



IRENEUSZ C. KAMINSKI

Applying Western Media Law Standards in Central East Europe

2002 / 2003

Applying Western Media Law Standards in East Central Europe

Ireneusz C. Kamiński

This chapter investigates the application of Western constitutional principles and non-constitutional standards concerning freedom of expression and the media in East Central Europe. It proposes policy recommendations aimed at changing perceptions of constitutional and international law and stimulating, encouraging and monitoring the implementation of Western constitutional principles and non-constitutional standards in the region.

1. Introduction

The application of legal standards has recently become an important feature of modern law. The narrowly oriented positivist approach, which focused on the content of ordinary domestic legislation and dominated Western legal history for almost two centuries, is currently being undermined by a profound new approach utilizing legal provisions that constitute or lay the foundations of the normative frameworks of states. A principal part of those foundations are human rights standards (Alexy 1985; Henkin et al. 1999; Wachsmann 2000).

Although human rights and freedoms have long been recognized in modern democratic states (sometimes in the form of special bills or declarations of rights), it was only after World War II that they began to exert a significant impact on law and legal practice. There are two principal sources of this process. The first is the constitutionalization of national legislation – the result of activities undertaken by constitutional or supreme courts. Encouraged to some extent by the wave of human rights movements in the 1960s and 1970s, judges began interpreting state laws in a constitutional perspective. The second stimulus was the emergence of international mechanisms designed for the protection of human rights. This gradual process of denationalization and the acceptance of supranational requirements did not occur without difficulties, but required time, work and education before taking root in various countries (Jackson & Tushnet 1999).

Freedom of expression and freedom of the media are among those human rights traditionally guaranteed in modern democratic states. Today the two free-

doms are no longer mere expressions of state intent – they exist as actual working provisions. Although seemingly general at first glance, these legal provisions carry a great deal of substantial information that enables a range of standards to be developed around them. These standards, elaborated from principles and solutions in Western democracies, are considered to be indispensable prerequisites for the protection of freedom of expression and the media.¹

Understanding what freedom of expression and freedom of the media mean, and how they are applied in practice, is essential for any state that aspires to follow the requirements of a modern democratic legal regime. This chapter addresses the question of what should be done in the newly (re)born democracies of East Central Europe to create the conditions necessary for the emergence of a genuine legal culture of standards related to freedom of expression and freedom of the media. The first group of standards consists of principles and rules of a constitutional character. The adjective ‘constitutional’ does not only mean that all of the standards are based on provisions of a constitution. The concept is deeper and based on the fact that freedom of speech and freedom of the media are human rights constituting the foundation of any democratic state, and the constitutional status of those freedoms is a consequence of the importance they have in a democracy. The two freedoms – and principles deduced from them – are ‘executable’ in the same manner as the entire constitution. Although the constitutional perspective is enhanced when a country designs a judicial mechanism to control whether ordinary legislation conforms to its constitution, an international instrument can be utilized in cases where the judiciary is not empowered to check the constitutionality of statutes. All traditional democracies and almost all countries in present-day Europe have ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms, which in article 10 protects the freedom of expression.

The second group of standards addressed in this chapter can be called non-constitutional. If they are at all executable, these standards cannot be applied like constitutional principles. Although non-constitutional standards also contribute to the proper functioning of freedom of speech and freedom of the media, their efficacy depends more on political culture than on expressed legal remedies.²

1. Despite the fact that in some modern democracies there are some differences in understanding what the freedom of speech and the freedom of the press are, an analysis of the main and representative constitutions as well as international instruments leads to identifying the true nature of the two concepts. They comprise the right to communicate and the right to receive both information (factual statements) and opinions (value judgements). The scope of the protected speech is not limited solely to political pronouncements but extends also to artistic and commercial expressions. For a comprehensive analysis see Barendt (1985).

2. This observation does not change the fact that some constitutional courts have by their decisions contributed immensely to creating ‘a constitutional dimension’ as well. See for example Barendt, (1991; 1995 & 1998), and Powe (1982).

The two groups of standards require different implementation strategies and must not be intermixed.

2. Constitutional media standards

2.1. Background

Over the past several decades, Western democratic states have experienced significant changes in legal approaches to their constitutions and international law – two legal sources that were previously disregarded or, at best, scarcely used. Although in principle international law was considered to be binding between states, internally it did not offer any remedies to citizens and other entities. International legislation was domestically applicable only when converted into a municipal statute. Despite its formal priority, the constitution also required statutes to translate its vaguely phrased provisions into precise and therefore applicable legislation. The passage of ordinary legislation setting significant limits on how individuals could enjoy their rights was not uncommon.

Today, various techniques have empowered constitutional provisions, while international law has either directly impacted domestic legal order or has overtly been recognized as a part of internal law. In Europe, the emergence and subsequent development of common institutions was at least partly responsible for this revolutionary transformation of legal culture. The Council of Europe has played the most important role in this process as far as human rights are concerned. Following the creation of the Council as a forum for European cooperation in 1950, it enacted the European Convention for the Protection of Human Rights and Fundamental Freedoms (in force as of 8 September 1953). Despite the fact that member states retain responsibility for the application of the Convention, this act was initially conceived as a set of legal obligations ultimately implemented by effective supranational bodies. Supervision was originally exerted by the two-instance procedure before the Commission and the Court. On 1 November 1998, this scheme was replaced by the standard one-level proceedings of the Court of Human Rights.

