] The MTE had a roundtable debate in the Center for Independent Journalism and some parts of the Media Hungary, and Internet Hungary conferences of the year were dedicated to the discussion of the new Directive. The implementation of the new Directive was part of the discussion in September 2007 at a public hearing on the whole national media strategy—a document produced by the Office of the Prime Minister.

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[35] I repeatedly brought up this issue even in public debates about the national strategy on digital switchover, or other media policy subjects; in some radio interviews, I also tried to call the public's attention to what is at stake.

include this highly important topic in the public discourse in Hungary is that there seems to be a divide between the recognition of domestic and international policy issues. Media policy debates seem to revolve much more around rather domestic issues, while international matters, especially the extension of the scope of the television Directive that might appear at first sight as a somewhat theoretical matter, could only capture much less attention. At the same time, this is the very reason why such a fundamental regulatory move could have been passed without much public discussion in Europe as a whole.

The first public discussion in Hungarian specifically on the extension of the scope of the former Directive was held as part of a project of the South East European Network for Professionalization of Media[36] on the impact of the Directive on freedom of speech in some post-communist democracies of Central and South East Europe in January 2008 at the Center for Independent Journalism.[37]

As described above, in Hungary, there has been at least some discussion on the issue of the new Directive extending content-based regulation of the traditional media to a fast-growing, uncertainly identified portion of the Internet, largely without any sound constitutional justification for doing so. Critical comments tried to call attention also to the issue that, while aiming to catch a quickly moving target, the new European regulation does not consider the risks involved in the restriction of freedom of speech and freedom of information by regulating a huge portion of content providers.[38] I emphasized that the Central and East European context should be brought to the deliberative process for the draft Directive, considering that the new regulation could have a chilling effect on free speech—particularly in post-communist democracies, and especially where the Internet is a primary free channel for communicating ideas and information. Governments in such countries are likely to use the new Directive as an opportunity for further regulating speech, for further curtailing the free movement of information, and they would be able to do so with the approval of the European Union. All they would have to do, to suppress political dissent, would be to abuse the incitement to hatred provision of the AVMS Directive. Andrei Richter provides an example of such an abuse of the law when he writes about how the Russian statue "On countering extremist activity," enacted in 2002, was subsequently amended in 2006:

> According to analysts, the main idea behind the changes was to shield the authorities from discontent. Extremism now included spreading material that explained or justified it, disseminating public calls to engage in it and also promoting or facilitating it through the media. Publicly defaming state officials by maliciously accusing them of committing acts of an extremist nature also became an act of extremism (Richter 2007).

At the same time, it is hard to imagine how the anti-"hate speech" provision of the Directive could work, or be enforced. A good example is what happened with a horrible racist website in the last few years in Hungary. A site called *Olah Action* involved a video

[36] See www.seenpm.org. Sándor Orbán, the Executive Director of the South East European Network for Professionalization of Media.

[37] Sándor Orbán, the Executive Director of the South East European Network for Professionalization of Media, initiated the project.

[38] The international workshop at CEU also called attention to the importance of strengthening the country of origin principle, as regards on-demand, non-linear services.

game which asked players to kill the Roma community in one county after another, making them Roma-free. Self-regulation has been working, as far as it can work in the case of a website. The site was taken down by the provider after receiving notice from Radio C, the Roma community station in Budapest. But soon later, the site became available again through another server. How could state regulation work better?

As opposed to the example mentioned above, a satellite television that spreads hate speech could have been successfully removed from the transmitting satellite, and it would have been at least much harder for such a station to find another satellite to reach its audience again. There is no such example in Hungary, but the Al Manar case provides a convincing template.[39]

The possible abuse of the new Directive is more likely than its fair use to serve its intended purpose. We just have to look at the authority which would implement the extended rules. In Hungary, the ORTT has been authorized to apply the 1996. I. Law on Radio and Television.[40] Unfortunately, the 1996 law on radio and television—on which I worked for 6 years—provided an example how a law can help preserve the unhappy historical heritage of Central and Eastern Europe. Transforming state broadcasters into public ones, and creating independent media authorities to supervise the media market for the public good, has proved to be an almost impossible task for the new democracies in the region.[41] Hungary was among the worst examples, with bad regulation producing a National Radio and Television Board that often works under direct influence of the parliamentary parties (Molnar 1999). As I already mentioned earlier, the ORTT is a highly politicized body; each parliamentary group of the different political parties directly nominates its members, which sometimes at least results in decisions that are driven by the interests of the political parties at the cost of public interests.

