

## THE MEANING OF FREEDOM OF THE PRESS

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### Discussion of the Fundamental Questions

The first advocates of freedom of speech, because of the nature of the social order at the time when the need for freedom was first articulated, primarily preached the need for independence from the State. The struggle for freedom of the press and speech is a constant “concomitant phenomenon” of the drastic societal changes that can be viewed as prerequisites for today’s democratic order. The publicity created by the press, although, sometimes revolutionarily rapid and therefore short-lived, sometimes slower, therefore more lasting, is the engine of these changes. However, the need for free speech and press never crystallized into a thesis as objectives themselves: they were instruments necessary to reform society, realize a more just political system, and later, to involve the majority of the public in democratic decision-making.

However, in freedom of speech, individual liberty receives a great emphasis, too. Each person is entitled to the right to fulfill his individuality not only against the State but also against the community. Sometimes there is tension between the individualistic and community-based theories of freedom and, in practice, there is a need for striking a balance between individual rights and community interest.

After the two genocidal dictatorships of the 20<sup>th</sup> century and as a result of them, the process, during which original, society-level objectives are sidelined and replaced by the recognition of individual right above all, gained new momentum. According to certain views, the danger of the breach of these rights can only be expected by the State. However, other positions argue the necessity of the restriction of private sphere, which uses its “private censorship” more effectively than the State, because it overshadows freedom of speech, especially the societal function of the press resulting from the order of the objective of profit production overwriting everything. In the center of the debate between the two opposing views lies the question of whether freedom of speech is a “multidimensional” right, in other words, whether beyond its *negative* nature, according to which the State is obligated to respect the right and avoid interference with its practice, there is a *positive* nature, which obliges the State to perform certain proactive actions to further the opportunities for practicing the right? What is freedom of speech? What is its content?

According to the view of those advocating exclusively the negative nature, the role of the State ends after declaring the basic right and ensuring that it *itself* does not interfere with the practice or the right. Proponents of the negative nature believe that the State must retreat from the territory of this fundamental right, must recognize and respect it, but should not participate actively neither in facilitating and enabling the practice of the right, nor in assisting in the resolution of disputes arising among citizens during the practice of the right.

Obviously, the negative nature in itself is insufficient to define the content of the right. To a certain extent, the State does have an obligation to make the practice of the right possible. The State must facilitate, for example, organization of public demonstrations, guarantee their safety and security, and ensure that demonstrators do not interfere with each other’s events. The State has to organize the regulation of the press so during elections, political

organizations and candidates have access to the media, has to run and finance public media, and has to provide financial support to the arts and literature.

For the first time, Benjamin Constant differentiated between the liberty of “ancient” and “modern” times: the freedom of the Athenian citizen was only political in nature. He could freely participate in public affairs, could take part in decision-making, but his private sphere was strictly regulated. On the other hand, the modern, 19<sup>th</sup> century citizen jealously protects his privacy, which is also guaranteed by the State. However, his political freedom is only apparent.<sup>1</sup>

Differentiation between the “two principles” of freedom, which could be interpreted as the further development of Constant’s theory, appears for the first time in the treatise of the English philosopher Isaiah Berlin.<sup>2</sup> Berlin considers the space guaranteed for the individual without any outside intervention as negative liberty (freedom *from something or someone*) while views as positive liberty the right to make decisions, in other words, the individual’s self governance (freedom *to something*). Phrased in another way, negative freedom guarantees freedom in a formal, legal sense, while positive freedom provides actual possibility to act. Hence, it creates the effective “utilization” of formal equality. A balance must be achieved between the two freedoms. “They take advantage of the principle of negative freedom that they provide equal freedom to both the wolf and the sheep, and the State cannot intervene even if the wolf devours the sheep,”<sup>3</sup> while positive freedom can only be guaranteed to the detriment of the negative freedom of others, so it cannot overstep the right measures. To apply all this to freedom of speech, if we only guarantee the negative nature of the right, then, the majority of people will not have an opportunity to participate in public debate, therefore, the guarantee of certain positive rights, such as the balanced, objective information by the media, which in turn only can be achieved to the detriment of the negative freedom of news producers, because they have to provide news about events, which they would not otherwise publish. However, the fairness of this intervention can be justified. Partial sacrifice of positive freedom would take us back to Constant’s “ancient” liberty.