The European Convention is commonly recognized as the most substantial source of human rights guarantees in Europe. Article 10 concerning freedom of expression encompasses all types of expression including artistic and commercial, as well as all forms of speech (including symbolic) and writing. It protects both authors and those who provide the means by which their information is expressed.

The right guaranteed under article 10 is not absolute, so that member states are entitled to introduce some limitations on freedom of expression to protect a number of legitimate concerns. Any state intervention must fulfill three requirements to be accepted (the so-called ‘triple test’). Namely any limitations to freedom of expression must:

- (a) be prescribed by law, i.e. they must not occur unexpectedly without having any legal foundation;
- (b) serve the legitimate aims expressly enumerated in the Convention (protection of national security, territorial integrity, public safety, public health or morals, reputation or rights of others, prevention of disorder or crime, prevention of the disclosure of information received in confidence, maintaining the authority and impartiality of the judiciary);
- (c) be necessary and proportionate to the aim pursued.

It has been strongly emphasized in Convention case law that the Convention does not allow for a choice between two conflicting principles (as enumerated in (b) above, for example), and that freedom of expression is the prioritized principle. Therefore any restriction on this freedom must be narrowly interpreted and the necessity for it must be convincingly established. The Convention leaves member states a certain margin of appreciation, depending upon the legitimate aims pursued. As a rule, this margin is wider in matters of morality, since it is assumed that a common European conception of morality is lacking. In other areas, such as political speech or interventions aimed to protect the interests of the judiciary, for example, a relevant and precise European conception is assumed to have already been obtained.

Applying the triple test and general requirements mentioned above, the Convention organs have formulated a range of specific principles and rules which all member states must incorporate into their legislation and practice, including some of special importance for the media. First of all, it has been stressed that while freedom of expression is among those rights that must be highly safeguarded in any democratic society, freedom of the media merits particular protection. Without it, the media cannot play the role of public watchdog, exposing facts and commenting on events to reveal abuses of power. Public persons, especially politicians, must accept much more criticism than private individuals, and the protection afforded to the press may, in certain circumstances, go so far as to encompass words that are normally perceived as sharp or even offensive. Domestic courts must make a distinction between opinions and value judgments and, accordingly, judges may not require the holder of an opinion to prove that

his or her opinion is true. Although the Convention organs have not explicitly recognized the journalist's right to make an error, they have nevertheless emphasized that the principal criteria for the assessment of journalists' work are those of good faith, diligence and professional ethics. What ultimately counts, particularly in matters of public interest, is not whether the journalist has written the truth, but whether he or she has honestly striven to discover the truth. The requirement of writing only the truth would amount to posing unbearable restrictions on the press. Judges have decided that although the Convention does not forbid prior restraints on publications, any case involving restraints on the media calls for especially close scrutiny. The Convention case law has also recently recognized that journalists are entitled to keep the identities of their sources secret.³

Over the past three decades, jurisprudence in Strasbourg has brought about a significant constitutionalization and internationalization of domestic law and practice in countries with established democracies (see e.g. Gearty 1997). Nevertheless, while this process was taking place in the West, Central and Eastern European countries were either under authoritarian rule or only beginning the process of shifting towards a democratic form of government. To return to Europe, the newly (re)born democracies joined the Council of Europe and ratified its legislation, especially the European Convention. This formal accession does not mean, however, that these countries awoke the next day in a completely different environment and successfully followed the requirements of membership. In fact, most domestic law remains amended versions of legislation dating back to the communist period.

Other deficiencies result from the administration of law by bodies accustomed to extremely narrow legal approaches, with judges' conclusions based on particular legal provisions without sufficient (if any) attention to general principles, constitutional rules and international instruments. In other words, an inevitable remnant of the communist past is a legal climate with scant reliance on standards, reconstructed on the basis of systemic interpretation of hierarchically different legal sources. Under communism, constitutional provisions were stripped of any direct effect and did not provide any remedies in cases when human rights were either violated or denied altogether. Furthermore, international law was not considered a source of law unless transformed into a domestic statute. Ratified treaties were binding on communist states only externally and could not serve as a basis for an internal court decision.⁴

3. Overviews of the case law on article 10 are part of books presenting the legal system of the Convention. Among them the following deserve special mention: Frowein & Peukert (1995), Janis et al. (2000); MacDonald et al. (1993); Van Dijk & Van Hoof (1998); and Pettiti et al. (1999). See also Voorhoof (1995 & 1998). An updated summary has been prepared by the Council of Europe (2000).

4. On this position and the change that followed the collapse of communism, see for example Schweisfurth & Alleweldt (1997) and Stein (1993).

Although ordinary legislation has been changed, sometimes profoundly, in all East Central European countries following the collapse of totalitarian regimes, many old patterns have survived. Even the best laws do not answer every question, and amending old statutes or replacing them altogether with new ones does not necessarily produce good laws. No statute can successfully strike a fair balance in abstract terms between freedom of expression and other protected values such as privacy, human dignity, interests of the judiciary, or state security, for example. Only a meticulous analysis by judges of all interests and values involved in a particular case can help solve these ‘hard issues’. Once legal practice is directed by constitutional and international standards, judges and other state officers are provided a chance to find solutions to new problems that are not contemplated in domestic legislation. Making room for standards and giving them practical effect after means a significant modification of judicial practice and even legal culture.

