

FREEDOM OF EXPRESSION UNDER FIRE

**BRIEFING TO THE
HUNGARIAN GOVERNMENT
ON THE NEW MEDIA
LEGISLATION**

**AMNESTY
INTERNATIONAL**



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THE RIGHT TO FREEDOM OF EXPRESSION: PERMISSIBLE RESTRICTIONS

Amnesty International continues to be concerned about two new media laws which were adopted in Hungary in September and December 2010 respectively, and amended by the Parliament in March 2011.¹ The package of laws represents a threat to the right to freedom of expression. It creates a system of media content regulation and compulsory media registration, and introduces a powerful Media Authority without ensuring the necessary safeguards that these instruments will not lead to interference with internationally protected human rights.

Hungary has an obligation to respect, protect and fulfil the right to freedom of expression which, as outlined in international human rights law, includes the freedom to seek, receive and impart information and ideas of all kinds. A free, uncensored and unhindered press and other media is essential for the effective exercise of this right. Although governments may impose certain restrictions to the right to freedom of expression, such restrictions need to be strictly limited and narrowly interpreted. In addition, governments have to establish why any such restrictions are necessary.² Under international standards, any interference with the right to freedom of expression must meet a strict three part test, namely, it must be:

- provided by law, **and**;
- only for certain specified permissible purposes (for example, national security, public order or respect of the rights or reputations of others) **and**;
- demonstrably necessary and proportionate for the achievement of one of those permissible purposes.

Freedom of expression requires special attention as it is both a right in itself and also an important component of other rights, such as the freedom of assembly.³ The European Court of Human Rights (ECtHR) underscored that the “freedom of press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders and consequently, the freedom of a political debate is at the very core of the democratic society.”⁴

Amnesty International considers that the new media legislation in Hungary contains serious

1 The Hungarian Press and Media Act adopted in September 2010; the Act on Media Services and Mass Media adopted in December 2010.

2 See: *The Observer and The Guardian v. The United Kingdom* (Application no. 13585/88), judgment of European Court of Human Rights of 26 November 1991, para. 59

3 Council of Europe 2004, Freedom of Expression, Human Rights Handbooks No. 2, p.6.

4 *Id.* p. 12.

flaws that may infringe the freedom of expression. It is particularly worrying that such a restrictive legislation has been adopted by a country that is holding the Presidency of the European Union and should serve as an example when it comes to compliance with human rights standards.

REGULATION OF THE MEDIA CONTENT

Although both the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR) permit that the right to freedom of expression might be subjected to certain conditions, such restrictions need to be strictly limited. Amnesty International is concerned that the new media legislation in Hungary introduces provisions that aim to regulate the media content on the basis of vague concepts that do not fall under the legitimate purposes outlined by the international law.

The Hungarian Press and Media Act adopted in September 2010 imposes an obligation on the linear media services – i.e. non-interactive, operating in one direction– to provide diverse, factual, timely, objective and balanced information. The requirement of a “balanced nature of the communication” was reiterated in the Act on Media Services and Mass Media adopted in December 2010. A violation of the obligation of balanced reporting can be sanctioned under the legislation. The Organization for Security and Co-operation in Europe (OSCE) expressed concerns that such provisions “give the regulatory bodies discretionary, indeed arbitrary, powers to sanction content providers based on their own assessment of whether or not information distributed... is ‘fast’, ‘accurate’, ‘diverse’, ‘timely’, ‘objective’ and ‘balanced’.”⁵ Such regulation is worrying, as it goes beyond the permissible restrictions on the right to freedom of expression outlined by the European Convention.⁶

The Hungarian government emphasized that the requirement for balanced reporting is provided by law. However, it failed to respond to the criticism that such requirement, in fact, is not justified and necessary in a democratic society. In its analysis of the new media legislation, the OSCE warned that content-related legislative requirements impose ‘before the event’ regulation and go against the principles of freedom of expression.⁷ The ECtHR has ruled that there must be a careful approach to any prior restraints on publications. The Court held that such restraints are inherently dangerous to the right to freedom of expression.⁸

