

HCLU POLICY PAPERS

HCLU on Freedom of Expression

Can freedom of expression be dangerous for democracy? Is hate speech to be treated differently depending on the circumstances under which it occurs or on its tone? Can an office holder appeal to defamation law or libel law against public criticism of his activities? Can the divulgence of government secrets go unpunished if the public has a legitimate interest in having access to the information made secret? Does the journalist enjoy immunity from the obligation to reveal the source of his information? Is it permissible for the government to found a newspaper and edit a television program? Is offensive artistic expression protected against restrictions? Can speech restricted on the grounds that it affronts public morality? These are the most sensitive issues regarding freedom of expression in Hungary today.

Why is freedom of expression important?

HCLU maintains that freedom of expression is an indispensable characteristic of a free society for the following reasons:

- Freedom of expression is a fundamental right. It is constitutive for the acts of the individual as a social being, for his capacity to share his thoughts, experiences and intentions with others. Human dignity and freedom of expression are inseparable.
- Freedom of expression is the engine of the progress and intellectual advancement of societies. The only way to eliminating error is to allow all views to be expressed and confronted with their rivals in free debates.
- Freedom of expression is a necessary condition for democratic self-government. There is no working democracy without informed citizens.
- The best safeguard against public corruption and other abuses of power is freedom of expression and openness of public life. Free media can protect both the public against despotism and power-holders against degenerating into despots.

What constitutional provisions protect the freedom of expression in Hungary?

Article 61 of the Constitution of the Republic of Hungary provides: "In the Republic of Hungary everyone has the right to the free expression of his views and opinions, and has the right of access to information of public interest, and also the freedom to disseminate such information." Article 8 (1) says: "The Republic of Hungary recognizes the inviolable and inalienable rights of the person. Paying respect and securing protection to these rights is a primary obligation of the State." Such rights cannot be restricted by any provision other than law. Article 8 (2) adds that not even laws may impose limitations on the essential contents of fundamental rights. For the most detailed interpretation of the constitutional meaning of the freedom of expression, see Resolution 30/1992 of the Hungarian Constitutional Court. It says that freedom of expression has a special role among basic constitutional rights. It lays down the requirement that restriction of speech is unconstitutional unless it is justified by content-neutral reasons: "Freedom of expression protects opinions irrespective of their value and truthfulness." Beyond the duty to refrain from interfering with expression on content-based grounds, the government is subject to a duty actively to lay down the institutional framework necessary for free public deliberation.

Freedom of expression is an ultimate principle to which appeal can be made in support of more specific rights and freedoms related to speech.

"Freedom of speech and freedom of the press derive from freedom of expression. Freedom of the press involves the freedom of all media, the right to be informed, and the right to have access to information. Freedom of expression involves, in a broader sense, the freedom of artistic and literary creation and the freedom to propagate works of art, the freedom of scientific research and the freedom to teach scientific findings."

In addition to Article 61, aspects of the freedom of expression are mentioned by Article 64 ("In the Republic of Hungary everyone has the right to submit written petitions or complaints either alone or together with others"), by Article 60 (1) ("In the Republic of Hungary everyone has the right to the freedom of thought, conscience and religion"), and by Article 70/G ("The Republic of Hungary respects and supports the freedom of science and art, the freedom of learning

and of teaching.”) Note that while the act of expression may in exceptional cases be restricted, its opposite, that is, abstention from expressing one’s opinion, may never be subject to interference. No one – with the possible exception of public personalities – may be obliged to give expression to their religious, ethical or political views.

As for radio and television broadcasting (where the quantity of frequencies is limited), the Constitutional Court defines it as the duty of the State to secure access to public radio and television broadcasting free from government influence, and that the composition of the programs must be balanced and their content truthful. The emergence of broadcasting monopolies is unconstitutional. (Resolution 37/1992)

The constitution demands a two-thirds parliamentary majority for the adoption of laws that cover the following matters: freedom of conscience and religion, access to data of public interest, freedom of the press, radio and television broadcasting.

What Is the International Practice Regarding Freedom of Expression?

In the twentieth century three main principles have emerged in the democratic countries.