New democracies in East Central Europe have enacted both constitutional guarantees for human rights – among them freedom of expression and the media – and have ratified the European Convention (see e.g. Osiatyński 1994; Ludwikowski 1995; Schokkenbroek & Ziemele 2000; Mahoney et al. 2000). Accordingly, these countries have all of the normative sources of standards at hand, and the processes of constitutionalization and internationalization are actually taking place. The transformation began when constitutional control of legislation was established and political restrictions on judiciary set by the previous regime were removed. Since then the new approach based on standards has been spearheaded by some of the highest judicial institutions such as constitutional tribunals and supreme courts and has found some channels ‘downwards’ to ordinary courts and administrative bodies. A series of important changes has also occurred in the treatment of international law, resulting in the introduction of legal provisions into several constitutions allowing for the direct application of international instruments. Even before such constitutional reforms, encouragement from the highest judicial institutions allowed international law to play a greater role in the interpretation of domestic provisions. However promising the prospects are for the future, such reforms are still far from satisfactory.

The weakness of a legal approach focusing on standards in East Central Europe is a matter of practice. It is not surprising that judges who were educated for several generations to confine themselves to statutes and concentrate on their narrowly interpreted provisions now abstain from using more ‘courageous’ techniques. Although nothing formally prevents them from indulging in constitutional and international arguments, they consider such matters to be reserved for judges adjudicating on hierarchically higher courts (supreme courts, supreme

administrative courts, constitutional tribunals). This attitude is often strengthened by higher courts themselves, which treat ordinary judges' problems utilizing constitution and international law leniently, while at the same time qualifying as inexcusable any mistake committed in the application of ordinary legislation. However, judicial culture is not solely responsible for the deficiencies in the application of laws. The principal cause of the problem is often the fact that ordinary judges are not well versed in constitutional and international law and do not have enough data available about the content of these two branches of law. As a result, they prefer to leave all 'difficult' issues to 'more skilled' higher judges.

2.2. Policy proposals

The objectives of the policy recommendations presented below are to:

- identify actions that would enhance awareness, first of all among legal professions but also among the general public, of the role of constitutional standards relating to freedom of expression and freedom of the media;
- suggest how changes in the perception of constitutional and international law, especially among lawyers, could be promoted;
- identify activities that will effectively spread knowledge, the content of standards and how they are applied by international institutions and in consolidated democracies;
- propose ways to ensure that the implementation process of standards in East Central Europe is stimulated, encouraged and monitored;
- suggest how to create channels and forums for exchanging data, experience and expertise between the countries of the region (given that they shared similar fates under communism, it is assumed that they currently face similar problems; moreover, the experience of dealing with standards in one country may be more stimulating and convincing for the others than examples taken exclusively from Western countries);
- advise on ways to create an efficient structure ready to react quickly when domestic practices contradict international standards, and how to bring such cases to the attention of public opinion, both internally and internationally.

The proposed policies are strongly focused on legal practice. An alternative strategy would be to change legal practice when judges prefer to concentrate on domestic legislation provisions by reforming legislation so that it encompasses rules based on standards. However such an approach may only

resolve existing shortcomings and problems temporarily. Legal amendments based on standards should be made sparingly, as the attractive character of standards resides in their openness to interpretation. The strategy of change via legal amendments does not take into account the fact that standards are ‘realms unto themselves’ which cannot be successfully and exhaustively translated into a limited number of precise rules. Standards are by definition vague and open, balancing disparate competing values and interests. Furthermore, it must not be forgotten that standards are dynamic and change with time. Any detailed and far-reaching positivization of standards is likely to undermine this dynamic.

Generally, however, legal change consists of altering legislation and modifying legal practice simultaneously. Legislative measures are especially suitable instruments when there are differences in legal practice or progress is considered too slow, and new legislative instruments encompassing standards may discharge the judiciary of the task of attempting to read ordinary legislation according to constitutional and international law. While judges await improvements from the legislator, however, they often refuse to take responsibility for making bad decisions. This situation can lead to humiliating defeats before international bodies, first and foremost the European Court of Human Rights in Strasbourg.

Therefore, it is far preferable to strive for a major shift away from the approach focused on ordinary legislation toward the new legal practice approach based on standards, constitutional guarantees, and international obligations. The following measures would contribute to this effort:

- imbuing legal acts with flexible content more adequate to individual circumstances;
- reforming legal practice without waiting for modifications of ordinary legislation;
- protecting the fast-changing dynamics of constitutional and international provisions which are ‘living instruments’ subject to evolution and development;
- adjusting legal practice according to practices shared in states with long-held democratic traditions;
- facilitating compliance with the obligations of membership in international institutions;
- contributing to the emergence and proper functioning of civil society institutions; and
- providing assistance to individuals and other social actors whose rights have been violated.

The following pages summarize detailed actions towards carrying out the above-mentioned objectives in East Central Europe.