Joel Feinberg emphasizes the logical connection between negative and positive liberties. We cannot be free *to something* if first we are not free *from something*: negative liberty is a precondition of positive liberty. The presence of the two, however, is together necessary for considering someone free without any restrictions.<sup>4</sup>

## The Meaning of Freedom of Speech

After the general clarification of the concepts, we have to examine whether freedom of speech has a positive nature, and if so, how it appears in legal regulations and to what extent it prevails. The most important argument of the opponents of positive liberty is that recognizing its positive nature, freedom of speech is violated because state intervention is possible. The guarantee of positive rights necessarily results in the violation of others’ negative rights. If the State provides the opportunity for an injured party to correct in the press false statements about him, the State restricts the freedom of the editors of the that media product. We always

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<sup>1</sup> Constant, Benjamin: *A régiek és a modernek szabadsága*. Budapest: Atlantisz, 1997.

<sup>2</sup> Berlin, Isaiah: A szabadság két fogalma. In uő: *Négy esszé a szabadságról*. Budapest: Európa Kiadó, 1990. 334-443. o.

<sup>3</sup> Dénes Iván Zoltán: Beavatkozástól mentes cselekvés vagy uralomtól mentes emberi állapot? (A liberális és a republikánus szabadságfelfogás hasonlóságai és különbségei). *Jogelméleti Szemle*, 2004/2.

<sup>4</sup> Feinberg, Joel: *Társadalomfilozófia*. Budapest: Osiris, 1999. 26-28. o.

have to be cautious with state intervention, because even if the intention is right, it possibly causes more damages than provides benefits.<sup>5</sup> No doubt that the media has to act honestly, but it is not desirable, if the State forces honesty on the media, because if a state authority or court intervene with the practice of freedom, the danger of abuse or simply bad decision is always possible.

The positive nature of freedom of speech, in other words, providing opportunity to speak, is not necessarily the most important instrument for the expression of opinions. Although, the arguments that explain the need for acknowledging the positive rights stating that access to the press is restricted, and its operational cost is immeasurable are powerful but not sufficient arguments. Legally speaking, nobody is denied the right to establish a newspaper or television station, and restricted financial resources are not the same as restricted legal rights. Accordingly, the lack of positive rights does not mean the denial of freedom of speech, however, its acknowledgement would not guarantee its sufficient practice. The effective practice of freedom of speech requires access but also proper literacy, education, and financial situation, not to mention the role of personal features (suitable looks, proper speech, etc.). If we accepted that a *general*, positive right exist within the concept of freedom of speech, we could just as rightfully demand the improvement of at least the previously mentioned external conditions (for example, the education received).<sup>6</sup>

According to one of the main arguments for the acknowledgement of positive rights, democratic decision-making and public debate would suffer if the law would not provide opportunity for effectively practicing freedom of speech. This is important not from the speaker's but from the listeners', the audience's perspective, who should be familiar with all relevant information to attain real decision-making position.

If we primarily judge the value of the speech based on its role in the democracy, then the pressing argument for the restriction of the press become dominant. Namely, the press is the only truly effective instrument that can reveal the various viewpoints to the community. This characteristic justifies the regulation and the restriction of content, to a certain extent, of the press. However, this argument is not adequate for making acceptable the positive nature of freedom of press. As Alexander Meiklejohn stated, the important thing is not that everybody is allowed to speak but that everything worth shall be said.<sup>7</sup> The fulfillment of the democratic duties of the press, which is achieved through various institutions and instruments, provides with the opportunity of access not individuals but individual standpoints (and, of course, indirectly their representatives, too). Public service obligations, mandatory news broadcast, balance, impartiality, etc., provides through institutional means the possibility of public debate, and only in very limited occasions exists the right to access by concrete individuals, for example, when correcting a press statement or providing mandatory access regarding political broadcast during election campaigns.

According to the other main argument, providing the opportunity to speak is important because this is the only means to create equality among citizens. According to Kenneth Karst, the basic principle of the First Amendment of the US Constitution is equality, which to a certain extent is a barrier to others' freedom.<sup>8</sup> Participation in forming public opinion is

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<sup>5</sup> Schauer, Frederick: *Freedom of speech: a philosophical enquiry*. Cambridge: Cambridge University Press, 1982. 128. o.

<sup>6</sup> Uo., 126. o.

<sup>7</sup> Meiklejohn, Alexander: *Political freedom – the constitutional powers of the people*. New York, Oxford: Oxford University Press, 1965. 26. o.

