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Danger! Men at work

EU and CoE legislation and free expression in Hungary

The European Union's new directive on Audiovisual Media Services may not be all that it is cracked up to be. On the contrary, under the guise of protecting vulnerable groups from hate speech, it may have the unintended consequence of allowing national governments to indulge in a little censorship. Something his region is only too familiar with, warns Péter Molnár, a specialist on freedom of speech from Hungary.

The idea that free expression and access to information are rights is not strong enough yet in the former communist countries of Europe. While legislation alone cannot change attitudes, it can contribute to the creation of a society in which these concepts are taken for granted and contribute to a sense of freedom. Inappropriate laws can have quite the opposite effect by reinforcing long-standing habits of state secrecy, undue political influence in the media, lack of civic courage and the fear of speaking out.

It is in this context that some recently adopted European regulations raise serious concerns about the development of freedom of speech and freedom of information in the newer democracies. The European Union's new Audiovisual Media Services (AVMS) Directive¹ is a case in point, as is the Council of Europe's convention on access to public data.² Both illustrate that, given their very different recent histories, common European rules largely based on the experiences of the West-European states, will not serve the best interests of the newer members of the European community. If European law-making bodies are to avoid regulations that can cast a shadow on one of our most important, core values, freedom of speech, they will need to pay more attention to the particular cultural-political environment of the younger democracies. This includes the language in which legislation is drafted and the policy discourse that surrounds it. Development of the liberal values of constitutional democracy can only result from enabling national regulations that are supported by the binding effect of international law. Content-based regulation of communication based almost exclusively on the history and experience of long-term EU member states is playing with fire: risky anywhere, it could more likely result in the heavy-handed application of such laws in central and eastern Europe and fails to take into account the particular sensitivity against censorship new member states were forced to develop under communism. This in itself could be an important contribution to common European policy-making.

In its current form, the language of the discourse on the AVMS directive includes some dangerous connotations. The term "content regulation" unconsciously supports censorship and lends credence to the view that

media-specific regulation of radio and television — justified by the scarcity of the broadcast airwaves and the push media character of these media — can be extended to new, interactive media without any sound constitutional justification. Following a public consultation in September 2007, my long-standing effort to change the lexicon of media discourse in Hungary finally received broad support: Hungary's National Media Strategy (NAMS) and media politicians and other experts who provided written comments to it replaced "content regulation" with "content-based regulation", which does not imply that regulation of the content of communication can be taken for granted.

A second instance of the significance of the words we use in law and in media policy discourse comes from a recent amendment of the freedom of information law in Hungary.³ The original text of the law allowed anyone to "ask" public agencies for public information. Following my proposal, the 2005 amendment replaced the word "ask" with the word "claim".⁴ The implications are obvious: from being supplicants for a favour, citizens acquired a right to know. The state is no longer above citizens but exists to serve them, and part of the new system is that the protection of personal data does not apply to officials and other public figures where that data relates to their public activity. The constitutionally appropriate language forcefully educates society in the idea that the state should be transparent.

Through my personal experiences as a lawmaker during the first two terms of the freely elected Hungarian parliament in the 1990s, I became convinced that legislation has limited ability to change the mindset of a society that lived under oppression for so long without being able openly to discuss public matters. As András Sajó observes in the following example:

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 has often been part of the self-assertion of nationalist political movements and become part of 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, to some extent, socially normalized.⁵

What is the use of 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 its intended impact is significantly weaker than in states where the rule of law is better established? Legislation has to be carefully drafted and worded to enable a political community to develop toward the liberal values of constitutional democracy as fast as possible in their given circumstances. If they are to overcome the fear of speaking freely — a fear so deeply rooted in the political experience of countries with a long history of oppression — the new democracies in central and eastern Europe and elsewhere need the maximum protection for freedom of speech.⁶

In June 2006, media scholars from many countries signed the Budapest Declaration for Freedom of the Internet (Budapest Declaration) that I drafted at

the Central European University⁷ The declaration was highly critical of the EU's proposed AVMS Directive intended to replace its earlier Television Without Frontiers Directive. The Declaration protested the extension of the scope of the revised directive to the Internet and was sent to all members of the European Parliament.