The parties represented in the Parliament were negotiating several concepts of new legislation that would replace the 1996 law, but it is most likely wishful thinking to believe that a new board would be more independent than ORTT, because of direct pressure coming from the parliamentary parties. It means that, if the authority of the ORTT or of a probably similar board was extended to also control the on-demand, non-linear services (as they are

[39] In 1991, shortly after Hezbollah actively entered the Lebanese political scene, Al Manar was launched [It] has belonged to Hezbollah culturally and politically from its inception. Al Manar has several times been accused of broadcasting programming that preaches hatred and violence. In December 2004, the US Department of State put Al Manar on the Terrorist Exclusion List due to the channel's "incitement of terrorist activity". On 13 December 2004, the French "Conseil d'Etat", the highest administrative Court in France, ordered the French-based Eutelsat Company to shut down Al Manar broadcasts following accusations that its programs were anti-Semitic and could incite hatred. The "Conseil d'Etat" order was based on a decision by the French regulatory authority the "Conseil supérieur de l'audiovisuel". On 14 December, Al Manar obliged voluntarily, in order to avoid that other Arab programs of the same multiplex would have been shut down [*sic*]. The TVWF Directive assigns responsibility for ensuring that its rules are respected to the Member State that has jurisdiction. In this case, the French authorities were responsible for prohibiting the broadcasts of Al Manar because Al Manar was transmitted via the French satellite system within the satellite organization Eutelsat.' Available at http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/05/98&format=HTML&aged=0&language=EN&guiLanguage=en

[40] See the text of the Law at www.ortt.hu.

[41] About the transformation of the media in post-communist Central and East European countries, see: Jakubowicz (2007). See also: Broadcasting Regulation across Europe (2005). www.eumap.org

rather uncertainly defined in the new Directive), these services would be subject to decisions often motivated by the interests of the parliamentary parties.[42]

The likelihood of politically biased application of the extended European regulation, if applied by the ORTT (or a similar board which were to replace it) grows if we consider some instances in which some parts of the government have shown willingness to engage in an unjustified restriction on freedom of speech.

Hungary did not experience attempted or actual government censorship of communication through the Internet in the last few years, but prosecutors pursued criminal procedures against the investigative journalists Antonia Radi (from the weekly journal, *HVG*) and Rita Csík (from the daily paper, *Népszava*) for alleged breach of state secrets. The courts finally cleared the prosecuted journalists, but the procedure almost certainly had chilling effects. Miklós Haraszti, the OSCE Representative on Freedom of the Media closely followed the prosecutions,[43] and his office, the Hungarian Civil Liberties Union, the CMCS at CEU, and other NGOs played an important role in creating a growing concern for freedom of speech and of the press in connection with classification of information, while the procedure against the two journalists was going on.

In 2004, the ORTT almost closed down the most well-known community radio station in Budapest, Radio Tilos, for "hate speech", even though the station seriously apologized for the concerned sentence of one of its program hosts, fired him, and has introduced some editorial structure. In other cases where the management of a station had noticed hate speech, they did not react in such a self-critical way as Radio Tilos had. Still, the ORTT finally imposed sanctions on Radio Tilos that were far heavier than all other sanctions combined in other cases of broadcast "hate speech".

Protest in the press and support from other members of the Organization of Free Hungarian Radios helped to avoid at least the closure of the station, but even the courts let the highly discriminative application of the law stand. The witch hunt against the community station—a target far less powerful than its public or commercial counterparts—has had a chilling effect on the substantially open-mike, volunteer-run way in which non-profit media works, similar to so many websites.