<sup>8</sup> Karst, Kenneth L.: Equality as a central principle in the First Amendment. *University of Chicago Law Review*, 1975. 20. o.

everybody's equal and morally based right. It cannot be the privilege only of the wealthy. That is why at least some opportunity has to be provided for everybody to comment on a given debate and the speakers' positive right must be acknowledged. Simultaneously with this, others' obligation to provide instruments and opportunities to facilitate the effective practice of freedom of speech must be recognized, too. However, obviously, this should not mean that everybody can appear on television, but it does mean, for example, that everybody has the right for protesting in public or distributing flyers on the street, all this under state protection. Equal access cannot be guaranteed in the practice of freedom of speech, but the regulation of the press, the opportunity to utilize the instruments, besides the press, for the expression of opinion may provide a balance. Equality should be interpreted perhaps from the perspective of a given opinion not of the individuals.<sup>9</sup>

According to Michel Rosenfeld, the lack of positive freedom of speech imperils democracy, because it can be interpreted as „a concentration of power and support of monopolization.”<sup>10</sup> The average citizen, observing his and others' helplessness, easily acquiesces that public affairs are decided “over his head,” without inquiring about his opinion.

Those advocating exclusively for the negative nature of the right forget or make the wrong judgment about the danger of private restrictions of freedom of speech. Jerome Barron calls the “romantic interpretation” of freedom of speech the belief, which assumes that the free market of speech and the withdrawal of the State will create the necessary balance.<sup>11</sup> The fact that the speech will not be “audible” unless we invest huge amounts of money, the nearly exclusive monopoly of the press to influence public opinion has altered the picture previously formed about freedom of speech. Today, if we intend to correct the inequalities of the private sphere (the free market of speech), we must turn for help to the once “feared enemy” of free speech, the State.<sup>12</sup>

### **The Meaning of Freedom of the Press**

Freedom of speech, consequently, is not a *one-dimensional right*. It achieves its full potential, applying Isaiah Berlin's differentiation, through the *simultaneous prevalence* of its positive and negative natures. Freedom of speech, however, is not the same as freedom of the press. The liberty right bestowed on the press is not a right for the individual but for the *institution*, even though the direct beneficiary of freedom of the press is typically the “journalist.” We have good reasons to guarantee freedom of the press. On top of the list as the most important, is the interest in assuring the proper function of democratic societal order.

Usually, the content and meaning of freedom of the press is not discussed with proper weight in treatises and textbooks on the boundaries of freedom of speech neither in Hungary nor, for example, in the United States.<sup>13</sup> As if the arising problems would only be narrowed to the realm of *expressibility*, although there are many more questions to ask and answer concerning

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<sup>9</sup> Rosenfeld, Michael: Free speech, equality and minority access to the media in the United States. In Sajó András – Monroe E. Price (szerk.): *Rights of access to the media*. Boston: Kluwer Law International, 1996. 72-74. o.

<sup>10</sup> Rosenfeld, Michael: Az emberi jogok és az alkotmány az Egyesült Államokban. *Világosság*, 1990/8-9. 596. o.

<sup>11</sup> Barron, Jerome A.: Access to the press – A new First Amendment right. *Harvard Law Review*, 1967. 1642-43. o.

<sup>12</sup> Fiss, Owen M.: Free speech and social structure. *Iowa Law Review*, July 1986. 1405. o. és uő: *The irony of free speech*. Cambridge, Massachusetts: Harvard University Press, 1996.

<sup>13</sup> Ammori, Marvin: Another worthy tradition: how the free speech curriculum ignores electronic media and distorts free speech doctrine. *Missouri Law Review*, 2005. 59. o.

freedom of the press. The examination of the content of freedom of the press unavoidably poses structural-institutional questions as well as other dilemmas regarding, for example, restriction of free competition, protection of national culture, and the proper representation of public interest in general.

The positive-negative differentiation is a guiding principle within the concept of freedom of the press, too, and it can be interpreted with the same content as freedom of speech. The starting point is also freedom *from something* (negative), in other words, prohibition of intervention. However, in this case, we must pay attention to the *restriction* of the right *by the private sphere*, too. The freedom *to something* (positive), in turn, in case of freedom of the press generally does not provide rights to access that can be demanded by individuals. However, for the sake of broader access, the right may provide, to a certain extent, exceptions from the prohibition of intervention exactly for the sake of full assurance of the liberty right.

Every analysis can only interpret the right of freedom of the press in light of the rapid, day-by-day progress and transformation of the press. However, *globalization*, *convergence*, and *monopolization*, which are almost inextricably interlaced with each other, have not fully eliminated in the process of media development the room for state legislation and legal enforcement. Technological developments have a great ability to make us forget under their cover about the validation of the *regulatory principles* more or less *independent* from the characteristics of the transmitting medium, and their original rationale and meaning. It has to be stated again and again: in the regulation of the media, there are certain *constant principles* and *values* whose application and enforcement are of fundamental importance for the citizens of democratic and culturally unique states.

