
PRESIDENT

Prof. Dr. Kim Lane Scheppele

Woodrow Wilson School
415 Robertson Hall
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Budapest, March 20, 2012

Dear Professor Scheppele,

Having read your March 14 article entitled “Hungary’s Free Media” that was featured in Paul Krugman’s blog on NYTimes.com, as head of the Hungarian media authority I feel personally addressed. Allow me, then, to respond to your thoughts in the following open letter.

We are deeply honored by and appreciative of your distinct interest in Hungarian media regulation, which as far as I know goes back quite some time. Yet, I am saddened to see that the amassing of accurate and in-depth information about our legislation remains a challenge, more than a year after its coming into force. All the more so, because it proves the fruitlessness of our arduous and persistent efforts, by which we have so far tried to provide all foreign experts interested in the law with sufficiently precise and up-to-date information – to no avail. (Should you be looking for further knowledge in this topic, among your other sources, please take some time and consider our English language website at www.hunmedialaw.org as well).

Since I treat your opinion with utmost respect, I wouldn’t want to substantively debate your observations on the state of Hungarian media, even though I did find some of your implications about self-censorship and journalists’ fear hard to interpret – especially in light of your opening paragraphs, in which you draw up a credible summary on the diversity and liberty of Hungarian media, even mentioning a list of outlets harshly disapproving of the Government by name. As far as journalists living under financial or economic threat are concerned, well, that’s hardly the fault of the current Hungarian Government or media regulation. A widely known fact you might also be familiar with is that public and political journalism is going through a crisis worldwide, brought about by the unrelenting proliferation of tabloids on one hand and the long-lasting economic turmoil on the other. To my knowledge, a range of newspapers and publishing houses with historic pasts have had to close down in the United States as well. The Hungarian media market being incomparably smaller, it is all the more affected by the crisis. And while one might be tempted to draw parallels between all this and our new media legislation, the latter can simply not be regarded as the root cause.

Your remark that “the government exercises almost total control over the media that reach the most people” was equally surprising. That would be quite a remarkable turn of events in the case of large and popular commercial television channels that are fully foreign-owned. And it would be similarly surprising in the extraordinarily diverse radio market or in the case of the printed press, where foreign ownership is especially prominent among papers that cover political issues. In your view, in what ways could the Hungarian Government influence the Luxembourg-based RTL Group, Germany’s Pro7-Sat1 media consortium or publishing houses Axel Springer of Germany or Ringier of Switzerland?

The case of Klubrádió you are also referring to is a testimony to the power of the rule of law in Hungary. Our Authority has been the subject of numerous unfounded accusations regarding the

tendering of the frequency previously used by Klubrádió. It is not true that the Media Council acted peremptorily in this matter. What is however true is the fact that there was a bidder whose offer was simply found to be more favorable in terms of its content, and that we have been under immense international pressure – sometimes not entirely without menace – for the station over the past year and a half, which often overstepped the bounds of “fair lobbying”. My colleagues and I have yet to come to terms with the causes of this phenomenon.

Nowhere in the court ruling of March 14 – which we obviously respect to the maximum degree – was it established that the Media Authority proceeded wantonly when evaluating the bids; the winner was eliminated because of a minor technical violation. According to the ruling, the Authority will need to hold a repeat round of formal evaluation, after which all subsequent steps of the procedure must be repeated – an obligation which we will soon carry out.

Nevertheless, the ruling has proven that the Authority is unable to proceed at its own will – even if it had such intentions, which is obviously not the case – if only for the fact that all of our decisions may be subject to court-ordered inquiry. Please note that, under the previous media law, the review of frequency decisions had been outside the jurisdiction of courts, which means there would not even be a chance for an outcome different from what the media authority has decided.

As for your criticism concerning media regulation, I would question several – or rather, almost all – of its elements.

You denounce a solution where members of the Media Council are elected by a two-thirds majority of Parliament. I am eagerly awaiting your reflections on such appointment methods – none of them rare in Europe – that confer the right to appoint to the Government, the Prime Minister or perhaps a Minister (for various examples see Cyprus, the Czech Republic, Denmark, Finland, the Netherlands, Spain, Sweden, Slovenia, the UK etc.).

Your statement that “each media outlet must demonstrate overall political ‘balance’ in its coverage of news” is factually incorrect. This obligation only applies to television and radio news programs and has been in effect since 1996, that is, the enactment of the first Hungarian media law. An intriguing addendum: ever since the new regulation came into force, of all political parties only opposition groups have thus far referred to violations of the balanced-coverage obligation. Please note that similar clauses on balanced coverage also exist in many other European countries (see for instance Austria, France, Germany, Greece, Ireland, Italy, Malta, and the UK etc.).