As the examples mentioned above indicate, the independent press, civil society, constitutional protection for communication rights, independence of the court system, and rule of law in general might just not be strong enough, even in a Central European democracy like Hungary, to stop possible abuse of the Directive by the government.

The growing significance of NGOs in Hungary, with growing press coverage of their activities, seems to be the most encouraging development that can contribute to creating an

[42] It is worth mentioning that the highly politicized way the ORTT has been created provides the context in which the question arises of whether or not a converged regulator would be better. Such a regulator might be more effective, but in countries with a weaker tradition of democracy, it is risky to mix the radio–television authority with the telecom authority, because the former is likely not to escape undue political influence through misguided provisions of the law. In younger democracies, the real political feat of setting up a rather independent media regulator by regulation that enables the culture of the given country to do so should be the first step. The convergence of the media and telecom regulators should only follow.

As opposed to the ORTT, the National Telecommunication Authority (NHH) in Hungary works as part of the executive branch of the government. The reason for this different arrangement is simple. The media regulator ORTT applies content-based regulations of the radio and television market, while NHH (as the telecom regulator) does not apply content-based rules. Consequently, setting up ORTT as the media regulator requires special constitutional safeguards, while setting up NHH as the telecom regulator does not. As a result, implementing regulation to set up the NHH was not a hard challenge for the legislator, while setting up the ORTT was an overwhelming one as far as constitutional safeguards matter.

[43] See the following press release of Miklós Haraszti, the OSCE Representative on Freedom of the Media: http://www.osce.org/fom/item_1_28999.html.

environment that urges and enables the court system and other institutions to improve the constitutional protection for freedom of speech and freedom of the press. Contributing institutions should include the committees of the Parliament (even if they are under the control of the governing parties in the parliamentarian system of the Republic of Hungary) and the ombudsmen (the general one protecting all human rights, the one protecting the rights of ethnic and national minorities, and the one protecting informational rights) even if it depends on the two-thirds majority of the Parliament whether or not it elects ombudsmen who are really capable and willing to fulfill the great capacities of these public watchdog-advocate offices.

This environment should become one which better enables both freedom of speech and freedom of information to flourish by a careful implementation of the Directive in two separate phases for broadcast/linear and on-demand/non-linear services, instead of implementation in one phase for both kinds of service. First, the radio–television law would be amended for broadcast/linear services; and second, if self-regulation is not sufficient—the law on E-Commerce and other information society services (based on the E-Commerce Directive of the European Union) would be amended for on-demand/non-linear services. The ORTT—or a new board if the ORTT were replaced by another body by the amended or new media law—would be responsible for applying the implemented Directive regarding the broadcast/linear services. Courts would be responsible for applying the implemented Directive regarding on-demand/non-linear services.

The radio–television law requires a two-thirds majority vote in the Parliament, which might unfortunately provide the wrong incentive for the opposition in the Parliament to argue for including the implementation of the whole Directive in the amended or new radio–television law.[44]

But Hungary has two totally separate laws on radio and television and the Internet: the radio–television law and the law on E-Commerce. Communication through the Internet or other new communication technologies is not regulated at all in Hungary by the law which applies to traditional television broadcast: the 1996 Law on Radio and Television. Besides the law on E-Commerce and self-regulation, general laws like the Criminal Code or the Civil Code apply to content communicated through the Internet and other new technologies as well.

Hungary has a self-regulatory system for the Internet content providers, established by the MTE.[45] Since its establishment in 2001, MTE provides an effective example of self-regulation. The MTE had actually been founded to avoid the extension of the authority of the ORTT to cover the Internet as well, as had been suggested by the then chairman of ORTT. This way, MTE is a good example of having self-regulation not only, or not in the first place to raise the standards of the content provided, but to avoid or replace state regulation which is likely to prove heavy handed in the fast-changing environment of the

[44] A danger—additional to what has been already written—of merging ORTT and NHH is that it would be most likely not based on careful policy making but on a deal mostly driven by the personal interest of the deal-maker politicians/public officials and/or their parliamentary parties; as a result, the whole new regulation might just be rushed through the Parliament. This would reduce the chances of a carefully planned, slower implementation of the Directive in two phases: first for linear services by amending the radio–television law; second for non-linear services by amending the E-commerce law if self-regulation is not sufficient. In this case, the AVMS Directive would probably be implemented in one phase which would include implementation for both linear and non-linear services, instead of implementing the directive in the two separate phases as mentioned above. It would also mean that, as far as Hungary would start to regulate on-demand services earlier than other states, companies would probably move to countries with less regulation.

