

## Hungary's new Media Regulations and the Constitutional Court

András Koltay\*

At the end of 2010, the Hungarian Parliament adopted two controversial Acts, Act CIV of 2010 on the freedom of the press and the fundamental rules on media content, (hereinafter: Press Freedom Act) and Act CLXXXV of 2010 on media services and mass media (hereinafter: Media Act), thereby rearranging the landscape of media regulation. Under its decision no. 165/2011. (XII. 20.) AB<sup>1</sup> (hereinafter: Decision), the Constitutional Court (hereinafter: CC) passed resolutions on a number of issues relating to media regulation.

### I. Summary of the Decision

1. One of the two media laws was enacted on November 9, 2010, and the other on December 31. Both statutes entered into force on January 1, 2011. Accordingly, complaints filed with the CC claimed, *inter alia*, there had been a lack of adequate time for preparation. Despite having entered into force at a rapid pace without an adequate period for preparation after their adoption, the Acts should not be deemed as unconstitutional per se. Due heed should be given to the extent to which the particular piece of legislation is beneficial or burdensome to the affected parties, and the fact that the provisions setting forth new obligations may become applicable only after the effective date of such statutory regulations. Accordingly, the adoption and promulgation of the two new acts on media regulation is deemed to have taken place in accordance with the provisions of the Constitution.

2. The most controversial point of the new regulation is that printed and online press products became subject to the material scope of the statutes, to which some content requirements also apply. According to the Decision, obligations may be imposed on printed and online press products as regards their content and the Authority may supervise these; therefore this solution is not unconstitutional in itself. Constitutionality is conditional on the limitation being necessary and proportionate, and on the availability of the option to resort to Court to challenge the decision of the Authority. The latter obligation is fulfilled by the Hungarian regulations, with the particular obligations pertaining to press products deemed unconstitutional on account of the requirement relating to necessity and proportionality, while the other obligations are deemed constitutional.

3. The obligation to have press products registered shall not be deemed to limit the freedom of press, provided proper guarantees are in place. The Hungarian regulation at issue does include such guarantees and shall therefore be deemed constitutional.

4. The rules relating to the protection of journalistic sources have changed fundamentally; under the new regulation, protection of sources also extends to criminal proceedings (in other words, where protection has the greatest weight and significance of guarantees). Based on the regulation, the right to the protection of the source can be invoked if the information obtained is of public interest and none of the statutory exemptions (national security, protection of public order, and the prevention or detection of crimes) is present. According to the Decision,

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\* Senior lecturer at Pázmány Péter Catholic University, Budapest. E-mail: koltay.andras@jak.ppke.hu

<sup>1</sup> The first number of the decisions' notation stands for its line number, the second for the year in which it was brought. In brackets, the month and the day of its publication appear. "AB" is the abbreviation for the Constitutional Court.

as for the rule relating to the protection of journalistic information sources, appropriate and detailed legal guarantees shall be in place. The regulations shall be deemed constitutional when the opportunity to resort to Court is available in every case, the identity of information sources may only be revealed in justified cases, and when the principle of proportionality and subsidiarity is respected under the regulations. Protection of information sources in the current regulations constitutes a significant yet still insufficient development when compared with the previous regulations.

5. The rule under which, in any official procedures, the Authority has the right to learn and handle personal data of clients and information qualifying as business secrets is deemed constitutional. However, the protection of attorney-client privilege shall be expressly guaranteed even in procedures before the Authority.

6. The new regulation - in the interest of the objectives under the remit of the Authority - allowed clients to be required to provide data even outside any of the Authority's procedures. According to the Decision, the obligation of data provision – for general and unspecified reasons – beyond the scope of official procedures is deemed unconstitutional.

7. The newly appointed Media and Communications Commissioner has the authority to conduct procedures in connection with consumer complaints and “infringements of interests” (not amounting to illegal acts) arising in connection with the media. The Commissioner is a civil servant of the National Media and Infocommunications Authority, but with respect to his procedures and decisions, he/she is autonomous. The Commissioner does not have the power to render decisions on the merits. He/she is only authorised to mediate between consumers and the media. According to the Decisions, the existence of a Commissioner entitled to act under “quasi official powers” – albeit without real powers – in relation to content (with regard to consumer complaints, the possibility to contact the service providers and request data from the service providers) affects the freedom of the press and editorial freedom and is prejudicial to freedom of the press, and is therefore unconstitutional.

## **II. Analysis and Critique of the Decision**

The following is an analysis and critique of the most important elements of the Decision. An understanding of the analysis of the Hungarian media regulations requires familiarity with the theoretical bases and justifications (section A). We will also discuss the question of content regulation of press products (section B), the individual content rules (section C), and the rules of registration (section D), as well as the question of the protection of sources (section E).