Simply stated, the sharp dividing line is between the proponents of *free market* and *State intervention*, but in both groups numerous variations of these ideas exist. A great majority of the proponents of free market trusts in the market not because they view the press as any other commodity for sale such as, for example, a nail polish, but because they are wary of any role the State might play in regulating the operation of the press. Possibly, they understand exactly the imperfections of the market and the adverse effects the logic of the market has on the press, but they are ready to pay even this price to keep the State away. Others believe, with blind faith in the market, but perhaps with a great amount of cynicism, that the market is omnipotent: with rules created by and for itself, the market ensures the best possible and most effective functioning, satisfying private and public interests simultaneously. Quoting Clinton Rossiter, this is nothing else but “the great train robbery of [American] intellectual history”<sup>14</sup>: today’s devote supporters of *laissez faire*, reinterpreting but tirelessly using the arguments of 19<sup>th</sup> century early liberalism, want to preserve in the security of unchanged guarantees against the State its defined fundamental values (liberty, individualism, opportunity, progress, etc.) in the interest of protecting the already much stronger private sphere and large international corporations overcoming state interests with effortless ease. The operation of the press, which demands simultaneously several basic human rights originally belonging in the realm of private autonomy (freedom of the press, right to property, freedom to conduct a business), becomes regulated to protect the original meaning of liberty. Prevention of media monopolies, positive and negative content regulations, and actions attempting to protect culture, although, they undoubtedly restricting the room of maneuvering for the press, in reality, they do not limit liberty: on the contrary, they serve to mend the concept of liberty possibly deformed by the private sphere. The positions, which do not enthusiastically welcome but accept out of necessity State intervention as the only possible solution, view the

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<sup>14</sup> Rossiter, Clinton: *Conservatism in America*. New York: Vintage Books, 1962 (2. kiadás). 128. o.

press as a fundamental institution of national existence. It is because the press can be “used” for much more than any other service offered on the market. We could respect the press even as the network providing the primary forum for facilitating the cohesion of society, taking a key role in conducting the debates of the community, and promoting universal and national culture.

The market and the State, however, are forced to exist next to each other and tolerate one another. The first provisions (section 3, paragraph 1) of the British media law, *Communications Act 2003*, which defines the *simultaneous* furthering of the interests of *citizens* and *consumers* as a general duty of the communications authority, are perfect reflections of this reluctant duality. Needless to say that the two interests are often in conflict. However, the press must respect both. The consumer is interested in technological improvement, low prices, and a wide selection of entertaining shows, while the citizen is interested in proper access to information, satisfaction of cultural needs, and opportunity to participate in public debates. Of course, the description of these two different approaches is significantly simplified, because in reality, these needs, though, in different proportions, are combined in the members of the press’ audience, as most of them are consumers and proud citizens at the same time.

With some cynicism, the new prototype of the ideal human being, which started to develop in the second half of the 20<sup>th</sup> century and achieved its full form by today is *homo consumer*. Resulting from the unchallengeable logic of the economic system chosen by the states of western civilization, the ideal of the modern era is the more and more intensive consumption of material goods. The appearance and overwhelming numerical superiority of homo consumer, it seems, ended the posthumous competition of George Orwell and Aldous Huxley.<sup>15</sup> The two English clairvoyants of the first half of the 20th century described two perfectly contradictory *dystopias*. Orwell’s *1984*, which was still banned on this side of the Iron Curtain in the 1980s of the last century, is the shocking illustration of totalitarian regimes, where the tyrannical authority prevails using dictatorial measures. In Huxley’s *Brave New World*, on the other hand, erects a model more relevant at least in this part of the world, because in the new world, the oppressive dictatorship does not work. Maintenance of authority is achieved by the satisfaction of the carefully regulated individual needs of the subjects. Unfortunately, we cannot assert that some of the elements of the dark future described in the novel could not be paralleled with events of the more than seven decades that passed since its publication. Some authors go as far as identifying the effects of modern media on individuals with the effects of the mood enhancing drug, *soma*.<sup>16</sup> Although, if there is some rhetorical overstatement, Huxley himself admitted his prophetic abilities in a later essay, in which he describes his worries concerning the effect mechanisms of modern media.<sup>17</sup>

The greatest mistake of the theory preferring the market is the way it approaches the question of *individualism*. These views respect individual autonomy (both in relation to the freedom to conduct a business and freedom of the press), as a primary value, which position, of course, is acceptable. However, autonomy can be interpreted from two opposite directions: from the perspective of the press’ own and of its audience. The supporters of the market argue that the lack of state restrictions helps both to the same extent: the press is not bound by an outside

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<sup>15</sup> Orwell, George: *1984*. Budapest: Európa Kiadó, 1989.; Huxley, Aldous: *Szép új világ*. Budapest: Kozmosz Könyvek, 1982.