The new legislation introduces further restrictions of the media content in the name of protecting ‘common or public morality’. Hungarian authorities argue that concepts such as ‘common morality’ or ‘public interest’ are “well-established elements of the Hungarian legal system” and that there is a number of court decisions in which its meaning has been developed. However, such explanation implies that the concept of ‘morality’ is static. Such view has been challenged by the ECtHR which has recognized on several occasions that such concepts tend to change over time.⁹ Given the fluid nature of concepts such as “public morality”, “balanced reporting” or “public interest”, it is rather difficult to see how Hungarian authorities aim to ensure that the application of such legal provision will meet the

⁵ OSCE 2010, *Analysis and Assessment of a package of Hungarian Legislation and Draft Legislation on Media and Telecommunications*, p. 34.

⁶ Article 10 of the European Convention on Human Rights lists nine legitimate purposes for which restrictions of freedom of expression are permissible: for the protection of national security, territorial integrity, public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation of rights of others, for the prevention of the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary.

⁷ *Id.* p. 33.

⁸ *Gaweda v. Poland* (Application no. 26229/95), judgment of European Court of Human Rights of 14 March 2002, para. 35; *The Observer and The Guardian v. The United Kingdom*, para 60.

⁹ *Müller and others v. Switzerland* (Application no. 10737/84), judgment of European Court of Human Rights of 24 May 1988, para. 36

requirement of legal clarity. Lack of such clarity may undermine the effectiveness of legislation. Moreover, under the European Court case law, “[a] norm cannot be regarded as a ‘law’ unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able... to foresee... the consequences which a given action may entail.”¹⁰

PENALTIES

The government of Hungary argues that the penalties will not represent a financial burden to the media outlets. They justify the penalties provision by saying that “a broadcaster with annual revenue of several tens of billions or even hundreds of millions of forints will not be affected by a fine to the tune of a few hundred thousand forints, which will not prevent it from repeating its infringing conduct and will not set a dissuasive example for other broadcasters.”¹¹

This approach is oblivious to the European Court findings that even relatively small fines could lead to censorship. In the case of *Lingens v. Austria*, the Court held that “although the penalty imposed on the author did not strictly speaking prevent him from expressing himself, it nonetheless amounted to a kind of censure, which would be likely to discourage him from making criticisms of that kind again in future.”¹² The Court further clarified that sentencing a journalist with a relatively small fine of 20,000 Austrian Schillings (1,430 EUR) “would be likely to deter journalists from contributing to public discussion of issues affecting the life of the community. By the same token, a sanction such as this is liable to hamper the press in performing its task as purveyor of information and public watchdog.”¹³

¹⁰ *Gaweda v. Poland*, para. 39; *Feldek v. Slovakia* (Application no. 29032/95), judgment of European Court of Human Rights of 12 July 2001, para. 56

¹¹ Reply of the Ministry of Justice and Administration to the Criticism of International Media Against the Media Act, 3 January 2011. Available at: http://www.kormanyoszovivo.hu/news/show/news_3916?lang=en

¹² *Lingens v. Austria* (Application no. 9815/82), judgment of European Court of Human Rights of 8 July 1986, para. 44.

¹³ *Id.*, para. 44

COMPULSORY REGISTRATION OF ALL MEDIA

The Act on Media Services and Mass Media requires all media domiciled in Hungary to register with the National Media and Infocommunications Authority (NMHH). The legislation thus replaces a system of administrative 'notifications' with a system of 'registration' when the media provider will need an approval of an authority.

The new legislation allows the NMHH to deny registration in certain situations such as conflict of interest *vis-à-vis* the existing applicant or a 'confusingly' similar name to another media product. The ECtHR held that law which gives an authority the power to deny registration must be formulated with sufficient precision to enable the applicant to regulate his or her conduct. The Court further emphasized that restraints prior to publication – including registration that may be denied and thus lead to a prohibition of publication – by their very nature pose a potential threat to the freedom of expression.¹⁴

Following the amendment to the legislation adopted by the Hungarian parliament in March 2011, a media provider can start an operation without the necessary registration, but will still have to obtain the registration.

The OSCE criticized the registration-related provisions of the legislation as they create "a legal, administrative and potentially also political barrier to the entry of new content providers into the media landscape".¹⁵ It further expressed concerns that the system could be used to silence existing media outlets.