2.2.1. Teaching young lawyers how to apply constitutional and international law

Although constitutional law is among the core subjects obligatory to all legal students and is usually scheduled as early as the first year of studies, its content as taught in East Central Europe should change profoundly. Currently it does not reflect the history of this branch of law's evolution in consolidated Western democracies. Traditionally, the course focuses on the institutions of a particular national system and the relations between these institutions. It tends to ignore human rights and freedoms that are an indispensable part of what constitutes a contemporary democratic state's foundation. The reorientation of the standard constitutional law course should fulfill two substantial aims. First, it should educate future lawyers at the beginning of their studies about the importance of constitutional matters. Second, it should challenge the often prudent view that constitutional arguments are exclusively reserved for higher courts or constitutional tribunals.

The issue of applying international standards raises questions about the role of international law in domestic legal affairs. As emphasized by the integration processes currently underway in Europe, countries on the continent must not limit the term 'law' to what their own legislation stipulates. All bodies empowered to practice law must know how to use international law directly and in the first instance of the judicial process. In addition to the reform of university law education, mid-career practical training should specifically target the judiciary and other groups of practicing lawyers. The process of dispelling the bad habit of referring international law-related cases exclusively to supreme courts and constitutional tribunals throughout legal structures in East Central Europe will take time and patience. To better disseminate relevant knowledge and encourage the judiciary to indulge in the application of international rules, special importance should be placed on East-East experience to demonstrate how other countries in the region have already begun taking international law seriously (learning via 'leading examples').

2.2.2. Providing translations of information on international law and its application

To make the widespread use of international law possible, the judiciary must first become familiar with both international legislation and more detailed rules,

principles and standards. While the ratified acts have been translated into local languages and have been published in official journals, other information sources are usually available only in the original foreign languages. This is also the case with the European Convention. Although local audiences know its general text (at times with mistakes as in the Polish official translation), they are often not familiar with the case law of the Convention institutions, despite the fact that it is the case law that elucidates what the Convention actually is and what requirements it imposes upon member states. Without a firm grasp of the Strasbourg jurisprudence, judges cannot use it when deciding on domestic cases related to Convention rights. It is not surprising, therefore, that they prefer to wait for higher courts to settle 'Convention issues'.

The relatively simple task of translating the main case law of the European Court of Human Rights or preparing its comprehensive description in local languages could eliminate this glaring lack of judicial material. Although some initiatives aimed to resolve this problem have been financed by the Council of Europe, in many cases these efforts consisted of translating particular judgments only when their content was relevant to specific legal proceedings pending in a given country. Such 'targeted' activity cannot fill the gap. As knowledge of foreign languages in the region is still far from satisfactory, translations are essential to enable access to important legal materials not only to lawyers but also to the general public. Moreover, by knowing what specific guarantees are offered by the Convention and what obligations are binding on the state, citizens can more effectively organize civic initiatives and actions to ensure that state practice complies with international commitments.

2.2.3. Utilizing the experience and achievements of other countries in the region

As discussed, recent legal developments are sparking a process of denationalization in European law and legal science. As a result, comparative law and expertise on solutions existing in foreign legal systems are no longer deemed a matter of academic interest but rather a source of information for providing practical suggestions on how to cope with particular internal legal problems (see e.g. Koopmans 1996; Markesinis 1993 & 1994; Kamiński 2000a).

Comparative inquiry usually takes place in two contexts. First, when new legislation is being prepared, bodies entrusted with this task often investigate past achievements and how the issue has been regulated in other countries. Here the comparative interest is usually limited to a narrow circle of specialists in legislative techniques and other experts. More important is the second case of com-

parative inquiry, when courts must solve a difficult case in a system which has not elaborated appropriate rules in either its legislation or judicial decisions. Having a comparative dossier at hand or reviewing possibilities available abroad helps in the search for optimal solutions. Translations or presentations of the most important verdicts from the most developed and representative systems would be greatly beneficial to practitioners in Central and Eastern Europe, as comparative data is scarcely available to judges in the region.

The need for comparative legal material is especially strong in young democracies (Kamiński 2000b). To live up to expected standards, appropriate jurisprudence must follow legislative change. However, the inherent feature of many standards resides in the fact that although they originate from written provisions they may not be subject to legislative techniques. For example, case law from democratic countries strongly emphasizes that respect for freedom of expression depends upon politicians and public figures accepting much more scrutiny by the media than private individuals. This standard is particularly important for numerous cases pending in East Central Europe, such as *The Ministers of the Meciar Government v. Daily "Sme"* in Slovakia. Another important principle typically invoked by judges is that of 'reasonable publication'⁵ – a concept to be applied in the pending Polish case of *President Kwaśniewski v. Daily "Życie"*, considered the most important recent media case with numerous consequences for the future of media freedom in Poland. Although the landmark United States Supreme Court case *Sullivan v. New York Times* was discussed during legal proceedings, the American case is not available in Polish and was publicized among practicing lawyers only thanks to information provided by academics. The American case involves a range of standards: namely it imposes an extremely demanding burden of proof on any plaintiff who is a public figure, requiring him or her to show that the defendant acted with actual malice. The availability of representative case law and other legal sources in Polish and the encouragement of the judges to make use of these sources would inevitably facilitate their work and improve their final decisions.

