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HUNGARY: THE CONSTITUTIONAL COURT ANNULLED SOME PROVISIONS OF THE MEDIA LAWS

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On December 19 the Hungarian Constitutional Court delivered a decision (no. 1746/B/2010 – for the moment available only in Hungarian) which annuls some provisions of the Act on the freedom of the press and the fundamental rules on media content (Act no. 2010/CIV – for an English translation see here), and of the Act on media services and mass media (Act no. 2010/CLXXXV – for an English translation see here) in the very last moment, before the curtailing of its openness entered into force. After New Year's Eve the Constitutional Court would not have been able to deliver a decision, since the constitutional review of the media laws was initiated by private persons, NGOs and individual members of the Parliament through *actio popularis*, an instrument which is now abolished by the new Fundamental Law and Constitutional Court Act, both entering into force on January 1 (see a previous post). The Act also provided for the termination of all ongoing proceedings at the moment of its entering into force, except for those which were initiated by one of those persons or groups entitled to challenge the constitutionality of a law according to the new rules (i.e. the government, a quarter of the members of Parliament and the ombudsman). So the Constitutional Court delivered its decision

less then two weeks before this moment and it is based on the provisions of the old Constitution, which is not in force anymore. However, Article 61 concerning the freedom of expression was modified already in July 2010. New paragraphs were introduced in order to provide for the right to receive adequate information in respect of public affairs and a constitutional basis for the creation of a new administrative authority. Furthermore, the last new paragraph (par. 5) determined that for the adoption of a law concerning the media a two-thirds majority is required.

The nearly 50-page long decision's ruling consists of ten points and deals with all those popular actions which express concerns regarding the printed and online media. Several questions of constitutionality were raised in relation to the media laws. They concerned not only the content of the laws but also the circumstances of their adoption (namely the lack of consultation with non-governmental actors) and the remarkably short time between the adoption of the last media law and its entering into force (which, according to the complainants, prevents adequate preparation for the application of the new rules). Concerns were expressed about the provision that subjects the printed and online media to the newly created National Media and Infocommunications Authority, as well as the compulsory registration of all media products. For the complainants these rules violate the freedom of press (art. 61 (2) of the old Constitution which served as a basis for the review). Another controversial provision was the one entitling the police to oblige the journalists to reveal their source of information without a judicial decision. Furthermore, the Authority's large powers to request and handle personal data were considered to be incompatible with the right to privacy (art. 59 (1) of the old Constitution). Finally, the constitutionality of the Authority itself was questioned.

The Constitutional Court did not agree to all the concerns raised by the complainants. For example, it did not accept the argument according to which the law on media services and mass media entered into force without leaving sufficient time for the public to prepare themselves for its application, since the law in question allows the media service suppliers

one year to comply with the changes (par. III/1.1 of the decision). The argument concerning the lack of consultation was not accepted either. According to the Court it does not make a law unconstitutional, but determines political responsibility on behalf of the proponent of the bill, which in this case was a member of the Parliament and not the government (par. III/1.2 of the decision). At last but not least, the compulsory registration of media products was considered a "necessary and proportionate restriction of the freedom of press" (par. IV/3 of the decision).

The reasoning of the decision contains a thorough analysis of the concept of the freedom of press and of the relevant precedents of the Court, paying special attention to the possible restrictions (par. IV/1 of the decision). In particular, the Court underlies that in its case-law there has always been a distinction made between the different types of media when assessing the necessity and the proportionality of a restriction. In a former decision (no. 37/1992 AB) it was ruled that „the protection of the freedom of expression of opinions in the radio and television context required extensive, legally-regulated, organisational solutions able to guarantee comprehensive, balanced and accurate reporting of the views prevailing in society", since the range of applicable frequencies is limited, which is not the case for the printed media. However, 15 years later the Court adapted its opinion to the changing of time, since the monopoly of the national public service radio and television had vanished in the meanwhile, and new satellite- and cable-based broadcasts appeared, as well as new forms of communication had been developed. Consequently, according to the Court, "external pluralism has been achieved by the creation of a multi-actor market". Even so, it did not make needless to apply the requirements of balanced information (i.e. internal pluralism). (See decision no. 1/2007 AB) The reasoning makes reference also to EU law, in particular to the underlying principles of the Audiovisual Media Services Directive (2010/13/EU) expressed in its preamble.

The decision underlies that the Court has never excluded categorically the possibility for the state to restrict media content and to sanction criminal offenses or the violation of public morality, even by prohibiting

publication (see decisions no. 20/1997 and 34/2009). The decision clearly states that the freedom of press extends to the online media as well, but it has to be treated separately from the audiovisual media, and private websites and blogs cannot be subject to regulation (see par. IV/1.4). On the other hand online newspapers are treated by the legislator in the same way as printed media. Both online and printed media are subject to control by the administrative authority which can impose sanction on them or prohibit their publications. According to the Court, it is not a violation of the freedom of press on condition that an effective judicial remedy is available. There is, however, a violation of the Constitution if the restriction of this freedom is unnecessary and disproportionate. The challenged provisions of the media laws were examined by the Court on this basis, and no unconstitutionality was found in relation to the provisions which allow the intervention of the authority in the case of violation of human rights or to protect minors (par. IV/2.2.2 and 2.2.3).