### *A. Justifications of the Press Freedom and Media Regulations*

The Decision upheld earlier rulings of the CC with regards to laying the foundation of the freedom of opinion and the press. The first decision in connection with the freedom of opinion from the CC - from 1992 - decision no. 30/1992. (V. 26.), recognised the coexisting values of individual freedom and democratic decision-making as the justification for the protection of the freedom of speech and the press.<sup>2</sup>

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<sup>2</sup> See more on justifications of free speech in E Barendt, *Freedom of Speech* (Oxford University Press, 2005), 6-38.

This is significant because, since 1992, the CC examined, starting from this theoretical foundation, the possibilities of the limitation of the freedom of opinion and the press and rendered decisions on the constitutionality of the limitation keeping these values in mind.<sup>3</sup> The consideration of democratic disclosure and the legitimacy of applicable limitations in its interest play an essential role in the present Decision too.

If we accept the guarantee and protection of democratic public opinion as the most important objective of the freedom of the press, this results in important conclusions with regards to the possible limitations of this fundamental right. The interest of democratic public opinion - in a seemingly paradox way - serves as the justification for both the broad protection of the freedom of the press and its proportionate limitation.

To resolve the apparent contradiction, our starting point can be a section of the reasoning of the analysed decision no. 165/2011. (XII. 20.) AB of the CC:

The forming of democratic public opinion is a right and, at the same time, an obligation of the press. In addition to, and supplementing it, the interpretation of the freedom of the press from the perspective of individual rights, the interpretation based on a community perspective - sharply separating it from different collectivist and opinion monopoly-based considerations - is not alien to democratic thinking, but, what is more, it constitutes the foundation of democratic legal systems. The functioning of the free press and deliberative democracy are concepts based on each other: only individuals positioned in a decision-making situation are able to give an adequate response to questions of public interest, and a free press plays a key role in the creation of decision-making situations. The maintenance and operation of public opinion able to make democratic decisions may justify, on the part of the state, interventions beyond the protection of institutions and the mere provision of the framework.

It is justified to carefully consider the conclusions stemming from the cited section of the Decision before we turn to the specific provisions of the Decision.

It is evident that democratic public opinion can only function properly if all ideas necessary and relevant for decisions on public matters reach the members of the community. This does not merely presume the broad permission of individual expression, but also the creation of such institutional possibilities that ensure access to the ideas and that they reach the public. Besides freedom from unnecessary limitations (negative freedom of the press), the actual possibility of access (positive freedom of the press) completes the essence of the freedom of the press and realises its full meaning.<sup>4</sup> Access belongs to the *ideas*;<sup>5</sup> however, in a legal sense, *the entirety of the community* is entitled, “who” can demand appropriate information and access to the individual and diverse ideas.

In my opinion - although the CC’s Decision does not contain an analysis of such depth - the “democratic” approach to the freedom of the press also has far-reaching consequences and serious unresolved problems, so it is worth taking a short side trip to discover the foundations of the new regulations. According to Jürgen Habermas, the 20<sup>th</sup> century development of the press into mass media, which in principle contains the possibility for the broadening of disclosure by a great magnitude, compared with the earlier state of affairs, instead destroyed

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<sup>3</sup> A Koltay, ‘The Development of Freedom of the Media in a Newborn Democracy: The Hungarian Perspective’ 2 *Journal of Media Law* (2010), 27-29.

<sup>4</sup> See I Berlin, ‘Two Concepts of Liberty’ in *Four Essays on Liberty* (Oxford University Press, 1969)

<sup>5</sup> A Meiklejohn, *Political Freedom – The Constitutional Powers of the People* (Oxford University Press, 1965), 26.

the earlier, functioning model of the public sphere. The mass media monopolised the forums of public opinion, and among the topics of the press, defined and *dictated* by the logic of the market, the proper representation of the public interest is no longer a defining factor.<sup>6</sup> Although, not the same as the Athenian *agora*, the media is such a public forum that it is the only effective venue and functioning means of the expression of various viewpoints.<sup>7</sup> Quoting the forceful expression of Owen Fiss, this would be the media's "*democratic mission*."<sup>8</sup> According to the Cass Sunstein's diagnosis, modern media not only fails to extend a helping hand but also in effect makes the functioning of democracy difficult.<sup>9</sup> The hope of training active citizens playing a crucial role in participatory democracies decreases in proportion with the complete expansion of commercial media.