¹⁴ *Gaweda v. Poland*, para. 39, 40.

¹⁵ OSCE 2010, p. 29.

THE REGULATORY BODY

The National Media and Infocommunications Authority (NMHH) consists of the President, the Media Council and the Bureau and has – among other things – the power to deny registration of media; to interpret the law and decide what constitutes ‘public interest’, ‘common morality’ or ‘balanced reporting’; to perform supervisory and control tasks over the compliance with the law; to impose penalties on the media outlets violating the legislation. Given such powers *vis-à-vis* media regulation, the independence of NMHH is important in order to ensure the right to freedom of expression.

However, it has been precisely the independence of the NMHH that has become a source of concern of domestic and international NGOs, the OSCE as well as journalists and editors. The procedure followed to appoint the President and members of the Council appears to be inadequate in ensuring plurality and representation of a broad range of political and other standpoints. The President is appointed by the Prime Minister for nine years. According to OSCE analysis, nine years is the longest known term of office for members of equivalents of broadcasting regulatory authorities in Europe.¹⁶ The four members of the Media Council were appointed by a parliamentary *ad-hoc* committee on which the ruling Fidesz party had a majority and who are all members or supporters/delegates of Fidesz. Given that this regulatory body can ultimately close down media outlets, the apparent lack of independence from the government is of even greater concern.

The length of the term of office in conjunction with the manner of an appointment of the president of NMHH and the strong powers of the NMHH raises concerns over its impact on the right to freedom of expression. To achieve greater independence of the NMHH members, the OSCE recommended to identify alternative methods of considering candidates so that their identification is “taken out of hands of the politicians” and the parliament “could only consider candidates [of the Media Council] recommended by institutions of higher learning and appropriate professional, trade and civil society organizations.”

¹⁶ OSCE 2010, p. 42

CONCLUSION

Amnesty International wishes to bring to the attention of the Hungarian government that freedom of expression is vital for the fulfilment of other human rights. It is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb.¹⁷ Any restrictions of the right to freedom of expression need to be strictly limited and narrowly interpreted. The newly adopted legislation introduces restrictions that create a system of regulation under which freedom of expression might be at risk.

The Hungarian Parliament adopted an amendment to the media legislation in March 2011. Amnesty International noted with concern that these changes fail to put the regulation in line with international standards on the freedom of expression. Despite the amendments, the media legislation continues to:

1. Regulate the media content by imposing restrictions in the name of vague concepts such as "public morality", and by obliging linear media content providers – non-internet based media – to provide "balanced reporting";
2. Require the compulsory registration of all media, thus creating a legal, administrative and potentially also political barrier to the entry of new content providers into the media landscape;
3. Threaten the right to freedom of expression by fines for violation of the legislation, despite jurisprudence of the European Court of Human Rights according to which even relatively small fines can lead to censorship;
4. Lack guarantees of independence of the Media Authority as the President is appointed directly by the Prime Minister, while the four members of the Media Council are appointed by a parliamentary ad-hoc committee in which the currently ruling Fidesz party has a majority.

The changes adopted in March 2011 therefore fall short of the recommendation of the Council of Europe Commissioner for Human Rights to carry out a 'wholesale review' of the media law package with the objective to strengthen the guarantees that media regulatory mechanisms will be "immune from political influence".¹⁸ The amendment also falls short of the recommendations of the OSCE which called on the Hungarian authorities to – among other things – abolish the requirements on balanced coverage and other content prescriptions and obligations; abolish the registration requirement of the media; and ensure that the media regulatory body is independent.¹⁹

Amnesty International urges the Hungarian government and parliament to address the

¹⁷ *The Observer and The Guardian v. The United Kingdom*, para 59.

¹⁸ Opinion of the Commissioner for Human Rights on Hungary's media legislation in light of Council of Europe standards on freedom of the media, 25 February 2011, Strasbourg. <https://wcd.coe.int/wcd/ViewDoc.jsp?id=1751289>

¹⁹ OSCE 2011, Analysis of the Hungarian Media Legislation, February 2011, pp. 15-16.

concerns expressed above and to take steps to ensure that the legislation is in compliance with international human rights law.



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