By the time of the Declaration, the scope of the directive had been narrowed down to cover only audiovisual media services rather than all audiovisual Internet content. The final text of the directive further narrowed its scope. But the line between content that is covered, or not covered, by the directive remains unclear; moreover, some of the content-based rules apply to both broadcast and on-demand services. In this light, 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 in European policy-making. The criticism in the Declaration remains relevant and in December 2006 was essentially repeated in a set of Recommendations — also sent to the members of the European Parliament — that were endorsed by the office of the OSCE Representative on Freedom of the Media.⁸

The new directive is a powerful example of how regulation can restrict the freedom to communicate ideas and information through the freest ever communication tool, the Internet. In states where democracy is fragile, and particularly where the Internet is virtually the only free channel of communication, there is no question that some governments will see this as an easy opportunity to regulate speech and curtail the free flow of information and ideas. But if a government chooses to protect freedom of speech and freedom of information in their country by testing the limits of its space for implementing the extension of the rules in a way that largely keeps the state away from the Internet, it could risk infringing the directive and appearing before the European Court of Justice.

Hungary, where there has been at least some opposition to the extension of the scope of the Television Without Frontiers Directive, offers an opportunity to analyse the chances of the narrowest possible implementation of the AVMS Directive.⁹ Despite the publication of the Budapest Declaration, public awareness of the implications of the directive was minimal; discussion remained mostly confined to a small circle of experts. Despite efforts to put it on the public agenda, people remained largely unaware of what was at stake.

One reason for the failure to include this important topic in public discourse in Hungary is the failure to make a clear connection between domestic and international policy issues. Media policy debates mainly revolve around domestic concerns; international matters largely fail to capture the same degree of attention. Indeed, this is why such a fundamental regulatory move could have been passed without a broader public discussion in Europe as a whole.

The first public discussion in Hungarian — as opposed to the English-language medium of earlier conferences — focused on the impact of the directive on freedom of speech in some post-communist democracies of central and eastern Europe.¹⁰ Governments in such countries are at least somewhat likely to use the new directive as an opportunity for further regulating speech and curtailing the free movement of information — all with the approval of the EU. All they would have to do to suppress political dissent would be to abuse the incitement to hatred provision of the AVMS Directive, as Russia has already done in its statute "On countering extremist activity".¹¹

While it is hard to imagine how the anti-hate speech provision of the directive could be effectively enforced on the Internet, the fate of the racist website *Olah Action* is an instance of what has been happening in Hungary in the past few years. *Olah Action* included a video game that asked players to kill the Roma community in one county after another, making them "Roma-free".

Self-regulation worked to the extent that the provider took down the site after receiving complaints from Radio C, the Roma community station in Budapest. But the site was soon available again on another server. Could state regulation do any better?

A satellite TV station spreading hate speech could have been successfully removed from the transmitting satellite and would have had far greater difficulty in finding an alternative host. While there is no such example in Hungary, the case of the broadcaster *Al Manar*, ejected from the French satellite system for preaching hate and incitement to violence, provides a convincing template of how the directive might be put to proper use.¹²

We only have to look at the authorities that would implement the AVMS Directive to see that abuse is more likely than fair use. Transforming state broadcasters into public service ones, creating independent media authorities to supervise the media market in the public interest, and maintaining their independence — an institutional challenge even for long-standing democratic systems — has proved an almost impossible task for the new democracies in the region.¹³ In Hungary, the poor provisions of the law on radio and television¹⁴ produced a National Radio and Television Board (ORTT) that works under the rather direct influence of the parliamentary parties.¹⁵ The ORTT is a highly politicized body: each parliamentary group of the various parties directly nominates its members, which sometimes, at least, results in decisions that are driven by the interests of the parties at the cost of the public interest. Yet it is the ORTT that has been authorized to apply the 1996 Law on Radio and Television.

The five parties represented in parliament in 2009 are negotiating new legislation that would replace the 1996 law. However, given the direct pressure from the parliamentary parties, it is wishful thinking to believe that a new board would be more independent than ORTT. If the authority of the ORTT, or of its successor, was extended to include control of the "on-demand, non-linear services" — as they are somewhat vaguely defined in the new directive — these services would be subject to decisions often motivated by political interests.