A comparative dossier also helps to identify common strategies in a group of countries and demonstrates an 'average approach' to a given issue. Legal provisions and decisions from different systems may prove, for example, that many states respect the principle of the protection of journalists' sources despite attempts to clarify the scope of this privilege. Even if this principle is overtly sup-

5. Numerous jurisdictions recognize that even when a statement of fact on a matter of public concern has been shown to be false after the publication was disseminated, the defendant should be protected by a defence of reasonable publication. This defence is established if it is reasonable in the circumstances for a person in the position of the defendant to have disseminated the publication.

ported in legislation, legal bodies are provided significant leeway in the balance of conflicting interests, and information in foreign case law on how others have arrived at such a balance is often extremely useful.

2.2.4. Establishing a group of regional experts to monitor ongoing developments

Problems relating to freedom of expression and the application of international law and constitutional arguments in the countries of East Central Europe are often strikingly similar. Establishing a group of regional legal experts who are practicing lawyers and academic scholars specializing in media law issues is therefore advisable. Such an initiative would facilitate the exchange of data throughout the region, provide expertise, and establish a body able to react immediately to problems in the region involving freedom of expression and media law. Expertise on relevant legislative issues would be especially important when legal action is initiated against individuals and the media, with teams working together not only to help solve cases, but also to bring such cases to the attention of the public. In conjunction with similar initiatives in Western Europe, the regional group of experts could coordinate a range of activities including the development of specialized courses for lawyers and journalists intended to improve their knowledge about freedom of expression and media law issues.

The existence of similar expert groups in Western Europe, bolstered by well-known initiatives like Article 19, Interrights, and the International Federation of Journalists, contributes significantly to the cross-national exchange of information on legal development and practice, and the organization of support for freedom of expression and media rights. The kind of strong commitment to the objectives of these groups based on acceptance of Council of Europe requirements and the role of human rights as basic principles of the European Union has yet to be developed in Central and Eastern Europe.

2.2.5. Establishing a data collection center

The existence of a regional data center that collects relevant legislation and monitors actions initiated against individuals and the media would greatly facilitate the provision of legal expertise and advice. Although several national human rights-oriented, non-governmental organizations are attempting to create such a dossier (the Polish Freedom of the Press Monitoring Center, for example), the materials collected do not enter a supra-national database. Such a center could prove invaluable to European structures as well, particularly those specializing in freedom of expression and media issues. Interest in receiving relevant data and expertise on a

regular basis as well as the results of regional research has been expressed by international organizations including the Media Division of the Council of Europe. The Council of Europe recently decided to create a group responsible for human rights monitoring in the region after identifying weaknesses in this area.

2.2.6. Developing university curricula

As argued above, data collected on legislation and how courts in the region are making use of the European Convention and other standards should be introduced into existing courses on human rights, media law, and European law, while new courses must be developed dealing specifically with these issues in the region. At the university level, such courses should strive to convince future professionals about the practical use of European and constitutional instruments.

3. Non-constitutional legal standards

3.1. Background

The following section of this chapter addresses the question of what should be done in East Central Europe to promote new legal practices that comply with the non-constitutional standards of traditional democracies. The primary focus is on the audiovisual sector and especially public service broadcasters, since many people still rely on this form of media as their primary source of information. The sources of relevant standards applying to audiovisual media are sometimes international legislation, but more often they are the result of shared common practices rooted in democratic states. Although standards based on international legislation may seem to be more ‘binding’ than those based on practice, in reality the opposite is usually true. Non-constitutional standards from international law tend to be sporadic recommendations that are weaker than constitutional standards, and the resulting gap must be filled by standards created at the domestic level.

Despite more than a decade of democracy-building in East Central Europe since the collapse of authoritarian regimes in 1989 and 1990, in certain aspects the media situation significantly deteriorated in the region toward the end of the 1990s compared with the initial period of reforms. The basic assumption is that the failures are not the result of weak legal frameworks, but rather weak practice at a time when the young democracies are immature. In such circumstances, it seems reasonable to suggest that legal amendments may facilitate or even compel the emergence of practices that comply with standards.

After the fall of communism, the democratization process required the privatization of the broadcasting sector and the reform of the role of public service media from a mere propaganda tool of the authoritarian state into an instrument serving civil society and, originally, facilitating its emergence and development. The new democracies decided to rely on various Western schemes and models to reform their public service media, with the task of regulating the broadcast media given to national councils or boards, i.e. newly created bodies whose legal status was usually regulated by constitutions. To ensure the proper functioning of these institutions, the reformers enacted two categories of laws regarding the composition of the media regulatory bodies. The first group of laws requires that the members of national media councils be neutral specialists in electronic media and be free from direct political involvement (i.e. in Poland). The second group aims to guarantee a balanced representation of various political parties and views by assigning equal participation in media councils to government and opposition parties (i.e. in Hungary).

The first years of reform seem to have produced the results intended by the drafters of the laws. The media regulating bodies awarded numerous licenses to private broadcasters, resulting in the emergence of a decentralized audiovisual market. The national councils played an active and important role in the profound reform of public broadcasters, transforming them into institutions that are part of the democratic structures of the new state. Although some political institutions occasionally attempted to exert pressure on the media regulating bodies, the regulators generally functioned independently according to the legal safeguards protecting them from such pressure. It is therefore not surprising that national media councils were ranked in many public opinion surveys among the most trusted public institutions.