<sup>16</sup> Collins, Ronald K. L. – Skover, David M.: The First Amendment in an age of paratroopers. *Texas Law Review*, May 1990. 1084. o.

<sup>17</sup> Huxley, Aldous: *Visszatérés a szép új világhoz*. Budapest: Dee-Sign, 2000.

authority, and the audience can choose from an unrestricted supply. This is the first flaw in the argument, as modern mass media, which in general, aims at the simplest and quickest profit-making, without hesitation throwing aside the fulfillment of its duties indispensable for the functioning of democracy, subordinates its broadcast time primarily to the entertainment of the largest possible masses, in the holy name of individualism, thus attributing to the development of the no-personality *mass human being*. Ortega y Gasset has painted a long time ago in his classic essay, *The Revolt of the Masses*, the process of the rise to power of the mass human being (who can be identified without further ado with our homo consumer above).<sup>18</sup>

Of course the dead end of unrestricted individualism was recognized long before Ortega. Free market capitalism has produced serious societal injustices early on. First, since the beginning of the 20<sup>th</sup> century, classical private law began to go through significant transformations. This development is called the *publicization* or *constitutionalization* of *private law*<sup>19</sup> and it resulted in the loosening of fundamental private law principles and structures for the sake of the more effective protection of living conditions of the personality and individual. What seemed before the only real token for the autonomy of the personality, i.e., the enhanced protection of private property and the private sphere, because of the cruel logic of the market and only a little over a century after the codification of these rights began, questioned the basic conditions for the existence of the weaker individual who did not have any property. To prevent vulnerability, *human rights*, especially *human dignity* of the individual, *defined as property owner* before, came to the forefront.<sup>20</sup> This process got another push after World War II. However, it soon became apparent that limitless application of human rights (including freedom of the press) could be also used for taking advantage of the status of the weaker. Hence, the freedom of the few must be controlled for the sake of the freedom of the masses. Many recognized this and came to the only possible conclusion that steered the future development of private and human rights from individualism to some sort of a community principle based theory. At the beginning of the 20<sup>th</sup> century, the British legal scholar Albert Dicey treated this transformation evident reporting in his book about the change of principles affecting the thinking of British public opinion. According to his assertions, from the beginning of the 19<sup>th</sup> century, a sort of *collectivist view*<sup>21</sup>, which, of course, also influenced the thinking concerning the role of the press, started to replace *Bentham's individualism*. This notion is very significant in the "cradle" of individualism, which, according to certain authors, was already market oriented in the 13<sup>th</sup> century, and was built for centuries on the sanctity of private property and the strength of the individual<sup>22</sup>, in the spirit of *puritan traditions*, measuring the value of a person based on his commercial success.

During the historical development, of course, the *negative nature* of the freedom of the press was emphasized, which right then was identified with the prohibition of *ensorship*. This coincides with the thinking that the ban of "prior scrutiny" will lead to the total freedom of the press. This view required re-evaluation after the adoption of the first laws eliminating censorship, because external interference with the freedom of the press has a wide range of possibilities beside the limitation of publication. To prevent that providing information for

<sup>18</sup> Ortega y Gasset: *A tömegek lázadása*. Budapest: Nagyvilág, 2003.

<sup>19</sup> Lábady Tamás: *A magyar magánjog (polgári jog) általános része*. Pécs – Budapest: Dialóg Campus, 1997. 22-27. o.

<sup>20</sup> A folyamatról ld. Sólyom László: *A személyiségi jogok elmélete*. Budapest: Közgazdasági és Jogi Könyvkiadó, 1983.

<sup>21</sup> Dicey, Albert Venn: *Lectures on the relation between law and public opinion in England during the Nineteenth Century*. London: MacMillan, 1919.

<sup>22</sup> Macfarlane, Alan: *Az angol individualizmus eredete*. Budapest: Századvég – Hajnal István Kör, 1993.

the community become the monopoly of a few, the law limits the ownership right of broadcasters and newspapers and the possibility of cross ownership, defining a limit over which the same owner cannot obtain further rights. The maintenance of state funding of public service media further limits free competition. Naturally, these rules also affect indirectly the content channeled through by the press.