This trend was amplified (in a strictly numerical sense, of course, increasing the selection) by the internationalisation of the media. In the world of cross-border television broadcasting and the Internet, the potential for the prevalence of the regulation of individual states is constantly decreasing, and has often become symbolic, and this was counterbalanced only to a small extent by the community law of the European Union existing in this field, too. As such, individual states can only partially influence what "democratic disclosure" should mean in their territory and how it should function. We can also see advantages in this trend without a doubt (a counterbalance to, and free from the influence of, unnecessarily limiting states), but we can also view it as the restriction of state autonomy (against which there are limited means of countermeasures because of the acceptance of European Union and other international frameworks).<sup>10</sup> The advantages emerge with respect to the flow of public-political content and ideas, but the states could rightfully claim complete sovereignty with respect to the determination of the limits of apolitical content, which, however, significantly influence the taste and cultural level of the community. (A clear example is that the measures for the protection of children are different all across Europe, but cross border services do not consider this.)

Another consequence of this phenomenon is that the internationalisation of the media and consequent universality of media content contribute, to a significant extent, to the depolarization of content and, simultaneously with this, to the audience turning away from the "classic" (public life and political) themes of democratic disclosure.

The law more intensely protects communications of political and public content than those that do not wish to contribute to the decision of public matters. However, an opinion having a public content does not merely receive enhanced protection; in addition to this, the media must also contribute - in an active manner - to the conduct of public debates.

But how do we get from this point to the fact that while the law must guarantee its broad prevalence, the freedom of the press can, in justified cases, be limited exactly for the sake of democratic public opinion?

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<sup>6</sup> See J Habermas, *The Structural Transformation of the Public Sphere* (MIT Press, 1991)

<sup>7</sup> C W Logan, 'Getting beyond Scarcity: a new Paradigm for Assessing the Constitutionality of Broadcast Regulation' 85 *California Law Review* (1997), 1687.

<sup>8</sup> O M Fiss, *The Irony of Free Speech* (Harvard University Press, 1996), 50.

<sup>9</sup> C R Sunstein, *Democracy and the Problem of Free Speech* (New York: Free Press, 1995). On media see particularly 53-92.

<sup>10</sup> P Keller, *European and International Media Law. Liberal Democracy, Trade and the New Media* (Oxford University Press, 2011), 81-82.

Technical development and the internationalisation of services often render a segment of the community vulnerable (those who cannot access the opportunities of media consumption or cannot use them appropriately). A segment of the community thus becomes unprotected from certain content or is deprived of access to them. The state has a responsibility with regard to guaranteeing access to ideas at the same time as safeguarding democratic disclosure. It further complicates its situation that, considering the cultural significance of the media, it has to assert the preservation of the aspects of national characteristics in the media regulations. If the state remains passive, it effectively gives up the enforcement of its interests and perspectives in the development of the frameworks of democratic public opinion thus undermining its own sovereignty; if, however, it actively participates and develops these frameworks, it will be accused of paternalism and the diminution of its citizens. This is a difficult public policy decision resulting in serious consequences. (It should be noted that the starting point in the media regulations of European states are common, and none of the states has yet given up the efforts of actively shaping the public within its borders. In other words, they all opted for regulation, but of course with considerable differences between the emphases and proportions.)

The new Hungarian regulation prescribes – fundamentally differentiated but, with respect to certain obligations, binding on every medium – obligations for all players in the media market (media services as well as press products), because it wishes to protect through this the public debates conducted through the press and the media; based on the logic of the regulation, the press can only become a “functioning” (i.e. fit for meaningful debates and respecting others’ rights and freedom) public forum by respecting certain minimum rules.

It is important to emphasise that the content of the new regulations is negative regarding the press (i.e. prescribing constraint), and it defines concrete content requirements enforceable against the individual press products (human dignity and human rights, prohibition of the violation of constitutional order and privacy, prohibition of hate speech, rules for the protection of minors, and certain advertising restrictions). In contrast with the regulation of the electronic media, in their case the regulation does not oblige them to any active conduct. (The only exemption from this is the rule pertaining to the protection of minors [Article 19(3) of the Press Freedom Act], and certain advertising rules [Articles 20(1)-(2) and (8)]; the former, however, pertains to access and not to content.)

In the CC’s view, expressed for the first time in 1992 (decision no. 37/1992. (VI. 10.) AB of the CC), the entire media market has a social responsibility, and some of the obligations stemming from this responsibility may be also stipulated as obligations in legal regulations. Based on the differentiation materialising in the regulation of certain media, these cannot be norms obliging the press to follow certain active behaviours; however, certain negative obligations necessary for the functioning of the democratic public - basic “rules of the game” - may be prescribed for it.

### *B. The Differential Limitation of Press and Media Freedom*

According to the traditional view of media regulation, different rules should apply to media services (television, radio, and recently, on-demand services) and press products, naturally,

imposing much fewer obligations on the latter.<sup>11</sup> However, from this view that is still valid today - looking at the colourful European palette of media regulations -, we cannot see this leading to a complete deregulation of press products.