[45] Self-regulation also works in the field of advertising by the Board for Self-Regulation of Advertisement. See http://www.ort.hu/. Co-regulation by the Internet content providers and the state does not exist in Hungary.

Internet. Thus, the implementation of the new Directive challenges MTE to repeat what it could have accomplished so far: it could maintain and even improve its self-regulatory system in order to reduce state regulation to the minimum in the process of implementing the AVMS Directive.

The self-regulation system established by the MTE substantially covers all fields of the content-based regulatory provisions of the AVMS Directive. Amending the law on E-Commerce will be necessary only to the extent the new Directive explicitly requires member states to rely on state regulation when implementing the Directive. As the Declaration—mentioned above—stated:

> The E-Commerce Directive of the European Union already provides the necessary regulatory framework for the information society services. There is no any reason to duplicate the existing regulation with complicated, confusing new rules that would abridge freedom of expression and freedom of information, and would cause uncertainty that withholds investments and developments. If additional regulations of the information society services are needed at all, they should be backed by much more and much more carefully done research—especially by more impact assessment—than what has been done to support the draft proposal of the European Commission.

Further research might even lead to some deregulative changes in the E-Commerce Directive, as far as the unmatchable opportunities for free communication through the internet are the strongest safeguards of media freedom especially in countries where other parts of the media is under government control. The fast development of the new communication technologies also triggers that both the European Union and the Council of Europe rather rely on self-regulation and let the new communication technologies to develop freely and people to exchange ideas and information through them unrestricted.

In the light of the critical statements quoted above—undersigned by either many media scholars as in the case of the Declaration, or by different organizations as in the case of the Recommendations—the Council of Europe could take into consideration the concerns raised in the two documents.

The Council of Europe should first have a highly critical discussion on whether there is strong enough constitutional justification for extending the scope of its Convention to on-demand services.

Second, it should have a highly critical review of the new Directive, in the light of the results of the discussion about the justification for the extended regulations such as provided by the Directive.

Third, it should have an in-depth analysis of how different the cultural–political–legal environment is in non-EU member state countries, as opposed to EU member state countries in the Council of Europe. The abuse of the content-based rules of the AVMS Directive is more of a danger in younger democracies, especially in those countries where the democratic institutions are still rather fragile. As Hungary is in Central Europe, the strength of the democracy is somewhere halfway between Western and East European countries, but as the examples mentioned above show, unjustified restriction on freedom of speech can occur in Hungary as well, in a way that is at least somewhat more foreclosed in older member states of the EU.

Fourth, it should pass its own independent decision on whether it will amend its Convention, and if so, in what way.

Fifth, in the light of the results of the work described above, it should initiate the amendment of the new Directive in order to respect freedom of speech and freedom of information in accordance with the foundational importance of these values in our shared European tradition,

while considering also the broader international implications of the Directive and the Convention as an example provided by the human rights organization of Europe.[46]

It remains to be seen to what extent the Council of Europe will be able to play such a role both independent from and critical of the AVMS Directive of the EU. There are some encouraging signs, but they are far from being clear. We can read in the Parliamentary Assembly's Recommendation on *The regulation of audio-visual media services* that:

> "9. The Assembly notes that the European Union AVMS Directive has the main objective of ensuring freedom of services within the internal market of the European Union in accordance with primary European Community law. This approach differs from the ECTT, which has the aim of ensuring freedom of transmission and retransmission of broadcasting in Europe, regardless of frontiers, in accordance with Article 10 of the European Convention on Human Rights".[47]