Over the past few years, however, after the turbulent infant age of the democratization process, the situation surprisingly began to deteriorate. Political interests and ambitions repeatedly attempted to reclaim the public service media as their playground. In Hungary, a loophole in the broadcasting law was used until the 2002 elections to block the nomination of the political opposition's representatives. In Prague, journalists working in public television protested in December 2000 and January 2001 against a new managing director whose nomination was the result of a political deal between the ruling social-democrat party and the 'supporting' conservative opposition of Vaclav Klaus. In Poland, nominations to the public service media boards at both the national and local levels turned into a highly politicized process based entirely and exclusively on political arithmetic. The majority of the National Council, which was formed before the last parliamentary elections by the then opposition and is still in government opposition and is composed of three parties – the post-communists turned social-democrats (Alliance of Democratic Left), the liberals (Freedom Union), and the peasant

party (Polish Peasant Party) – appointed only those nominees who were closely associated with their structures, leaving no representation for the Council’s minority represented by the ruling party. Eight media board places were divided 4:2:2 with the remaining ninth place reserved by law for a representative of the Ministry of Treasury – the official owner of public service media. New elections favoring the social-democrats inevitably changed the media managing board majority but did not provide balanced representation as intended by law. ⁶

3.2. Policy proposals

The policy proposals outlined below are intended to:

- suggest legal measures to promote the use of standards;
- propose ways to build public support for such reforms;
- recommend ways to effectively disseminate knowledge about relevant standards in consolidated democracies and enhance this awareness.

The policies recommended here are separate from those focusing on constitutional standards and legislation, as recent developments demand changes to the original legal schemes of East Central European countries. A good grasp of political realities in the region is necessary to tackle this issue properly. At present, the evolution of the political scene has led to a situation where opposing political camps are often extremely hostile and are likely to favor the elimination or marginalization of the opponent as the most convenient solution. This negative approach to politics is rooted in the fact that the political left has often descended from post-communist parties while the rest of the political spectrum (especially the right) emerged from an anti-communist tradition. In the beginning of the 1990s, when the post-communists remained weak and rejected, and the main political parties emerged from the anti-communist opposition, political antipathies were moderated by belonging to the same vivid tradition of struggles against the communist regime and the commonly shared project of building a new democratic state.

To some extent, the politicization of the broadcasting councils nomination process seems inevitable. Existing as constitutional institutions, national councils

6. This paper was written before the September elections. As the social-democrats had ultimately fallen short of gaining the absolute majority of seats in the newly elected Parliament, they had to form a government coalition with the Peasant Party. At present the two ruling parties have seven representatives on each board. The remaining two places belong to Freedom Union which did not reach the five percent threshold and is absent from Parliament. The parliamentary opposition does not have any representative on the boards.

will always be nominated by politicians and political bodies, even in established democracies. Much is already done to detach the nomination process from current election results (by providing terms in councils that are longer than the parliamentary cycles and allowing councils to elapse gradually, for example). Furthermore, council members are appointed by constitutional institutions such as parliaments, legislative bodies (two parliamentary chambers), and executive organs (the president or the government).⁷ Nevertheless, significant differences exist between Western consolidated democracies and the new democratic countries in East Central Europe – the former have elaborated numerous rules and practices determining precisely how the nomination process functions. Taking a longer term perspective in the public interest, the main political actors in most consolidated democracies agreed to share responsibility for the regulatory activities and thereby stabilize the decision-making process (Hoffmann-Riem 1996). The new democracies must contend not only with outright hostility between the post-communist left and the anti-communist right, but also with the reality that politicians often continue to perceive the media, and especially the audiovisual and public service media, as a tool for influencing and molding the public. Such attitudes are bolstered by the fact that public broadcasters are continuously considered by many viewers and listeners (voters) as a primary source of information and opinions.

The alternative to making legal amendments is remaining passive under the assumption that democratization and the development of the broadcasting sector (especially the emergence of commercial competitors) must, by their very nature and logic, lead to the professionalization and depoliticization of both the regulatory bodies and the public service broadcasters. Such an alternative should not be hastily dismissed. In the interests of state stability and legal order, it is sometimes better for legislative bodies to restrain themselves from making *ad hoc* amendments. In principle this argument applies, however, to states with a longer tradition of democratic institutions. In young democracies, proper mechanisms are still being created and developed, and this process justifies immediate modifications to the original post-communist schemes when they do not function properly.

Actions and activities recommended in this spirit are summarized below.

3.2.1. New schemes compelling opponents to cooperate on the constitutional level

Any proposal for change in new democracies must first take into consideration the current state of politicization. The lack of a genuine and sufficiently

7. For an overview of the existing models see Hoffmann-Riem (1996) and Barendt (1995).

entrenched political culture of cooperation requires the introduction of new mechanisms that first enforce balanced representation and then compel political parties to cooperate. Such a mechanism seems to be offered by ‘fifty-fifty’ representation schemes which give an equal number of votes in regulatory bodies to the government and the opposition. In order to function effectively, however, such schemes must ensure that the nomination process is not blocked by formalities. This would require significant changes in the unstable and reshuffling political scenes of new democracies.