According to the “platform neutrality” principle, regulation pertaining to the individual media outlets is becoming independent of the content distribution method. However, if we accept that television content must be regulated independent of whether they are broadcast via analogue frequency, cable, or satellite, than why could we not accept that the interest in human dignity can be protected with respect to every media service and press product serving mass communications?

The Decision gave a peculiar answer to this question. On the one hand, it accepted that not only media services but also press products could be subject to regulation but, based on its earlier jurisprudence, found that the regulation must be differentiated in certain cases. This does not mean that no content regulation obligating both subtypes of the services can exist, but the decision regarding the constitutionality of the generally prevailing limitations must be made by taking those aspects serving as the bases of the differentiation into consideration. The Decision defines those provisions that, in their current forms, may be prescribed in the same manner for both press products and media services, and those where their differentiation is necessary. Since, however, in the course of the disposal it was not possible to proceed in accordance with this differentiation and because of the disposal of the concrete obligations, they would have become inapplicable also with regard to media services, the Tribunal chose the solution exempting press products from being under the scope of the law, as it clearly follows from the reasoning as a temporary solution until the legislature adequately resolves the issue.

According to the CC, the differentiated regulation may have two justifications in principle; the scarcity of frequencies and the theory of “media effects”. With the introduction of digital broadcasting, the CC – following the path of Decision no. 1/2007. (I. 18.) of the CC – is slowly bidding farewell to the former argument. Based on the scarcity principle that was traditionally handled as a basic principle in earlier media regulations, one of the justifications of regulation was naturally the finite number of limited resources (analogue frequencies), and the consequent obligation of the state to organise the media market. But today– at the threshold of the digital switchover and in the world of the Internet -, the scarcity principle has already significantly lost its clout. Although currently approximately one fifth of Hungarian households are only able to receive analogue terrestrial television broadcasting, there are however numerous other media services available for the other four fifths. Scarcity cannot today be the primary basis of the regulation. (However, it is worth looking at today’s Hungarian media market: the large number of players - at least in the audiovisual media services market - have not in themselves automatically brought the expected diversity.)

It could be brought up as a criticism of the Decision that the CC has differentiated only between press products and media services but not between printed press and the Internet.

According to the “romantic” view of the freedom of the Internet, the Internet had transformed social communication to such an extent that any form of media content regulation is unjustified. In other words, since the Internet “subverted” previously well identifiable – and

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<sup>11</sup> L C Bollinger, ‘Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media’ 75 *Michigan Law Review* (1976-1977), 1.

regulated – traditional forms, and a portion of social publicity was transferred into the online world, the regulation of traditional media outlets thus became obsolete, because it does not make sense to regulate the more increasingly marginalised media while the free World Wide Web is flourishing.

However, while the Internet without a doubt contributes to the free flow of ideas and the democratisation of the public, through its technical characteristics (unlimited distribution, anonymity, development of addiction to its use, etc.) it also contributes to the increase of grievances and inequality, and it also generates new problems itself.<sup>12</sup>

The marketplace of ideas does not operate perfectly on the Internet either. The competition for customers is tough on the World Wide Web, too. In this competition, arguments for the non-regulation of the Internet and the objective to preserve the “untouched reservation of democracy” are no longer relevant. Players with greater material resources have a huge advantage on the World Wide Web too.<sup>13</sup> The most frequently visited web pages are the property of companies that are dominant players in the market outside virtual reality - in the real world, too.<sup>14</sup> These company giants and media empires try to transform the World Wide Web to their own images, and although they probably will not succeed ever (because of the character of the medium), they may at least succeed in restricting the Internet use of broad masses to content provided by them. The portion of the Internet that can be included in the definition of “press product” should be regarded as a forum for public discussions in a similar way to print newspapers; the possible difficulties of legal enforcement in itself cannot provide a sufficiently strong case against regulation.

According to the CC’s reasoning,

[i]n the system of the new media regulation, the official control of media content becomes general within a defined scope (...) Although, without a doubt, the possibility of the state’s subsequently initiated systematic inspection and sanction means the limitation of the freedom of the press, the mere possibility of this - with effective and substantive judicial control as a guarantee – however cannot be regarded as unconstitutional.

Thus, while the option of judicial review is guaranteed, the main question from a constitutional perspective is not whether an authority may monitor the media, but whether content limitations are necessary and proportionate from a constitutional perspective.

As such, according to the CC with regard to press products in certain cases, it is constitutionally permissible to impose (beyond statutory, Civil Code and Criminal Code) obligations influencing their content, and an authority established for this purpose can monitor the checks on compliance with this.

It is important to remember that even before January 1 2011 a press law existed in Hungary (Act II of 1986, enacted in communist times), which remained burdened with contradictions

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<sup>12</sup> See Keller (no. 10), 21-27.

