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Law and the Creation of Free Speech Rights – The Impact of International Regulations in Central and Eastern Europe

Abstract

In former communist countries people do not take it for granted that they have a right to free speech and to get all public information they are interested in. 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 result. They can enable people and society as a whole to gain a sense of freedom. My article will provide a few examples of such opportunities.

Keywords: freedom of speech, freedom of information, constitutional justification, media-specific regulation, content-based regulation, claiming public data.

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Introduction: The impact of the law in younger democracies

In this essay, I will provide a few examples of how legislation and its application influence the development of culture in newer democracies. For lack of space, it will obviously not be possible to examine all the issues, but it is important to point out that some recently adopted or draft European regulation raises really serious concerns about freedom of speech and freedom of information. The purpose of this essay is to show how such 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 that the European Union had started to move towards with its new Audiovisual Media Services (AVMS) Directive.

My other example concerns an ongoing case: the Council of Europe's convention on access to public data that at this writing is still only a draft. Considerable pressure exerted by international civil society and NGOs to strengthen the safeguards provided by the draft has so far been disappointingly unsuccessful, but there is still hope of improving the convention.

Concerns regarding the new “media law” of the EU, and about the planned 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 analogue frequencies, and the push media effect of 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

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

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 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 law and in media policy discourse has been provided by a recent amendment of the freedom of information law in Hungary⁴. According to the original text of the law everyone could have asked public agencies for public information. Following my proposal, the 2005 amendment of the law replaced the word *ask* with the word *claim*.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 could only *ask* the public agencies for access to public information, making it sound that it was a favour 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 right⁶ - the implication has been that everyone has a right to know all public 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

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

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

⁵ 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: László Majtényi: Az információszabadságok - adatvédelem és a közérdekű adatok nyilvánossága. Complex Kiadó 2007 (available only in Hungarian)

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

data relate to their public activity. If we can *claim* public 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.

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.”⁷

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

⁷ András Sajó: *Freedom of Expression*. Institute of Public Affairs, Warsaw 2004. p. 128.

so deeply rooted in the political experience of countries with a long history of suppression.⁸

The Audiovisual Media Services Directive and the draft convention of the Council of Europe on access to official documents

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.⁹ 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

⁸ See: Peter Molnar: "...without uncertainty, compromise and fear," or Should the New York Times Rule be Introduced in Hungary? Shorestein Paper 2000. http://www.ksg.harvard.edu/presspol/research_publications/papers/working_papers/2000_15.PDF 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.

⁹ István Szent-Iványi, a Hungarian liberal member of the European Parliament helped me to send the Declaration to all other members of the Parliament.

of information. Neither the scarcity of frequencies, nor the push media character of television applies to the unique architecture of the Internet.”¹⁰

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 more narrowly to define the scope of the directive.¹¹ 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, 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.”¹²

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

¹⁰ Budapest Declaration for Freedom of the Internet 06.15.2006. www.cmcs.ceu.hu, see also: <http://www.edri.org/edriagram/number4.16/budapestdeclaration>

¹¹ 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.

Recommendations¹³ 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 Audiovisual Media Services (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.”¹⁴

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

¹² Budapest Declaration for Freedom of the Internet

¹³ 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 audiovisual media services directive (AVMS). Following this workshop these recommendations have been developed by the signatories.

fragile, and particularly where the internet is almost the only free channel of communicating ideas and information?

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.¹⁵

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 later drafts for this reason at conferences and other events of the CMCS¹⁶ at CEU,¹⁷ 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 National Radio and Television Board (ORTT¹⁸) 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

¹⁴ http://www.osce.org/documents/rfm/2006/12/22708_en.pdf

¹⁵ 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.

¹⁶ See www.cmcs.ceu.hu.

¹⁷ 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.

the 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).¹⁹

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.²⁰ The extension of the scope of the European ‘media law’ somehow could not really be put on the agenda of the broader public discourse.²¹ One reason for the failure to 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 Media²² 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.²³

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

¹⁸ www.ortt.hu

¹⁹ Following my initiative to hold such a hearing, I was able to present a critical view on this part of the directive.

²⁰ 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.

²¹ 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.

²² See www.seenpm.org. Sándor Orbán, the Executive Director of the South East European Network for Professionalization of Media.

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.²⁴ 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 statute „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.”²⁵

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 website called *Olah Action* involved a video game which asked players to kill the Roma community in one county after another,

²³ Sándor Orbán, the Executive Director of the South East European Network for Professionalization of Media, initiated the project.

²⁴ 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.

²⁵ Andrei Richter: Post-soviet perspective on censorship and freedom of the media – Restrictions to counter extremism in Russia. UNESCO, Moscow 2007. p. 227.

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.²⁶

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 Law on Radio and Television.²⁷ Unfortunately, the 1996 law on radio and television – on which I worked for six 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.²⁸ Hungary was among the worst examples, with bad regulation producing a

²⁶ ‘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 programmes 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 programmes 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 organisation Eutelsat.’ Available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/05/98&format=HTML&aged=0&language=EN&guiLanguage=en>

²⁷ See the text of the Law at www.ortt.hu.

