ECtHR: *ATV Zrt v. Hungary*

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The European Court of Human Rights (ECtHR) has delivered an important judgment on a politically controversial issue: since 2010, the Hungarian authorities have imposed an obligation on broadcasters to distinguish rigidly between facts and opinions in news and political reporting. In its unanimous judgment in the case of *ATV Zrt v. Hungary,* the ECtHR found that a ban on referring to the political party Jobbik as 'far right' was a violation of a TV station's right to freedom of expression as guaranteed under Article 10 of the European Convention on Human Rights (ECHR).

ATV is an independent broadcaster providing television and online services. Every evening, it broadcasts televised news programmes, including a series of news items introduced by a newsreader in a studio and subsequently presented by a different news reporter. In November 2012, ATV broadcast a news item on preparations for a demonstration under the title 'Mass demonstration against Nazism.' The demonstration was a protest against the political party Jobbik, after one of its members, during a plenary session of parliament, stated that it was time to make "an assessment of how many persons of Jewish origin, especially members of parliament and the government, there are who pose a risk to national security." The newsreader introducing the news item about the upcoming demonstration announced that an unprecedented alliance was about to materialise "against the biased remarks of the parliamentary far right."

Following a complaint from the press officer of Jobbik, the National Media and Infocommunications Authority (NMHH) initiated proceedings against ATV. The NMHH found that ATV had infringed Section 12(3) and (4) of the 2010 Act on Media Services and Mass Communication (Media Act) and prohibited it from repeating the statement. The NMHH declared that the expression 'parliamentary far right' went beyond a factual statement and amounted to a value judgment. It emphasised that the communication of any opinion by a newsreader was prohibited by Section 12 of the Media Act in order to ensure that the public received unbiased news and political information. ATV appealed, arguing that the term 'far right' was widely used in relation to Jobbik, that it had a scientific basis in political and social science, and that it reflected Jobbik's position in parliament. After ATV's appeal was dismissed by the Media Council of the NMHH, the TV company sought judicial review, maintaining that the impugned statement was part of a news item describing a certain parliamentary group. A Budapest court

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annulled the injunction against ATV, finding that the reference to ‘far right’ corresponded to Jobbik’s nature as accepted by current social and political public understanding, and it referred the case back to the Media Council. This judgment was, however, overturned by the Supreme Court (*Kúria*), again confirming the injunction against ATV. According to the *Kúria*, the term ‘far right’ in the news programme was an opinion, not a statement of fact. This approach was confirmed by the Constitutional Court, clarifying that any opinion or evaluative explanation "added to the news provided in a programme must be made in a form that distinguishes it from the news itself, indicates its nature as such, and identifies its author." A short time later, ATV Zrt complained before the ECtHR that the Hungarian courts’ decision finding that it had infringed the Media Act, in particular its provision prohibiting the expression of opinions in news programmes, had violated its right to freedom of expression under Article 10 ECHR.

As it was not contested that the injunction in question amounted to an interference with ATV’s right to freedom of expression, and as the restriction was intended to ensure the audience’s right to a balanced and unbiased coverage of matters of public interest in news programmes, and thus pursued the aim of the "protection of the rights of others," the question remained as to whether the interference was prescribed by law and was necessary in a democratic society. Although the ECtHR, with reference to a report by the Venice Commission and to the lack of any domestic case law on the matter, reflected on the vague character of Section 12 of the Hungarian Media Act and the very broad notion of ‘opinion’, it decided that it was not necessary to address the question of whether this provision could, *in abstracto*, constitute a foreseeable legal basis for the interference complained of (on this matter, there is an interesting concurring opinion by judge Pinto de Albuquerque in annex to the judgment). According to the ECtHR, the salient issue in this case was not whether Section 12 of the Media Act is in principle, sufficiently foreseeable, in particular in its use of the term ‘opinion’, but whether, when publishing the statement containing the term ‘far right’, ATV knew or ought to have known – if need be, after taking appropriate legal advice – that said expression would represent an ‘opinion’ in the context of the case. The Court acknowledged that the very fact that this case was the first of its kind does not, as such, make the interpretation of the law unforeseeable, as "there must come a day when a given legal norm is applied for the first time." Hence, the ECtHR chooses to focus on the question of whether the interference corresponded to any "pressing social need." It referred to the importance of pluralism in the audiovisual media, while reiterating that "there is little scope under Article 10, section 2 for restrictions on debates on questions of public interest. The margin is also narrowed by the strong interest of a democratic society in the press exercising its vital role as a public watchdog: freedom of the press and other news media affords the public one of the best means of discovering and forming an opinion on the ideas and attitudes of political leaders. It is incumbent on the press to impart information and ideas on subjects of public interest and the public also has a right to receive them." In the Court’s view, it

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was for the domestic courts to interpret the term ‘opinion’ in a manner that took into account the aim of the restriction and guaranteed the audience’s right to a balanced and impartial coverage of matters of public interest, as well as the media’s right to impart information and ideas. The ECtHR clarified that Section 12 should not turn into a tool for the suppression of free speech, encompassing activities and ideas which are protected by Article 10. The application of Section 12 indeed had to stay within the contours of its legitimate aim, which was "to protect democratic public opinion from undue influence by media service providers and was in the interests of providing objective information". The Court noted the variety of approaches applied by the domestic courts in determining the nature of the notion ‘opinion' related to the adjective ‘far right' and it observed that the government did not demonstrated the existence of a common practice either. This state of affairs cast doubt on whether the interpretation given by the higher-level domestic courts in the present case – namely, that a statement containing the term ‘far right’ constituted an opinion – could reasonably have been expected. More importantly, there was no indication that the domestic courts sought to consider, when assessing the nature of the impugned notion, that Section 12 of the Media Act was supposed to promote balanced news reporting. The Court also referred to ATV’s argument that the labelling of Jobbik as a ‘far right’ party was sufficiently commonplace for the audience and was a generally accepted category in the media, scientific discourse and colloquial language in relation to Jobbik. Furthermore, the ECtHR found force in the argument that political parties were frequently defined with adjectives such as ‘green’ party or ‘conservative' party, which did not constitute an opinion or value judgment about them capable of creating bias in the audience. Moreover, the Court considered that the context and factual elements in this case were relevant for the contention that the term ‘far right’ did not concern an assessment of someone’s conduct in terms of its morality, or the speaker's personal feeling, but described the position of a party within the political spectrum in general, and in parliament in particular. The ECtHR also disagreed with the Constitutional Court finding irrelevant any defence by ATV based on the veracity and factual accuracy of the term employed. Having regard to the domestic courts’ divergent approaches to distinguishing facts from opinions, to the aim of the relevant provisions of the Media Act and to the circumstances of the present case, the ECtHR found that ATV could not have foreseen that the term ‘far right’ would qualify as an opinion. Nor could it have foreseen that the prohibition of its use in a news programme would be necessary in order to protect unbiased reporting. Therefore, the interference with ATV’s right to freedom of expression was disproportionate and not "necessary in a democratic society." There ha, accordingly, been a violation of Article 10 ECHR.

ECtHR, Fourth section, ATV Zrt v. Hungary, Application no. 61178/14, 28 April 2020

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