<sup>13</sup> S F Kreimer, ‘Technologies of Protest: Insurgent Social Movements and the First Amendment in the Era of the Internet’ 150 *University of Pennsylvania Law Review* (2001-2002), 119.

<sup>14</sup> A Chin, ‘Making the World Wide Web Safe for Democracy’ 19 *Hastings Communication and Entertainment Law Journal* (1996-1997), 322–325. and 328–329.; J Curran – J Seaton, *Power without Responsibility* (London – New York: Routledge, 2003, 6<sup>th</sup> ed.), 248–250. and 281–282.

and constitutionality problems even after it was overhauled in 1989-1990.<sup>15</sup> That statute prescribed certain content requirements for the press, but it did not accompany it with a monitoring mechanism. This awkward situation remained in effect until 2010, not because after thorough contemplation and lengthy discussions the profession and the legislature thought that this kind of regulation was proper; the reason presumably was that politics after the regime change became tired of the six-year debate (between 1990-1995) preceding the passing of a law sorting out the situation of media services (television and radio), and did not bother with finding yet another compromise. Presumably, if somebody brought up the question of official supervision of the press in the beginning of the 1990s, probably even the press itself would not have found the idea “coming from the devil”; in time, however, it got used to the partial non-regulations.

Also worthy of attention is the fact that numerous Member States of the European Union have press laws (containing content requirements, too), and there are states where the supervision of these are carried out by an authority; with regard to the fact that these laws have a long history almost without exception and their practice has been matured and ossified, the press does not view them as threat to its existence.

The CC has earlier found in its decision no. 34/2009. (III. 27.) AB that

[n]ot undermining the competence of the legislative power, the Constitutional Court wishes to emphasise that Article 3(1) of the Press Act sets forth the principles of the practice of the freedom of the press for law-making and applying the law in a guiding manner. It is not ruled out, thus, that the legislature attach certain sanctions to the violation of statutory rules based on this or similar provisions of principle...

Thus, the existence of an independent press law - containing also concrete requirements - was also accepted before on a constitutional law basis, but the decision of the legislature, according to which the Parliament charges an independent authority with the supervision of these, was approved by the present Decision (obviously, in the absence of such a solution by the legislature, the CC could not comment on the issue).

### *C. Content Regulation of the Press*

According to the Decision, from among the content regulations pertaining to both press products and media services, the rules pertaining to the protection of constitutional order (Article 16 of the Press Freedom Act), hate speech (Article 17 of the Press Freedom Act), the wanton, gratuitous and offensive presentation of persons in humiliating, exposed or defenceless situations (Article 14(2) of the Press Freedom Act), the protection of minors (Article 19 of the Press Freedom Act), and commercial communications (Article 20 of the Press Freedom Act) are entirely constitutional. In their current forms, however, with respect to press products, the rules governing the protection of human rights, human dignity, and privacy (Articles 14(1), 16, and 18 of the Press Freedom Act), as well as the rules relating to the right of withdrawal of statements made in the media (Article 15 of the Press Freedom Act) are unconstitutional (but with respect to media services, they are constitutional).

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<sup>15</sup> T Szecskó, 'Hungary's New Press Act' in *The Vigilant Press: a Collection of Case Studies. Unesco Reports and Papers on Mass Communication*, No. 103. 1989.



a) *Protection of constitutional order and prohibition of hate speech*

Pursuant to the Decision, the obligation pertaining to the respect of constitutional order and the prohibition of hate speech (the incitement of hatred against, and discrimination towards, certain social communities) may be prescribed with respect to press products too. The CC deemed the two rules constitutional from a similar approach, considering that communications violating these rules are questioning the constitutional order and the fundamental values of democracy.

Media content denying the institutional values associated with fundamental rights are excluded by definition as instruments of the development and maintenance of democratic public opinion. Such media content promoting views that are contrary to the values of democracy do not serve the democratic formulation of opinion and decision-making.

The CC conducted the constitutional review of provisions of the earlier media regulation pertaining to hate speech and similar to, or identical with, the effective regulation on many points in 2007 (decision no. 1006/B/2001 AB). The decision found the regulation constitutional, and made it clear that the possibility of intervention by the media authority - which is independent from the will of the community or individual harmed - does not limit the right to self-determination and does not substitute for the enforcement of claims of right-holders of subjective rights. The CC's 2007 decision made it clear that

...the instruments of legal protection complementing each other and with respect to fundamental rights, simultaneously available in different branches of law, the possibility of proceedings that may be conducted even simultaneously do not violate and, moreover, do not even unnecessarily limit the constitutional freedom of the expression of opinion and of the press.

Accordingly, outside of the system of criminal law, sanctions against hate speech may be constitutionally prescribed in the media regulations too.