Any legal system lacking a scheme enforcing ‘fifty-fifty’ representation in national broadcasting councils would require a constitutional amendment to introduce such a scheme – a complicated process requiring extremely broad support. With the current level of tension between the main political adversaries, agreement on such radical change is unlikely. Parties benefiting from the existing system prefer to defend the *status quo* and obstruct any modification. Only a dramatic crisis combined with pressure by international institutions may compel politicians to accept such reforms. To be successful, therefore, balanced representation models should be proposed during specific periods when a new constitution is being prepared or a package of significant constitutional amendments is considered.

3.2.2. *Reforming ordinary legislation*

Bearing in mind the formal procedural difficulty of constitutional amendments, more attainable approaches should focus on introducing amendments to ordinary legislation. Although parliaments agree to undertake a general review of a given act only occasionally, even ‘pointlistic’ amendments that enact small improvements are worthwhile for the precedent they set.

In general, legislative amendments should place limitations on the politicization process. Although national councils (and in some countries political institutions) will retain their power to nominate public service media supervisory and management boards, the right to propose candidates may be shifted to institutions more closely ‘associated’ with the national broadcaster’s public service mission. Such institutions may include associations of groups of artists (writers, film directors, etc.) and relevant associations that tend to be detached from direct involvement in political life while enjoying high public esteem.

Several mechanisms proven in other contexts could serve to loosen the relationship between the nominating political bodies and the nominees, such as establishing a qualified majority requirement (two-thirds or even three-fourths) for any nomination. This would effectively eliminate political candidates with minimal professional knowledge of the broadcasting sector. The same require-

ment may be introduced for nominations to supervisory and management boards made by national councils (or other bodies). Such a solution works well in many countries and is even practiced in several new democracies when electing members of constitutional courts.

Another possible policy aimed at depoliticization would be an amendment introducing single-person management of public media, which would likely lead to the nomination of someone who is acceptable to a broader spectrum of views provided that the nominating body is not dominated by one political party. The choice of a neutral candidate might be further assured by requiring a qualified (for example, two-thirds) majority in the selection.

3.2.3. Stimulating public support for changes

Although in legal terms the success of any amendment will ultimately depend upon legislative bodies, this does not mean that the public should passively wait until politicians seek changes. A range of associations, non-governmental organizations and experts' initiatives are able to diagnose the current situation, alert the public about its defects, and recommend available solutions. Unfortunately, even when a major event or crisis creates a good public climate for change, groups in East Central Europe are often not sufficiently prepared to propose suggestions for new legislation or amendments. Often they miss their golden opportunity while taking time to collect relevant materials and present their own proposals. Nevertheless, such efforts are invaluable, as coalitions created by civic initiatives that raise awareness about outdated or misinformed legal practices can succeed in reversing the attitudes of lawmakers even in seemingly inopportune moments. The possibility of bringing a citizens' legislative draft to parliament via a popular legislative initiative is always there, and such movements always contribute to building an active civil society even if they are unsuccessful in the short term.

3.2.4. Building expert and teaching bodies specializing in standards and solutions

In some East Central European countries, expert bodies advising on audiovisual media issues are either completely absent or made up of experts for whom media law is outside their main set of interests. In the case of constitutional media standards this gap is more or less successfully filled, but broadcasting media topics are still considered to be technical and therefore escape the attention they deserve. Only recently, after experiencing particular problems, did some non-governmental organizations focusing on the protection of media freedoms begin to address neglected broadcast media matters.

This lack of knowledge may be eliminated via the following activities:

- (a) establishing data centers (or introducing special programs to existing initiatives) that collect information on established public service media models, solutions and practices;
- (b) providing translations of the most representative and important materials enabling broader public dissemination;
- (c) introducing university courses on broadcasting standards and, more broadly, non-constitutional standards (especially for lawyers and journalists) or targeting existing courses on freedom of the media/freedom of speech to lawyers and journalists.

Conclusion

The policy proposals outlined above strive to improve the shortcomings and barriers related to media law that have become evident over the past decade of democratization in East Central Europe. They are based on the assumption that succeeding in building efficient institutions and practices is a long-term process that needs to be accompanied by profound changes in the political and legal culture of the region. Efforts to encourage this change should begin with the university education of future generations of lawyers, journalists, public officials and other relevant professionals. Practitioners should not only be well-prepared professionally. They should also perceive themselves to be an active part of civil society institutions existing within the broader context of European integration and the modern development of democratic countries. Whether and how contemporary states live up to standards should be a yardstick by which states are evaluated. Law is no longer limited to a particular set of rules existing as domestic acts and regulations. It now extends to the value-oriented norms of both national and international regimes striving to achieve a democratic ideal.

The actions and initiatives recommended presuppose that an active civil society is oriented towards evolving standards. Therefore citizens must know what these standards mean, how they are implemented in other democracies, and what changes they have initiated. Citizens must also participate in the democratic process rather than wait passively for state institutions to act on their behalf, usually under international pressure, according to human rights standards. The shape of the democratic state depends on how active its people are and how much they are willing to invest in the democratic ideal.