Also, contrary to your statement, violations of the above mentioned, limited obligation of balanced coverage cannot be penalized with financial sanctions under the current law.

Concerning the prohibition on infringing human dignity, the following European countries use similar provisions in their respective media regulations: Cyprus, France, Italy, Luxembourg, Portugal, Romania, Slovakia and Slovenia, among others. The Hungarian Media Act operates with a very narrow definition for the infringement of human dignity and, as opposed to most of the above listed nations, we do not use this rule for alleged slander or injury to reputation. The Authority enforces the law in the case of content that go against the “culture of human dignity” (a quote from Decision 165/2011. (XII. 20.) AB of the Hungarian Constitutional Court), which means these are suitable for questioning the fundamental values of human dignity or even denying its very existence. That, as you might also recognize, leaves the Authority with a scope of action that is much restricted than what the Civil and Criminal Codes have for the protection of honor, good name and reputation. And in political debates, based on the media regulation this scope of action is brought to a minimum.

Furthermore, you disapprove of the fact that the provision on hate speech protects not only individual minorities. Allow me to call your attention to a solution widely accepted across Europe, in which regulations on hate crime are aimed at the protection of all groups of society, not only minorities. This approach has characterized Hungary’s Criminal Code since 1989, and its media regulation since 1996 (which means the rule you are now contesting has been in effect for 16 years). Such a solution cannot be seen as an obstacle to the effective protection of minorities, who due to their situation are more likely to be put in harm’s way. Not that there has not been any instance when a majority group (e.g. those of Christian faith) was severely harmed through the

media. I am looking forward your arguments about why regulations on hate speech should leave majorities unprotected.

I must say I am baffled by your appraisal of the rule used for the protection of minors. My confusion stems from the fact that this rule is derived from the European Union's Audiovisual Media Services Directive (see Article 27 thereof), and the quote you used ("programs which may seriously impair the physical, mental or moral development of minors") is a word-for-word transcription of the directive's text. Please enlighten me how the Hungarian Government could have possibly avoided the implementation of an EU Directive, also providing pressing reasons why it should have done so. Unless I am mistaken, obscenity in your country is a crime in itself, and an inadvertent flash of a woman's breast on live TV may result in a \$500,000 fine. Why is it, then, that you consider it a problem that the Hungarian media law – in line with EU regulations – bans pornographic and unreasonably violent programs from linear media services?

It is unclear why you hold the media's basic principle of good faith and fairness unacceptable. Originating from Germany's "Treu und Glauben" doctrine and affecting the Hungarian legal system throughout, this principle is not something that can be enforced – hence it being a principle. While on the subject, though, it is worth mentioning that it has been featured in the Hungarian law on digital switchover in exactly this form since 2007. To avoid any possible false associations, please note that the term "fairness" in this context is by no means correlated to the "fairness doctrine" that had previously existed in the US legal system, and has no specific connotations in terms of media law. Also worth mentioning is the fact that administrative proceedings cannot be instigated upon violation of the principle of good faith and fairness.

Equally untrue is your statement "these fines cannot be challenged in any ordinary court" – to be honest, it is difficult to even imagine what sources this information could have come from. On the contrary, each decision by the Media Authority may be subject to judicial review, which of course includes the merits and content of decisions. Courts are therefore entitled to modify or overrule the Authority's decisions, in accordance with the rules of administrative proceedings.

As you also point it out, the Authority has essentially surrendered its powers to proceed against the press to so-named co-regulatory organizations. And yet in your next sentence, you are concerned that such devolutions can be withdrawn unilaterally by the Authority with a 30-day notice. Please be informed that the co-regulatory agreements that have been concluded with professional organizations representing media market players are working very well and in a mutually reassuring fashion; their modification or termination is of no interest to us.

We consider all opinions and helpful comments by foreign experts very important. Therefore, should you continue to keep such a close eye on Hungary's media regulation, may I request that you do so with utmost foresight and from an equitable approach. My colleagues and I would be happy to assist you in this matter. I am also asking you that the rigorous standards and stern critical approach I have come to know from your writings be put to use with equal effect when assessing and evaluating the media regulations of the US or other European countries as well.

Sincerely,

Annamária Szalai
President
Media Council of the
National Media and Infocommunications Authority