The 2007 decision also based its ruling, finding the media regulations of that time constitutional, on the media-effect theory. We cannot state that the causes of action of the media regulations (existing since 1996 in both the old and new regulations) of “incitement to hatred” and “discrimination” would duplicate the cause of action of “incitement to hatred” defined under the crime of “incitement against a community” of the Criminal Code (Section 269 of Act IV of 1978). The jurisprudence of the CC and the lower courts, which has been forming since 1992 (taking shape gradually), gave a definition to incitement to hatred, according to which the application of the cause of action in practice is difficult and almost impossible. This development led to the fact that the CC, in Decision no. 18/2004. (V. 25.) AB, introduced into the Hungarian legal system an interpretation that is similar, to a significant extent, to the „*clear and present danger*” test formulated by the Supreme Court of the United States of America.<sup>16</sup> However, the CC failed to provide a thorough explanation for this. Today, the situation is therefore that - since it is only possible to act in a very narrow scope based on the prohibition of any incitement against a community - in actual practice, it is exclusively the sanctioning of hate speech in the media that is possible. This serves another argument for the extension of the material scope of media regulation. In my opinion, it is neither Decision no. 1006/B/2001. AB of the CC, nor the Decision that is incomplete in the judgement of the constitutionality of the rules pertaining to the prohibition of hate speech, but

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<sup>16</sup> See more in P Molnár, “Towards Improved Law and Policy on “Hate Speech” – The “Clear and Present Danger” Test in Hungary” in I Hare – J Weinstein (eds.): *Extreme Speech and Democracy* (Oxford University Press, 2009), 237-264.

that earlier decisions examining Section 269 of the Criminal Code failed to give explanations for the unprecedentedly broad permissibility measured by European standards of hate speech.

*b) Prohibition of the violation of human rights, human dignity, and privacy*

According to the Decision, the prohibition of the violation of human rights in general, and the prohibition of the violation of human dignity and privacy in particular, in their current forms can be viewed as constitutional only as applied to media services. The reasons for this are the following: (1) press products have less significant effects on their audience than media services; (2) in the case of press products, these rights are adequately protected by laws and regulations guaranteeing personal enforcement of rights; and (3) in the media regulations, based on the “protection of constitutional order” - in accordance with section a) - the Authority can sanction media outlets regularly violating human rights and thus failing to respect the constitutional order.

The possibility of individual enforcement of rights through civil or criminal law exists naturally not only for human (personal) rights violations committed by press products but also in media services but, according to the CC, in the case of the latter - because of their more significant social effects - the regulations are constitutional in their current form. (Decision no. 46/2007. (VI. 27.) AB of the CC also considered the prohibition of the violation of human rights with respect to television and radio as a constitutional obligation when the CC examined the earlier regulations).

To fully understand the concept of the protection of human dignity in respect of media services, and to see why the CC considered that obligation as constitutional, we have to take a short detour to the foundations of the “state institutional protection obligation” developed by the CC. According to the principles laid down in Decision no. 64/1991. (XII. 17.) AB of the CC, the state’s human rights protection obligation has a dual nature: on the one hand, it protects those human rights guaranteed to the individuals (legal entities), and on the other hand, in certain cases - and with respect to certain human rights - it has to provide for the conditions necessary for the prevalence of human rights (“institutional protection”). With respect to the freedom of opinion (for example, based on decision no. 30/1992. (V. 26.) AB of the CC), the state is required not only to guarantee the freedom of the expression of opinion to its citizens but also it has to ensure the appropriate functioning of democratic public opinion. Decisions no. 46/2007. (VI. 27.) AB and 165/2011. (XII. 20.) AB of the CC opened the gates toward such an interpretation, based on which the protection of human rights and human dignity in the media regulations also stems from this institutional protection obligation of the state.

The primary objective of criminal law is to deter citizens from committing crimes in the future using the instruments of the state’s penal authority, while the objective of civil law is to provide, in the event of the violation of a right, the injured party with appropriate remedies (for example, compensation for damage) – this justifies, for example, conducting simultaneous proceedings for the protection of the person. At the same time, no similarly strong arguments can be raised for creating the option for a third proceeding (that of the media authority) protecting the individual. This is because media regulation primarily protects the audience and not the individual attacked in the media.

The protection of human rights and human dignity is one of the negative obligations (i.e. it prescribes restraint, in other words avoidance of infringements), which – similarly to certain positive obligations – protect the appropriate functioning of the democratic public sphere and not the individual. Because the main justification of rules appearing as restrictions to the freedom of the press is the protection of the viewer/listener/reader (collectively: the audience), who is ‘entitled’ to such protection as a member of society. When media regulation prohibits the violation of human dignity, with this it protects one of the basic principles of European civilization (which often appears in continental legal systems, but which is controversially judged in Anglo-Saxon laws<sup>17</sup>), and excludes from democratic disclosure any content channelling the denial of respect, appreciation, and equal status to which the individual is entitled.