An important point of the ruling is the annulment of three words in art. 2 (1) of the Act on the freedom of press (no. 2010/CIV): "and published media" (in Hungarian: *és kiadott sajtótermékre*). The provision which contains these words determines the scope of the Act, therefore the elimination of this part means the exclusion of the printed and online media from the scope of application of the Act. In this respect the available (not official) English translation of the Act can be misleading, since it refers to „printed press materials", while the expression *kiadott sajtótermék* – literally "published press products" - includes also the online media (even if point 6 of art. 1 of the Act which defines the most important expressions used by the legislator makes it clear that online newspapers and news portals are considered to be printed press materials). These three words were eliminated from the provision because, according to the Court, while the sanctioning powers of the new Authority towards the audiovisual media (radio and televion) are justified by the expectionally strong influence they exercise on the public, in the case of the printed and online media it is a disproportionate restriction on the freedom of the press. The Court explains that the already existing remedies, namely civil and criminal action before ordinary courts and the

sanctioning power of the Authority in case of persistent violation of human rights are sufficient and adequate to ensure the respect of human dignity (par. III/2.2.2 of the decision). However, the annulment of the above mentioned three words will enter into force only on June 1, as the Court wanted to leave time for the legislator to enact new rules relating to the printed and online media (par. IV/2.2.5 of the decision).

Article 175 of Act no. 2010/CLXXXV concerning provision of data was found unconstitutional and annulled by the Court. According to the reasoning (par. V/3.2.2 of the decision) the provision which enables the Authority to request that media service providers furnish "any and all data that are indispensable for the Authority to perform its duties" is too vague, and there is no legitimate purpose for this restriction of the freedom of the press as there are other ways to obtain the required data in the context of other proceedings.

An entire chapter of the same Act, concerning the Commissioner for Media and Communications, was annulled by the Court. According to the Court the introduction of a new institution in this form with sanctioning powers is an unjustified restriction on the freedom of expression, as the already existing other institutions (among which the new Authority) already fill in this role. In this case the Court wanted to leave time for the legislator to enact new rules and annulled the provisions with effect from May 31 (par. VI/3 of the decision).

The Court also found an omission of the legislator in two respects. First, procedural guarantees are missing for the protection of the sources of information in legal proceedings. Second, the duty of the media service provides to furnish data to the Authority is not regulated in a satisfactory way, since the sources of information and the duty of confidentiality of lawyers are not properly respected. The deadline to find a remedy for these omissions set by the Court is May 31, 2012 (points 3 and 4 of the ruling).

The decision was made by the Constitutional Court in its renewed composition consisting of 15 members, five of which were appointed last summer by the government (formally by the Parliament, but the current

government holds two-third majority in Parliament, sufficient for the appointment of new judges to the Constitutional Court). The *rapporteur* judge was the President of the Court, Péter Paczolay, a professor of constitutional law. At the Hungarian Constitutional Court actually it is the President's responsibility to assign the cases to the judges. So in this event the President assigned the case to himself.

Two of the newly appointed members attached a dissenting opinion to the judgment: Béla Pokol and István Balsai. Both dissents are partial and both disagree with the annulment of certain provisions. According to Judge Pokol it is a too radical step to exclude the printed and online media from the scope of the Act on the freedom of press. He expresses his dissent also in relation to the annulment of art. 175 of Act no. 2010/CLXXXV concerning the provision of data, arguing that the "opinion monopoly of the global media powers" is more dangerous than the possible intervention by a democratic state in order to protect the rights of its citizens. Judge Pokol's dissenting opinion was joined by Judge Lenkovics (a professor of private law appointed to the Court in 2007 during the previous legislature). The dissent of Judge Balsai, whose appointment was harshly criticized by several commentators for his lack of independence as he was an active politician and a member of Parliament until the moment of his nomination, disapproves the exclusion of the printed and online media from the scope of the above mentioned Act. He deems the majority opinion contradictory and exceeding the competence of the Court. According to Judge Balsai the Court recognized the necessity of regulation also in relation to the printed and online media, but considered unconstitutional the concrete scheme adopted by the legislator, so the exclusion from the scope of application of these types of media implied also the annulment of some constitutional provisions.

Shortly after the publication of this decision of the Constitutional Court a heated public debate emerged in relation to a decision of the newly established Media Authority. In a public tender a well-known leftist radio station (Klubrádió) lost its frequency in Budapest. For more information on this matter see a writing of Hungarian media expert Judit Bayer and an

official statement of the Media Authority responding to the accusations (both in English).