During World War I the Supreme Court of the United States took a stance on freedom of expression in response to the activities of anti-war movements. In the *Schenck v. U.S.* case, Judge Holmes stipulated a principle of clear and present danger. He used the following metaphor: freedom of expression would not protect a man falsely shouting fire in a theater and causing panic. In the *Brandenburg v. Ohio* case (1969) it was stated that no seditious or subversive speech can be punished unless it constitutes an incitement to immediate unlawful action, and unless the incitement is likely to produce, in the circumstances, such action.

The practice followed by the European Court of Human Rights (Strasbourg) is that whether restriction is justified must always be determined upon examining the place, time and circumstances of the event. There is, consequently, no statement that could be forbidden merely by its content, free of its context.

Following World War II, several European countries adopted content-based sanctions against racially motivated incitement. In view of the horrors of the Holocaust, countries from where Hitler’s war machine rolled out took a stiff position toward those propagating neo-Nazi views. In Austria, those who propagate, in printed or other forms, Nazi ideals, hail the Third Reich or state that the Holocaust did not take place, face imprisonment ranging from one to ten years; in Germany, they are threatened by a punishment ranging from a fine to three years of imprisonment. In Germany it is forbidden to disseminate ideas of any banned parties (unless for scientific, educational or artistic purposes) or to use insignia of illegal organizations. To keep the skinhead movements at bay, in 1992 the ban was extended to insignia that are similar to Nazi ones. The amendment of the German law on incitement to hatred of 1960 provides that an act qualifies as disturbing the public peace if it causes potential danger, occasionally even without the people threatened knowing about the verbal attack.

In the *Observer and Guardian v. U.K.* case (1991) the Strasbourg Court declared that the press acts as a "vigilant guardian for society". That having said, conflicts between the legitimate interest of the public to get informed and the personal rights of office-holders need to be adjudicated. The sentence the Strasbourg Court handed down in the *Castells v. Spain* case (1992) set a precedent for the treatment of such conflicts. The judgment declares that the limits to permissible criticism by the media depend on who the person criticized is, the scope for criticism being broader in the case of office-holders than in that of private individuals. In a democratic society, the opinions and conduct of public personalities cannot be considered as a private matter. It is their choice to assume public office, and in making this decision, they must be aware that the media follow what they do in public. In fact, the media have the right to make value judgments about their demeanor.

Acknowledging the outstanding social role of the media, several European countries have adopted legal safeguards to protect the media against police harassment. In those countries, journalists bear immunities similar to those enjoyed by attorneys, physicians and members of the clergy. Here is, for example, the relevant provision of the French law on criminal procedure. “Only a judge or a state prosecutor may initiate an inquiry into the activities of the printed or electronic press. The above persons shall ensure that the investigation neither impedes journalists in pursuing their profession nor causes an unjustifiable delay in public access to information.” In Austria, the law on the media (1981) provides, among other things, that a court decision is needed for the surveillance of the premises and facilities of the media. Even that may only happen if the object of the investigation is clarifying the suspicion that a crime punishable by at least ten years of imprisonment was committed.

Freedom of Expression – the Case of Hungary

Hate Speech

In the first ten years of its operation, the Constitutional Court took a clear stance on permissible and impermissible restrictions on freedom of expression. Resolution 30/1992 provides that it is unconstitutional to prosecute hate speech by means of the criminal law. "The content of basic rights and freedoms (...) may only be restricted in order to protect another basic right or constitutional value, in unavoidable cases, and even then only to the required degree and in due proportion." The Resolution adds that among the possible legal options, the instruments of criminal law may only be used as a last resort. And even if penal restriction is necessary for the attainment of the desired aim, it should be confined as narrowly as possible.

The Resolution is based on legal principles adopted in the United States and on the practice followed by the Strasbourg Court. It defines the hierarchy of values that may conflict with freedom of expression. "A law that may be applied to restrict the freedom of expression has greater weight than the freedom of expression if it directly serves the assertion or protection of another basic right that is vested in every citizen. A law that may be applied to restrict the freedom of expression has smaller weight than the freedom of expression if it protects such rights indirectly, with the mediation of some 'institution'. A law that may be applied to restrict the freedom of expression has the smallest weight if its object is a value per se (for instance, public peace)."