As such, the media regulations consider “institutional protection” (the interest of the audience), and therefore the individual whose personal rights were violated cannot rely on the infringement of these rules. The reasoning of the Decision provides handrails for the interpretation arguing for the separation of the individual right and institutional protection. The decision finds that the Authority does not act „*in the protection of the side of the protected right relating to the individual*”, and then states that the media “*are capable of bringing about the destruction of the culture of respect of human rights, especially human dignity*”, and so, the protection of “culture” may be the objective of the media regulations. After this, the reasoning makes it clear that “*it is justified that the Authority - within the scope touching the institutional content of these rights - (...) has the ability to act against the violator*”. From the quoted sections of the text, it becomes clear that, according to the CC, the objective and justification of the regulation are the protection of the “institutional content” (and not the concrete violations) in the interest of the community (and not the individual).

The media authority (the Media Council) cannot be a tribunal restricting the individual right to self-determination and, as a general rule, it cannot act in the defence of others’ (individual) rights, irrespective of whether or not the person concerned has acted before other available forums. In the course of deciding such cases, the Media Council has also to take into account the option of initiating other (criminal or civil court) actions to the extent that it needs to shield its own competence from such proceedings. As such, the Media Council does not act for the protection of individual rights but contributes to the institutional protection of human rights; it has to ensure (according to the Decision, only in the case of media services) that the functioning of the media remains within constitutional limits.

### *c) Prohibition of presentation of people in humiliating or exposed situations*

According to the CC, the provision under Article 14(2) of the Press Freedom Act on the wanton, gratuitous and offensive presentation of persons in humiliating, exposed or defenceless situations is constitutional with respect to press products too. Based on the CC’s reasoning, human dignity may be protected with respect to any media content; thus, it can be the limitation of the freedom of the press with respect to press products too, if it appears in the regulation not as a general wording but as a concrete cause of action, it is adequately narrow, and the ability to protect the rights of the individual is lacking or limited.

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<sup>17</sup> C McCrudden, ‘Human Dignity and Judicial Interpretation of Human Rights’ 19 *European Journal of International Law* (2008), 655.; D Feldman, ‘Human Dignity as a Legal Value I.-II.’ *Public Law* (1999), 682., (2000), 61.

#### *d) Protection of minors*

The rule of the Press Freedom Act (Article 19(3)) pertaining to the protection of minors and obligatory for the restriction of access to violent or pornographic content does not directly concern the content. Based on this provision, access by minors to printed newspapers has to be restricted (by the packaging and by checking the age at the time of sale), and in the case of online content, the age of the user must be also verified in some manner. The protection of minors, as a potential limitation to the freedom of the press, is such a consensual question that it is debated by only a very few, and the CC therefore also approved these rules.

#### *e) Commercial communications*

The limitation of commercial communications (the prohibition of surreptitious advertisements, the obligation to name the sponsor, the prohibition of the advertisement of certain goods and services, etc., Article 20 of the Press Freedom Act) directly concerns the content, but in this case the concerned “expressions” fall far from the most protected central core of the freedom of opinion, and, thus, their limitation is permissible in a broader scope. Obligations similar to the obligations contained in the Press Freedom Act also appear in the Advertisement Act (Act XLVIII of 2008 on the basic requirements and certain restrictions of commercial advertising activities), but the limitation (or the protection of the audience) is realised in the media regulations in accordance with other perspectives and logic. The media regulations oblige the media content providers and not the advertisers, and a relatively quick and potentially effective administrative procedure guarantees the appropriate protection of consumer interests. It is an important aspect that the limitation of commercial communication does not concern so-called “editorial content”; it does not undermine the editorial freedom of media service providers and publishers. At this point the CC found the regulation pertaining to press products constitutional.

#### *D. Registration of press products*

The CC found that the also often debated registration rule - mandatory for all media services and printed or online press products - is constitutional in its entirety. The ruling, in the light of an earlier CC decision (see Decision no. 34/2009. (III. 27.) AB of the CC), was hardly surprising.

It has to be noted that the registration rule in the Media Act has fundamentally changed. Registration indeed became a formality, an administrative procedure that does not include the substantive examination of media content regulation, nor an examination concerning the content. The Authority does not have discretion with regard to the evaluation of the registration. In other words, if the conditions prescribed by the law are fulfilled, the Authority is obliged to register the media content service and, moreover, with regard to the notification of press products, registration cannot be denied and the publication of the press product can be commenced before the registration: the latter is thus not a condition for the commencement of the activity. With this, the outdated rules of the 1986 press law have softened a lot; their limiting nature has been terminated and, accordingly, the CC deemed the regulation constitutional.