However, the various *programming structure requirements* imposed on radio and television broadcasters have direct effects on the content of the media. Part of these set negative requirements (advertisements limitations, protection of minors, limitation of erotic content), others demand explicitly positive, proactive behavior from the producers of broadcasting (balanced news reporting, broadcasting of public service programming, etc.).

Interference with the freedom of the press can originate not only from outside but also from *inside*. This phenomenon stems from the business-nature of the media. It is a fundamental truth that the press, which is an expensive venture, is sponsored not by the readers but the advertisers. It can be logically inferred that approaching from the business nature of the enterprise, the “products” offered for sale are not the news articles and programs produced by the press. If that were the case, the media, at least in its current form and extent, would not be capable to support itself. In reality, the “products” offered are the *viewers, listeners, and readers*, for larger their numbers, the higher the advertising fees are in exchange. That is why a popular product, newspaper, and program have to be offered as a *bait* to attract more and more customers and turn them into the consumers of the media, and with that, of the commercials. The advertisers, who, because of the high prices in case of the most important media can only be really large companies, become the number one controllers of the whole process, even if their effect remains indirect. And in the market, where a lot of money is risked, rock hard rules prevail: the advertisers prefer to see their commercials in a media environment deemed proper, possibly in the neighborhood of programs that are popular, controversy free, entertaining, radiate a peaceful and quiet atmosphere, or, without any real stake, generate excitement and suspense. Talk shows, television series, game shows, magazine programs, and action movies are perfect for this goal. Programs dissecting real societal problems, fact finding, more sophisticated cultural programs, or other programs that interest only a smaller portion of social groups with significant purchasing power are less suitable for this kind of advertising.<sup>23</sup> The result is nearly total *homogeneity* of the selection of competing streams of programming, in which almost no significant differences can be detected (because of the risk of losing consumers). Free competition, making possible the operation of many competing media, increases only the *quantity* but not the *selection*.

The competition for consumers is increasingly intensifying, and the converging media more and more interweaves with everyday life, while community debate and social „*discourse*“ slowly disappear.<sup>24</sup> Advertisers categorize their potential customers (the target group) based on their financial status (purchasing power), persuasibility, and other such characteristics that hardly fit in the democratic principle of “one man – one vote.”<sup>25</sup> Internal “*private censorship*” that subordinates everything to maximalization of profits that can stem from the personal interests or even political convictions of the owners or employees of the media, however, is not the same as external censorship. In case of the former, we cannot talk about tyranny, or even justifiable external intervention closely regulated with legislative guarantees. Anyway, censorship in constitutional states has already long disappeared. However, its new

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<sup>23</sup> McChesney, Robert W. – Scott, Ben (szerk.): *Our unfree press – 100 years of radical media criticism*. New York: New Press, 2004. 119-176. o.; Baker, Edwin C.: *Advertising and a democratic press*. Princeton University Press, 1994.

<sup>24</sup> Collins, Ronald K. L. – Skover, David M.: *The death of discourse*. Carolina Academic Publishers, 2005.

<sup>25</sup> Fiss (1996), i. m. [12. jegyzet] 54. o.

form, private censorship, which is indirectly imposed by interest groups commissioning the advertisements, achieves similar results as its once existing “step-brother”, realized exclusively through external forces: it makes difficult and even impossible the performance of the press’ public service obligations.

The *positive nature* of freedom of the press is inseparably interwoven with the concept of *social publicity*. Although, primarily the theory is connected to the name of Jürgen Habermas<sup>26</sup>, and during the decades since its publication (1962), representatives of various social sciences dissected its details in numerous occasions, from our perspective, its main principles can be accepted without any major arguments. The central nucleus of the train of thoughts concentrates around the conceptual construction of “*public opinion*,” which practically exists since the 18<sup>th</sup> century.<sup>27</sup> According to the theory, the elements of “publicity” (from coffee houses to newspapers) jointly contributed to the development of *public thinking* and *critical outlook*, and the slow and gradual start of the process of *democratization*. Publicity ensured access to information, and with time, it grew so significant, that it became capable of restricting the State. An important element of the concept is the provision of wide range of opportunities to access with the help of near equal opportunity of participation ensured by low expenses to enter.<sup>28</sup> According to Habermas, the 20<sup>th</sup> century development of the press into mass media, which in principle contains the possibility of the broadening of publicity with great magnitude, compared with the earlier state of affairs, which rather destroyed the earlier, functioning model of public sphere. The mass media monopolized the forums of public opinion, and among the topics of the press, defined and *dictated* by logic of the market, the proper representation of mutual and joint interests is no longer a defining factor. This final conclusion of the book can be accepted regardless of the truth of other theses of Habermas.