Furthermore, Andrew McIntosh, Chairman of the Sub-Committee on the Media and Rapporteur on media freedom of the Parliamentary Assembly of the Council of Europe, writes:

> "The Parliamentary Assembly has been concerned that the Convention should respect the basic principles of Article 10 of the European Convention on Human Rights on freedom of information and expression, rather than the EU's single market concerns. It wants to see broadcasting regulation applied sensibly to on-demand audiovisual services, but not to the internet, whose glory is the new opportunities it offers for freedom of expression. The Assembly thinks this will still be true even as the internet acquires the ability to transmit images and sound as well as text".[48]

But unfortunately point 9 of the Recommendations is followed by rather ambiguous wording in point 10.4:

> "10. Having noted the current progress in drafting an amending protocol to the ECTT in order to transform it into a new Council of Europe convention, the Assembly believes that the following considerations should be taken into account:
>
> 10.4. the transmission of on-demand audio-visual media services should be treated in a comparable way to television broadcast services and should not be subjected to the more restrictive provisions taken from the AVMS Directive of the European Union;"[49]

It is worrisome that even this Recommendation includes that "the transmission of on-demand audio-visual media services should be treated in a comparable way to television broadcast services"[49], and we saw in the drafting process of the convention on access to information, that the final decision of the Council of Europe can simply disregard the position of its own Parliamentary Assembly. It is also not encouraging that the political declaration of the 1st Council of Europe Conference of Ministers responsible for Media and New Communication Services includes that "Existing media-related standards that were

[46] For detailed analyses of the interactions between the Directive and the Convention see: *Audiovisual Media Services without Frontiers*, European Audiovisual Observatory (2006).

[47] Parliamentary Assembly of the Council of Europe, Recommendation 1855 (2009) The regulation of audio-visual media services.

[48] Andrew McIntosh, *Parliamentary Assembly: Stand on Regulation of Audiovisual Media*. IRIS Legal Observations of the European Audiovisual Observatory. IRIS 2009-3:3/2.

[49] Recommendation 1855.

developed for traditional forms of mass communication may well apply to new services and service providers".[50]

Laws that Enable Citizen Participation and the Development of Civil Society

Finally, I mention two examples from Hungary, for regulations that successfully aimed to support the development of the culture of constitutional democracy.

The 1996 law on radio and television includes provisions that a very significant portion of the broadcasting airwaves has to be provided to the non-commercial community broadcasters and such media organizations can apply for special funds to establish and maintain their activities. These fundamentally important elements of the media system are guaranteed by the following provisions of the law:

- Section 101. (3) If a non-profit broadcasting company has also submitted a tender, with the exception of national broadcasting, the rights shall be awarded to the non-profit broadcasting company if 80% of the inhabitants of the given area already have access to at least two profit-oriented local broadcasting services, and at least one of these is realized through broadcast transmission.
- Section 78. (1) Minimum half percent and maximum 1% of the annual revenues of the (Broadcasting) Fund shall be allocated to each of the non-profit broadcasting companies and broadcasters of public programming in the form of repayable or non-repayable financial support. The financial support may be provided for a specific period of the continuous activity of the broadcaster.

These provisions, combined with continuing efforts in order to rightly implement them, enabled the development of the internationally acclaimed community radio station sector in Hungary.

Another typical instance of well-placed, enabling "transition regulation" in Hungary is the law that provides the opportunity for every income taxpayer that they can direct 1% of their income tax to any NGO they wish to co-finance this way. As the not-for-profit organization, NIOK summarizes: "The 1% law allows taxpayers to transfer 1% of their previous year's paid personal income tax to the charity of their choice, provided that the charity complies with certain legal requirements. The law was introduced in Hungary in 1996. It enables taxpayers (of which there are 4.5 million) to contribute to the third sector, and to exercise their choice as to what activities they wish to support, without any loss to their own income. It has the potential to unlock at least 6.5 billion HUF for Hungarian charities".[51]

On the top of their separate good impact, the workings of these enabling regulations are interconnected. Radio Forbidden, the flagship of the community radio sector in Hungary, receives one of the major parts of its budget from the 1% directed to it by its committed listeners, some of whom are voluntary producers of regular weekly or bi-weekly shows. These laws provide good opportunities to make personal choices that influence the whole environment of a community, and in fact through different ways of participation they enable the creation of communities in which the free individuals can develop their own faculties as well as can help each other.