### *E. Protection of journalistic sources*

A regulation imposing the obligation on journalists of revealing their information sources is to be deemed as a significant limitation of the freedom of the press. For this reason, it is of crucial importance that such limitations are regulated in legislation and that appropriate procedural guarantees are in place for the protection of journalists and their information sources.<sup>18</sup>

In the context of the protection of information sources, the relationship of trust between the person delivering information and the information source deserves protection. Pertaining provisions of the Press Freedom Act are to be deemed in line with the Constitution when they provide for the right of protecting journalists' information sources to be exercised even in their relations with the Authorities; however, the absence of relevant guarantees renders Article 6 of the Press Freedom Act and the entire legal system in violation of the Constitution by way of omission. In its decision, the CC held that the protection of information sources was previously absent in criminal proceedings and so the new regulation should be deemed as a significant development, albeit one without sufficient guarantees.

Article 6 (2) of Press Freedom Act provides for exercising the right of information source protection as a civil right in Court or official procedures, on condition of fulfilment of the obligation to prove the grounds thereof. In other words, media providers may resort to the protection of the identity of their information source when capable of proving that the information was released in the public interest. The investigating authority or the Court therefore does not have to substantiate the need to reveal the identity of the information source, as the media provider's failure to prove that the information was released in the public interest will suffice. The burden of proof allows quite a wide opportunity for limitation and no constitutional objective substantiating the obligation to ensure protection of information sources subject to burden of proof may be defined: the CC has therefore annulled the last sentence of Article 6 (2) of the Press Freedom Act.

In its decision, the Constitutional Court has revealed the failures in the new regulation and, in view of the practice of the European Court of Human Rights, has defined the requirements under which the violation of the Constitution by legislative omission may be remedied.

These criteria include:

- a) opportunity to resort to preliminary Court revision against the first decision;
- b) the statutory limitation shall be in accordance with the provisions of Article 10 (2) of the European Convention on Human Rights, i.e., limitation shall be properly substantiated;
- c) limitation is possible only when the authorities or the Courts do not have alternative ways of obtaining the particular information;
- d) the limitation should be proportionate, that is, revealing the identity of information sources should take place in exceptional cases only, when so justified by threat to human life or health or particularly significant public interest;

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<sup>18</sup> D Voorhoof, 'The Protection of Journalistic Sources Under Fire?' 72 *International Communication Gazette* (2010), 407.

- e) in the context of protecting information sources, the opportunity to reject delivery of documents, deeds and data media shall also be provided for;
- f) no burden of proof may be required for the exercise of the right of information source protection.

### **III. The significance of the Decision**

In my opinion, the Decision - based on the old foundations - has in many respects opened a new chapter in constitutional thinking on the freedom of the press and media regulation. The lengthy reasoning reveals that the more than two decades of operation of the CC has laid down the constitutional foundations of the freedom of the press and media regulation for a long time. Although there may be debates in the future, even within the Tribunal, over some of the details, the theoretical foundations have been secured and, using them as a starting point, the assessment of the constitutionality of the effective and any other future regulations can be carried out with reassurance.

According to the most important element of the Decision, the content regulation of press products and its official supervision may be a constitutional solution in certain cases; with this, the CC took a position on the most debated point of the regulation. It is an important element of the Decision that, with regard to certain concrete content requirements (hate speech, protection of the constitutional order, protection of minors, and rules pertaining to commercial communications), the regulation is also constitutional with respect to press products.

It is also worth mentioning that the Decision may contribute to dispelling certain misconceptions in connection with the regulations; it can, for example, thus promote the protection of journalistic sources or the realistic assessment of the issue and regulation of registration. The Decision sheds light on the fact that the rule contained in the Press Freedom Act is a substantial - but at the same time not adequate - step forward in the direction of the appropriate regulation of source protection, and registration cannot be regarded as a disproportionate or unjustified limitation of the freedom of the press.

The Decision has not ruled on a number of important issues. The issues of official and public service structure, the rules on the financing of public services, the assessment of the nature and extent of official sanctions, and the rules on frequency tenders can be regarded as such. Certainly, sooner or later, these issues will be submitted to the Tribunal one way or another. I am looking forward with great interest to the constitutional assessment of these matters.

It does not belong to the professional analysis of the Decision, but at this point it is definitely worth mentioning that, with the Decision, the CC contributed to restoring its authority, which recently was openly questioned on several occasions (because of the impairment of its competence and the expansion in the composition of its members), before the Hungarian and European public opinion. The Decision contributed to proving that, even in the new regulatory environment relative to its competences, it is able to perform the task of constitutional control with which it is charged.