In Hungary, following the transition to multiparty democracy, a considerable section of the public were shocked to see that the lid has been removed from the expression of far right views, which were thought to have long disappeared. When members of a neo-Nazi group – which alleged that the Holocaust did not take place – were acquitted by a court, an angry public protest followed, generating a press debate in Spring 1996. The pro-restriction camp put forward the claims that

- the neo-Nazi statements inflict emotional wounds,
- the denial of the Holocaust tarnishes the memory of the victims,
- the brandishing of Nazi insignia in public can scare the survivors,
- Auschwitz was so horrendous that it is not comparable with any other historical sins,
- putting forward Nazi views necessarily involves the approval of violent action and stirs hatred, hatred in turn generates violent action,
- there are certain acts that are so dangerous that they are punishable even if the resultant danger is not clear and present,
- the self-confessed aim of neo-Nazis is to overturn democratic state order and, therefore, toleration of their speech disarms the defenders of democracy against the onslaught of the forces of intolerance.

The HCLU shares the views of the pro-permission camp. The main pro-permission arguments raised in the debate are as follows:

- First, prohibiting the expression of any views, even those which are obviously false, may harm the community. As long as it is not forbidden to deny an established truth (e.g. that the Holocaust took place), the general public has good reason to believe that what the experts say about the facts of history is true. If it becomes forbidden publicly to deny a thesis, the general public will be deprived of any basis for their belief in what the expert say.
- Secondly, when an agitated crowd is incited to violent action, and the potential victim is on the scene, then the danger that the speech is followed by violent action is clear and present. When, however, a speaker addresses indifferent passers-by, who are hurrying about to do their business, and the potential scapegoat is not present, the danger is negligible.
- Finally, when the democratic institutions work well, and the people who fill the main institutional roles are united in rejecting antidemocratic radicalism, extremism has no appeal beyond a very limited section of the public. It is indeed imperative to take resolute action against racism, but that should not be done with instruments of the penal law in the first place.

Criticism of office-holders

In Hungary, the transition to parliamentary democracy put the public office-holders to heavy strain by making them accessible to public inquiry and criticism. During the term of the first freely elected government (1990-'94), a columnist and a member of parliament have been charged, on the initiative of the Prime Minister, with "offense to the honor an office-holder". Occasionally politicians take umbrage at parodies or caricatures about them and seek remedy in civil suits.

The ordinary courts as well as the Constitutional Court handled these cases in conformity to the practice of the Strasbourg Court.

Ironically, the civil courts find orientation in a Supreme Court standpoint, issued while Hungary was still a single party dictatorship. That standpoint provides that the press rectification cannot be obliged to rectify the expression of any opinion, critical assessment, or polemical statement on the ground of falsity of content. The fact of defamation or libel cannot be established unless a false statement is made that injures a person's integrity or uses an expression that is unjustifiably aggressive, condescending or rudely injurious.

Resolution 36/1994 of the Constitutional Court abolished the institution of “the protection of the honor of office-holders” – which was a remnant of the authoritarian era. The Resolution provides that the honor of public personalities does not deserve broader protection than that of ordinary people – on the contrary. There is more room for public criticism of officials than that of the ordinary people. Freedom of the press requires special protection when the media items cover personalities who hold public office or take place in public life.

Freedom of the artistic expression

During the 1990s, works of art caused controversy on two occasions. In both cases, the right-of-center government of the time got involved in the polemic. In 1991 *New Lady Messenger*, an avant-garde magazine, carried on its cover an unconventional rendering of Hungary’s coat of arms (instead of two angels, two naked girls supporting the royal crown). In 1999, an exhibition by the internationally renowned avant-garde artist, Hermann Nitsch, outraged the guardians of prudish conventionality. In the first case, the Public Prosecutor ordained that an issue of the magazine is to be confiscated on the ground that its cover undermined the authority of the State. In the latter case a State Secretary responsible for church affairs called for the closure of the exhibition on the ground that it “hurt the feelings of religious people.”

When assessing these cases, we have to take the followings in consideration.

First, artistic experimentation often proceeds along the outer perimeter of the conventional taste. Therefore, banning works of art on the ground that they offend the sensibility of the public would put creativity to an end in this domain.