The category of public opinion is important for us, because the only acceptable social structure, democracy can only work exclusively through public opinion. If the affairs of the “public” are not debated in the various institutions of publicity, if citizens do not connect with each other at various forums, if these forums do not provide the minimal cohesion necessary between the members of society, then, although possibly the laws are promulgated by parliament based on public representation, the community no longer exists in a democratic order.

Pericles’ famous Funeral Oration<sup>29</sup> directly *stigmatizes* men indifferent to public life. Reference to ancient Athens is appropriate at this point. It is because the wide spread of the press and the increase of its effects and influence generated the naïve belief, according to which direct exercise of power, or at least something similar to it, of the Greek *polises* may be recreated with the instruments of modern media. The press would provide the possibility to conduct citizens’ debates, through the naturally necessary mechanisms of representations, because everybody cannot speak, and some inevitably have to represent others.<sup>30</sup> Although, not the same as the Athenian *agora*, the press is such a public forum that is the only effective

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<sup>26</sup> Habermas, Jürgen: *A társadalmi nyilvánosság szerkezetváltozása*. Budapest: Osiris, 1999 (3. kiadás).

<sup>27</sup> Briggs, Asa – Burke, Peter: *A média társadalomtörténete – Gutenbergtől az internetig*. Budapest: Napvilág, 2004. 74. o.

<sup>28</sup> Price, Monroe E.: *A televízió, a nyilvános szféra és a nemzeti identitás*. Budapest: Magvető, 1998. 54. o.

<sup>29</sup> Thuküdidész: *A peloponnészoszi háború*. Budapest: Osiris, 1999. 134-43. o.

<sup>30</sup> Keane, John: *Média és demokrácia*. Budapest: Helikon, 1999. 155. 38-39. o.

venue and functioning means of the expression of various viewpoints.<sup>31</sup> Quoting the forceful expression of Owen Fiss, this would be the media's "*democratic mission*."<sup>32</sup>

The most authoritative (and consequently most attacked) American devotee besides Owen Fiss of necessary state intervention in the field of freedom of the press is Chicago professor Cass Sunstein. His work summarizing modern age problems of freedom of speech is a *legal complaint* written against the free marketplace of ideas.<sup>33</sup> In his book Sunstein downright demands a second *New Deal*, because according to his realization, modern media not only fails to extend helping hand to, but also makes the functioning of democracy impossible. The main conclusions of the book focusing on the United States should be taken into account in Europe, too. The primary concerns weighing heavily on the author's mind are not novelties. With the full expansion of commercial media, proportionately decreases the hope for training active citizens to gain decisive roles in participatory democracies. According to the professor, the United States should give up the stubborn resistance that prevents state intervention, because strictly keeping the distance only makes the status quo, the increasingly growing media empire even more powerful. In certain instances buttressed by strict guarantees, the State is indeed capable of promoting liberty. To borrow the metaphor of the market, representative democracy is based on representation by citizens selected by, and from among, themselves time to time (in Hungary in every four years) for conducting ongoing business and making decisions. During the elections taking place in every four years, naturally, citizens generally have less information compared with the ones elected. The political elite always will be significantly more informed than other members of society. The press, in accordance with its capacities, should balance this information deficiency, as the decision of the citizens is irrevocable and irreversible. However, the current system is inadequate to publish the available positions and information, because the discussion of public affairs is not in the interest of the majority of the media, what is more, it would be explicitly burdensome.

Therefore, based on the foregoing, *ideas* are entitled to access. In legal terms, however, the *entirety of the community* is entitled that, relying on concrete regulatory provisions and not on constitutional articles drafted with generality susceptible to multiple interpretations, can demand proper information and access to differing ideas. Of course, only lawyers can think that this form of direct access, composition of the list of ideas to be published, and balance portioned in a pharmacy scale is free from all serious difficulties. On the contrary, the task is very sensitive and requires able journalists and editors. Obviously, not *every* idea deserves publicity. The definition of a rational framework is indispensable. The perspective for differentiation could be, for example, the societal proportion of citizens representing the given viewpoint, and the respect of legal regulations and moral principles.