The likelihood of politically biased application of the extended AVMS Directive if applied by the ORTT or its successor grows if we consider instances in which some parts of the government have shown a willingness to engage in unjustified restrictions on freedom of speech. Hungary has not experienced attempted or actual government censorship of the Internet in the past few years, but prosecutors have pursued criminal proceedings against investigative journalists Antonia Radi of the weekly journal HVG and Rita Csík of the daily *Népszava*¹⁶ for alleged breach of state secrets. The courts finally cleared the journalists, but the process demonstrates the potential use to which the directive could be put.

In 2004, ORTT almost closed down the best known community radio station in Budapest, Radio Tilos, after one of its hosts made an offensive comment on air, even though the station apologized, fired the person concerned and subsequently introduced editorial controls. Faced with similar situations, other

stations have not reacted as commendably. Nevertheless, ORTT imposed sanctions on Radio Tilos that were far heavier than the sum total of sanctions imposed in other comparable cases.

Protest in the press and support from other members of the Organization of Free Hungarian Radios helped to avoid the closure of the station, but the courts let the highly discriminatory application of the law stand. The witch-hunt against this community station — a far less powerful target than its public or commercial counterparts — did not encourage the substantially volunteer-based non-profit media that function in a similar way to many websites.

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

The growing significance of NGOs in Hungary and the increasing press coverage attracted by their activities may be the most encouraging contribution so far to making constitutional protection of freedom of speech and of the press a robust part of the legal system. This should also be promoted by parliamentary committees and the three ombudsmen charged with protecting human rights, the rights of ethnic and national minorities, and information rights. We need an environment that better enables both freedom of speech and freedom of information to flourish, and it requires careful implementation of the directive, in the narrowest way possible.

As the Budapest Declaration pointed out, "the rapid development of the new communication technologies suggests that both the European Union and the Council of Europe should rely on self-regulation and let the new communication technologies develop freely allowing people to exchange ideas and information through them unrestricted". Hungary has a self-regulatory system for Internet content providers, established by the Hungarian Content Providers Association (MTE).¹⁷ Founded in 2001 to avoid the extension of the authority of the ORTT to the Internet, MTE is a good example of a self-regulating body that exists not only, or not primarily, to raise the standards of the content provided, but to avoid state regulation. The self-regulation system established by the MTE largely covers all fields of the content-based regulatory provisions of the AVMS Directive and it would seem a better option for the implementation of the directive than state intervention.

Any hope that the Council of Europe (CoE) — which should by all means make its own assessment, independently of the AVMS Directive, of the regulatory, not to say deregulatory challenges of the new media environment beyond traditional television — might exert greater independence in the drafting of the first binding Convention on Access to Official Documents was frustrated at the end of 2008. Despite protests from FoI experts and organizations around the world that the draft fell far short of established international principles of freedom of information,¹⁸ and the concerns of the CoE's Steering Committee on Media and New Communication Services (CDMC), there was no attempt to incorporate the proposed safeguards, identified in detailed letters to the CoE, in October 2007 for example, into the draft.¹⁹

On the contrary, the three NGOs who had coordinated action to improve the draft — Access Info Europe, Article 19 and the Open Society Justice Initiative (also backed by Information Commissioners of many countries and the OSCE Representative on Freedom of the Media) — reported in March 2008 that almost none of the concerns raised had been adequately addressed.²⁰ On 27 March 2008, the three NGOs wrote with "profound disappointment" that rather than strengthening safeguards, the Steering Committee on Human Rights had excluded heads of state from access to information obligations. "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."²¹

On 3 October 2008, the Parliamentary Assembly of the Council of Europe returned the draft to the Committee of Ministers with the recommendation that it "send the draft back to the Steering Committee for Human Rights (CDDH) for further consideration" in the light of the fact that "the current draft has some shortcomings which need to be resolved in order not to miss the opportunity to enshrine modern standards for access to information in what will be the first binding international legal instrument in this field". In the restrained language of its kind, it further "invited" the Committee "to solicit its opinion at an earlier stage of the procedure, in order to allow for a true dialogue", and concluded by further inviting the Committee "to inform it of action it has taken in response to this opinion".²²