²⁸ About the transformation of the media in post-communist Central-, and East-European countries see: 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

National Radio and Television Board that often works under direct influence of the parliamentary parties.²⁹ 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 five parties represented in the Parliament in 2008 are negotiating the concept 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 in likelihood of a similar board created by a possible new law was extended to also control the on-demand, non-linear services (as they are rather uncertainly defined in the new directive), these services would be subject to decisions often motivated by the interests of the parliamentary parties.³⁰

The likelihood of politically biased application of the extended European regulation, if applied by the ORTT (or a similar board created 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 has not experienced 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

²⁹ Peter Molnar: Transforming Hungarian Broadcasting. In: After the Fall – Media Studies Journal, Fall 1999.

³⁰ 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.

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,³¹ and his office, the Hungarian Civil Liberties Union, the CMCS at CEU, and other NGOs played an important role in expressing growing concern for freedom of speech and of the press in connection with classification of public 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 offending sentence of one of its programme hosts, fired him and has introduced some editorial controls. 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 environment that urges and enables the court system and other institutions to improve the constitutional protection for freedom of speech and of the press. This should also be promoted by parliamentary committees (even if they are under the control of the

³¹ 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.

governing parties in the parliamentary 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 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 careful implementation of the directive. The National Media Strategy (NAMS),³² produced by the Office of the Prime Minister contained a detailed plan for implementing the AVMS Directive; and among the written comments provided by organizations to the NAMS at least some – CMCS, MTE – emphasized the criticism of this part of the strategy.

The proposed national media strategy suggested transposing the directive into Hungarian law within the two-year deadline provided for by EU law. The NAMS³³ proposed that the directive be implemented in two separate phases for broadcast/linear and on-demand/non-linear services, instead of implementation in one phase for both kinds of services. First, the broadcasting 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.

Passage or amendment of the broadcasting requires a two-thirds majority vote in the Parliament, which might unfortunately provide the wrong incentive for the opposition

³² See http://www.meh.hu/misc/letoltheto/NAMS_jogalk_konc_071213_final.pdf (available only in Hungarian).

³³ Some other parts of the NAMS are unfortunately highly controversial.

in the Parliament to argue for including the implementation of the whole directive in the amended or new radio-television law.³⁴

The only logical way would be to follow the path suggested in the NAMS and in written comments to it provided by the CMCS and the MTE. 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 broadcasting: 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.³⁵ 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 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

³⁴ 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.

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 above-mentioned Declaration 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 unmatched 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 – supported 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 European Convention on Transfrontier Television, adopted within the Council of Europe, is the sister document of the EU Television Without Frontiers

³⁵ 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.

directive and work is now under way to align its main provisions with the new Audiovisual Media Service directive.

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. Given that 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 stricter than 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 encourage the EU to amend 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.³⁶

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. A recent example of free speech related policy making of the Council of Europe gives mixed impressions at best. The Council of Europe is drafting the first binding convention on

³⁶ For detailed analyses of the interactions between the Directive and the Convention see: *Audiovisual Media Services without Frontiers*, European Audiovisual Observatory (2006).

access to official documents. But hundreds of NGO`s and individual FOI-experts from all around the world agreed that the draft falls short of established international principles of freedom of information.³⁷ In a letter submitted to the Council of Europe in October 2007, the NGOs 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.

³⁷ See: ARTICLE XIX, London : *The Public's Right to Know. Principles on Freedom of Information Legislation*, June 1999. <http://www.article19.org/docimages/512.htm>, 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.

- Absence of a requirement that states set statutory maximum time-limits within which requests must be processed.”³⁸

As an encouraging sign in the story about the draft Council of Europe Convention, the criticism quoted above and supported by many states led the group of specialists that produced the draft to continue working on the Explanatory Memorandum. Though the draft was expected to be complete by the end of 2007, further discussion on the substance of the text was delayed until the next plenary meeting of the Steering Committee on Human Rights which took place in March 2008.³⁹ 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.⁴⁰ On 27th March 2008, the three NGOs 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 NGO`s 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.”⁴¹

But there is still some hope that the text of the treaty can be improved and brought up to the highest possible standards when it will be under consideration by the Parliamentary

³⁸<http://www.access-info.org/data/File/Council%20of%20Europe%20Treaty%20-%20Letter%20with%20signatories%20-%20Final%20-%202005%20October%202007.doc>

³⁹ <http://www.access-info.org/>

⁴⁰<http://www.access-info.org/data/File/Access%20Convention%20-%202007%20Main%20Problems%20-%202003%20March%202008%20-%20FINAL.pdf>

Assembly of the Council of Europe. In November 2007, the Council of Europe` Steering Committee on Media and New Communication Services (CDMC) also expressed its concerns about the draft Convention on Access to Official Documents.⁴² The human rights organization of Europe, when it is aiming to pass the first internationally binding treaty on access to official documents, should incorporate into it all the important safeguards listed above. Otherwise, the new treaty would be a step back instead of being a step forward.

Conclusion

As the few examples shortly described above show, international law-making bodies have to pay more attention to the special cultural-political environment of the younger democracies, 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 EU Member States should realize that they cannot suggest 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 common European wisdom. The community of countries united in the European Union and/or in the Council of Europe, need to avoid regulations that can cast a shadow on one of our most important, core values, freedom of speech in all of Europe. Many of us in the post-communist countries unfortunately had to develop a special sensibility to identify censorship or the menace of it. Is this not a valuable source for common European policy-making?

⁴¹ <http://www.access-info.org>

⁴² <http://www.access-info.org/data/File/CDMC%20Meeting%20November%202007.pdf>