One of the striking features shared by many citizens of new democracies in both Central and Eastern Europe is their passivity. Eastern Europeans are only now learning how to build a genuine civil society and actively struggle for their rights and freedoms. Until citizens begin to drive the process of change, legal reform will remain the domain of ‘distant’ and ‘paternalistic’ state institutions.

References

- Alexy, Robert (1985) *Theorie der Grundrechte*. Baden-Baden: Nomos Verlag.
- Barendt, Eric (1985) *Freedom of Speech*. Oxford: Oxford University Press.
- Barendt, Eric (1991) “The influence of the German and Italian constitutional courts on their national broadcasting systems”, *Public Law* 1991.
- Barendt, Eric (1995) *Broadcasting Law*. Oxford: Oxford University Press.
- Barendt, Eric (1998) The First Amendment and the Media. In Loveland, I. (ed.) *Importing the First Amendment*. Oxford: Hart Publishing.
- Council of Europe (2000) *Case-law concerning article 10 of the European Convention on Human Rights*. Strasbourg: Council of Europe.
- Frowein, Jochen & Peukert, Wolfgang (1995) *Europäische Menschenrechtskonvention*. Kehl: N.P. Engel Verlag.
- Gearty, Conor, ed. (1997) *European Civil Liberties and the European Convention on Human Rights. A Comparative Study*. Dordrecht: Martinus Nijhoff Publishers.
- Henkin, Louis & Neuman, Gerard L. & Orentlicher, Diane F. & Leebron, David W. (1999) *Human Rights*. New York: Foundation Press.
- Hoffmann-Riem, Wolfgang (1996) *Regulating Media. The Licensing and Supervision of Broadcasting in Six Countries*. New York: Guilford Press.
- Jackson, Vicki C. & Tushnet, Mark V. (1999) *Comparative Constitutional Law*. New York: Foundation Press.
- Janis, Mark & Kay, Richard & Bradley, Anthony (2000) *European Human Rights*. Oxford: Oxford University Press.
- Kamiński, Ireneusz C. (2000a) Comparative law and comparative lawyer at the turn of centuries. In Pałeczki, K. & Peczenik, A. (eds) *Legal Research in Dynamic Society. A Polish-Swedish Research Project*. Cracow: Ratio.
- Kamiński, Ireneusz C. (2000b) The power of aspiration. The impact of European law on a non-EU country. In: Van Hoecke, M. & Ost, F. (eds) *The Harmonisation of European Private Law*. Oxford: Hart Publishing.
- Koopmans, Theo (1996) “Comparative law and the courts”, *International and Comparative Law Quarterly*, vol. 45.

- Ludwikowski, Rett R. (1995) "Fundamental constitutional rights in the new constitutions of Eastern and Central Europe", *Cardozo Journal of International and Comparative Law*, vol. 3.
- MacDonald, R. St. J. & Matscher, Franz & Petzold Herbert (1993) *The European System for the Protection of Human Rights*. Dordrecht: Martinus Nijhoff Publishers.
- Mahoney, Paul & Matscher, Franz & Petzold, Herbert & Wildhaber, Luzius, eds. (2000) *Protecting Human Rights: the European Perspective. Studies in Memory of Rolv Ryssdal*. Köln: Carl Heymanns Verlag.
- Markesinis, Basil (1993) Learning from Europe and learning in Europe. In: Markesinis, B. (ed.) *The Gradual Convergence*. Oxford: Oxford University Press.
- Markesinis, Basil (1994) "Judge, jurist and the study of international law", *Law Quarterly Review*, vol. 109.
- Osiatyński, Wiktor (1994) "Rights in new constitutions of Eastern and Central Europe", *Columbia Human Rights Law Review*, vol. 26.
- Pettiti, Louis-Edmond & Decaux, Emmanuel & Imbert, Pierre-Henri (1999) *La Convention européenne de droits de l'homme. Commentaire article par article*. Paris: Economica.
- Powe, Lucas A. (1982) *American Broadcasting and the First Amendment*. Berkeley: University of California.
- Schokkenbroek, Jeroen & Ziemele, Ineta (2000) "The European Convention on Human Rights and the Central and Eastern European member states of the Council of Europe: an overview", *Nederlands Juristenblad*, no 39.
- Schweisfurth, T. & Alleweldt, R. (1997) "The position of international law in the domestic legal orders of Central and Eastern European countries", *German Yearbook of International Law*, vol. 40.
- Stein, E. (1993) "International law and internal law. Toward internationalisation of Central-European Constitutions", *American Journal of International Law*, vol. 88.
- Van Dijk, Pieter & Van Hoof, Fried (1998) *Theory and Practice of the European Convention on Human Rights*. The Hague: Kluwer Law International.
- Voorhoof, Dirk (1995) *Critical perspectives on the scope and interpretation of Article 10 of the European Convention on Human Rights*. Strasbourg: Council of Europe.
- Voorhoof, Dirk (1998) *Guaranteeing the freedom and the independence of the media*. In: *Media and Democracy*. Strasbourg: Council of Europe.
- Wachsmann, Patrick (2000) *Libertés publiques*. Paris: Dalloz.