The Assembly's reception of the convention gave some hope that the draft would be brought up to the highest possible standards with the incorporation of the safeguards listed by FoI experts. But the following week the treaty was rushed through. It was described by FoI advocates as a "weak convention" providing "fewer guarantees than most national FoI laws in Europe". FoI organizations that had been engaged in lobbying for a stronger convention nevertheless urged states to ratify the treaty, "so that minimum standards on access to information can come into force". They also urged the establishment of a body to "monitor the implementation of the treaty and to propose amendments in the future".

This is an edited version of the article "Law and the creation of free speech rights: The impact of international regulations in central and eastern Europe", published in Global Media Journal, Polish Edition, no. 1 (4) 2008.

¹ Text available at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32007L0065:EN:NOT>

² Text available at: <http://conventions.coe.int/Treaty/EN/Treaties/Html/AccessDoc.htm>

³ Text available at: www.obh.hu

⁴ László Majtényi, 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: *Az információs szabadságok — adatvédelem és a közérdekű adatok nyilvánossága*. Complex Kiadó 2007 (available only in Hungarian).

⁵ András Sajó, *Freedom of Expression* (Institute of Public Affairs, Warsaw 2004) p128.

⁶ Peter Molnar: "...without uncertainty, compromise and fear," or "Should the *New York Times* Rule be Introduced in Hungary?" (Shorenstein Paper 2000).

http://www.ksg.harvard.edu/presspol/research_publications/papers/working_papers/2000_15.PDF

⁷ For the full text of the Budapest Declaration for Freedom of the Internet (15.06.2006), see:

<http://www.edri.org/docs/BudapestDeclaration.pdf> or <http://www.cmcs.ceu.hu>

⁸ See: http://www.osce.org/documents/rfm/2006/12/22708_en.pdf

- ⁹ This part of the article is a slightly modified version of the country report on Hungary that I wrote for 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."
- ¹⁰ Sándor Orbán, executive director of the South East European Network for Professionalization of the Media, initiated the project.
- ¹¹ Andrei Richter, *Post-soviet perspective on censorship and freedom of the media: Restrictions to counter extremism in Russia* (UNESCO, Moscow 2007)
- ¹² See: <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/05/98&format=HTML&aged=0&language=EN&guiLanguage=en>
- ¹³ Karol Jakubowicz, *Rude Awakening: Social and Media Change in Central and Eastern Europe* (Hampton Press 2007). See also "Broadcasting Regulation across Europe" in *Television across Europe: Regulation, Policy and Independence* (Open Society Institute, EU Monitoring and Advocacy Program 2005). www.eumap.org
- ¹⁴ Act I of 1996 on Radio and Television Broadcasting, Section 33. See: <http://net.jogtar.hu/jr/gen/getdoc.cgi?docid=99600001.tv&dbnum=62>
- ¹⁵ Peter Molnar, "Transforming Hungarian Broadcasting" in *After the Fall* (Media Studies Journal Fall 1999).
- ¹⁶ See: <http://www.freedomhouse.hu/pdfdocs/hungary2006.pdf>
- ¹⁷ Self-regulation in advertising is carried out by the Board for Self-Regulation of Advertising, see: <http://www.ort.hu/>. Co-regulation by Internet content providers and the state does not exist in Hungary.
- ¹⁸ Budapest Declaration on the Right of Access to Information (23.12.2008), see: http://www.cmcs.ceu.hu/files/u3/ration_on_the_Right_to_Access_to_Information_0.pdf
- ¹⁹ See: *The Public's Right to Know. Principles on Freedom of Information Legislation* (ARTICLE XIX London June 1999). Also see recommendations in Transparency and Silence: A Survey of Access to Information Laws and Practices in 14 Countries (Open Society Justice Initiative 2006).
- ²⁰ See: <http://www.access-info.org>
- ²¹ Ibid.
- ²² See: <http://assembly.coe.int>

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