Second, the artists’ creeds do not necessarily coincide with the views that are presented in their works. What is more, the artistic message resists being verbalized in a non ambiguous way. Consequently, it is doubly true of artistic expression that the assumed content of its works is not an appropriate ground for intervention.

Finally, in a democratic society, not even the political principles that govern the State or the symbols that represent them, are beyond public controversy. Hence, artists must have the right to put official symbols in an ironic or critical context.

Advertisements

A few years ago the Advertisers' Union, a highly conservative professional corporation, attacked a poster that promoted the ladies’ magazine *Cosmopolitan* for showing a woman’s breasts covered partially by the hands of a man. At the same time, a company lending advertising surface refused to put on display a public-service poster of a gay NGO, which propagated the use of a prophylactic. The artwork on the poster clearly referred to a male sexual organ.

HCLU holds that appeals to public morals do not generally support restrictions on freedom of expression, not even in the domain of commercial ads. A case in a possible exception is an image whose only point is to frighten (rather than to advertise a journal, a prophylactic or some other item) and which, being on public display, may adversely influence the development of child personality. A different kind of exception is provided by commercial television channels which often put victims of grave accidents, violent crime and debilitating sicknesses to public display in a manner which violates privacy. Again, such considerations have nothing to do with the protection of morals.

Private secrets

A scandal blew up in 1999 when it became known that numerous well known personalities, and some of their family members, had access to loans under preferential conditions (so-called VIP loans) paid by the state-owned Postabank. One of the business dailies then published a list of the beneficiaries of VIP loans. It included politicians, civil servants, artists, athletes and less known businesspersons, bank officials and others.

This issue raises the problem of drawing the limits of banking secrets. The HCLU believes that the public have the right to know the names of public personalities who have access to preferential loans of a bank using public funds. The claim of the artists and athletes for the protection of their banking secrets – even if they are really well known – is better justified.

It goes without saying that the State, too, can have its secrets. Yet the HCLU finds it disquieting that in early 1998 a penal procedure was launched, at the government’s initiative, against the editor-in-chief of a Hungarian daily that had published the "secret" draft of a Hungarian-Slovak agreement on a hydroelectric project on the Danube River, at Gabčíkovo. HCLU regards it a grave threat to the freedom of the press that the premises of four editorial offices have been searched within a year: one case was related to the VIP loans, two to the alleged violation of state secrets and one apparently on a false tip.

HCLU on Freedom of Expression: Aims and Priorities

Public speech, the media, and artistic creativity enjoy far greater freedoms in Hungary these days than they did before the transition to democracy. However, freedom of expression is not established yet firmly enough. HCLU identifies five areas where momentous changes need to be effected within a short time.

- Up to these days, an unacceptably wide range of activities which belong to the jurisdiction of the freedom of expression are still threatened by criminal sanctions. For instance, the criminal offense called “incitement against a law or a bylaw”, rather than being as narrowly tailored as possible, is defined in a way which is fuzzy and allows for an expansive reading. The definitions “undermining the prestige of a national symbol” and “putting on display symbols associated with tyranny” run contrary to the principle of freedom of expression.
- The protection of state and official secrets is given such a wide understanding which makes the state of freedom of information extremely shaky. It is inadmissible that police would harass press organizations just because they make public information that was declared state secret even though the public have a legitimate interest in knowing about it. House search and hearings should only take place after a court writ has been issued. In deciding about the case, the judge should ask the question, which is more harmful: to divulge a state secret or to hide information that should actually be made public?
- In the field of the press, especially the electronic media, the most serious threat to the freedom of expression is presented by the monopolies. Effective antitrust legislation is needed to create a competitive market.
- Present regulations on public radio and television broadcasting need revision. It is inadmissible that their boards can consist only of trustees who have been delegated by the government parties, which is the practice under the present government. Furthermore, it is unacceptable that freedom of information is trumped by a joint interference by government and opposition parties, which was the practice under the previous government.
- State support for the arts must not depend either on the preferences of civil servants or the taste of the public. Here, just as in some other domains, the State should remain neutral between competing world views and cultural orientations. Hence, endowment awards should be vested in independent boards of respected trustees; the boards should be allowed to pass their decisions free of outside influence; and the government should not be allowed to overrule their decisions.