[50] Political declaration of the 1st Council of Europe Conference of Ministers responsible for Media and New Communication Services (28 and 29 May 2009, Reykjavik, Iceland)
http://www.coe.int/t/dc/press/source/20090529_final_declaration_iceland_en.doc
[51] www.niok.hu/1/indexe.htm

Conclusion

As the few examples shortly described above show, national and international lawmaking bodies have to pay more attention to the special cultural–political environment in which regulations could be implemented, including the language of the legally binding rules and the policy discourse that surrounds them. Development of the liberal values of constitutional democracy can only result from enabling national regulations that should be supported by international law. This in turn should be drafted with the understanding that what might be less dangerous—but still at least risky—restriction on freedom of speech and freedom of information in more established democracies might mean playing with fire in newer democracies. Long-time member states of the European Union should realize that they cannot suggest common European regulation based mostly on their experiences and opportunities, not only because that approach could result in international law that would work as a heavy-handed one in Central and East Europe, but also because they should build on the particular sensitivity against censorship that new member states can contribute to the common European wisdom. The community of countries united in the Council of Europe, in the European Union, and/or in the Organization for Security and Cooperation in Europe need to avoid regulations that can cast a shadow on one of our most important, core values, freedom of speech in whole Europe and beyond, and should carefully search for policies that enable the development of the culture of constitutional democracy. In regard policies that impact freedom of expression, many of us in the post-communist countries unfortunately had to develop a special sensibility to identify censorship or the menace of it as a typical backwards regulation. Is this not a valuable source for common European and global policy making?

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Peter Molnar is a Senior Research Fellow in communications law at the Center for Media and Communication Studies at Central European University. A former member of the Hungarian Parliament, Molnar was one of the drafters of the 1996 Hungarian media law. He has been teaching communications law since 1994 at ELTE University, and since 2007 at the Central European University, in Budapest. Additionally, he taught a freedom of speech course at the Graduate School of Journalism of the University of California in Berkeley in 2002 and at the Graduate School of Journalism and Communication of the University of Colorado in 2005. He was a German Marshall Fellow in Summer 1996, a Fulbright fellow at Cardozo School of Law and at Columbia Law School in 1999 and 2000, a Shorenstein Fellow at Harvard University in Spring 2000, a Fulbright fellow again at Cardozo in Spring 2008, and a lecturer in law at Columbia Law School in Spring 2009. Since 2002, he has been working as legislative advisor for the Parliament and the government of the Republic of Hungary. Since 2001, he has been member of the Complaint Commission of the Hungarian Radio and Television Board. He wrote extensively on communications law and freedom of speech. In 2006, he drafted the Declaration for the Freedom of the Internet that was signed by many media scholars. In 2007, the staged version of his novel, Searchers won the awards for best alternative play and best independent play in Hungary. His publications include 'Towards Better Law and Policy Against "Hate Speech" - The 'clear and present danger' Test in Hungary' in Ivan Hare and James Weinstein (eds.) *Extreme Speech and Democracy* 2009 (Oxford University Press); "Danger! Men at work: EU and CoE Legislation and Free Expression in Hungary", in the on-line journal *Eurozine* (March 20, 2009); "Law and the Creation of Free Speech Rights—The Impact of International Regulations in Central and Eastern Europe", in *Global Media Journal-Polish Edition* (2008); and "The Paradox of Informed Participation: What Universities Can Do for Freedom of Information?" in the Freedom of Information section of the 2/2009 issue of the *Cardozo Public Law, Policy, and Ethics Journal* that he initiated and co-edited. He is co-editor of a comparative book on "hate speech", "Content or Context: Rethinking Regulation and Remedies for 'Hate Speech'" with Michael Herz, forthcoming by Cambridge University Press in spring 2010.