Nobody demands total impartiality from the media. A wide space is available for biased publication and programs. This, however, has to be separated from the task of supplying information. Although, the proposal is tendentiously naïve, but in reality, nothing else would be necessary but that the press respect the ethical rules created for itself. Of course, our age does not favor codes of ethics, as other interests overrule them. Equalization enforced by legal means can never be full and cannot be desirable either, because viewpoints represented by more people perhaps deserves more exposure. The goal to be set is the *pluralism of opinions* and not equality.<sup>34</sup>

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<sup>31</sup> Logan, Charles W.: Getting beyond scarcity: a new paradigm for assessing the constitutionality of broadcast regulation. *California Law Review*, December 1997.

<sup>32</sup> Fiss (1996), i. m. [12. jegyzet] 50. o.

<sup>33</sup> Sunstein, Cass R.: *Democracy and the problem of free speech*. New York: Free Press, 1995 (2. kiadás).

<sup>34</sup> Sartori, Giovanni: *Demokrácia*. Budapest: Osiris, 1999. 60-61. o.

Many arguments can be brought up against the acknowledgement of the positive nature of freedom of the press. According to one of the groups of arguments, all kinds of state interventions rest on inherently false foundations, because if we are serious about democracy, a fundamental right of such importance and, at the same time, of symbolic value cannot be limited by the decision of a small circle of people (be it even parliament). Calling a spade a spade, it is more desirable that the audience decides what it wants from the press than, regarding its numbers, a proportionately narrow social stratum. The preferences of the audience can be measured relatively precisely. The audience will signal in a noticeable manner if it wants more programs of political debate or perhaps broader information. If the public wants entertainment, its decision must be accepted instead of despising as Pericles did for its indifference to public affairs. Anyway, public interest in relation to the press has not been precisely defined<sup>35</sup>, and it is not more than an oft referenced but never defined rhetorical catch. It is only a presumption that the free flow of information, debate of public affairs, and pluralism of the media serve public interest.

As Rupert Murdoch, the powerful owner of News Corporation says, let freedom and choice replace regulation and scarcity.<sup>36</sup> The press is just a commodity as anything else<sup>37</sup>, as for example, according to Mark Fowler, “[t]he television is just another appliance – it’s a toaster with pictures,” and if a toaster does not to make a perfect toast, nobody will buy it. Based on this analogy, the content of the press can only be influenced exclusively by the direction of market competition.

Without a doubt, the market has certain advantages the State cannot provide with its own instruments. Competition can eliminate the incompetent, increase quality, and promote development. It makes performance measurable. Sometimes the market is forced to make concessions to satisfy minority needs, too. The argument supporting freedom of the market has a very bogus point. From the fact that in a given moment what the majority selects from the available choices concludes that the audience demands exactly what the media, through the selected program, presently provides. In its simplicity, this seemingly effective argument loses its edge if we recognize that in the market filled by the modern mass media the audience does not have a real opportunity to choose. The audience only can choose from among the products that are offered. They perhaps do not even know what other possible choices and programs the media could offer besides the ones they already know. The media by itself is not capable of providing colorful programming, at least not in a reachable manner for the masses. The large majority of society receives the information primarily from television, in Hungary and Europe namely from land broadcasting channels, of which so far altogether three are available in Hungary. The other weakness of the argument is that it pretends as if the media merely *catered* to the needs of the audience, although, it just as much *shapes*, or, with a stronger expression, *dictates* public taste.

Others argue against the acknowledgement of the positive nature with the *fetisization* of the market but claiming that everything is better than state intervention. According to this view, the State must retreat to the smallest possible area and should only undertake the most important tasks (law enforcement, guarantee of substantive rights, etc.).<sup>38</sup> They do not deny

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<sup>35</sup> Dennis, Everette E.: The press and the public interest: a definitional dilemma. In E. E. Dennis – A. H. Ismach – D. M. Gillmor (szerk.): *Enduring issues in mass communication*. St. Paul, Minnesota: West Publishing, 1978.

<sup>36</sup> Keane, i. m. [33. jegyzet] 45. o.

<sup>37</sup> Brenner, Daniel L. – Fowler, Mark S.: A marketplace approach to broadcast regulation. *Texas Law Review*, 1981.

<sup>38</sup> Nozick, Robert: *Anarchy, state and utopia*. New York: Basic, 1974.

the appropriateness of the intentions of people urging regulation, as the proponents of the “night watch state” also would like if the press fulfilled its information distribution function respecting ethical norms, but the enforcement of this should not be trusted with the State, because that would necessarily distort the execution of the originally noble intention.<sup>39</sup>

According to this, the State is a constant source of danger to individual liberty, and its limitation is a basic requirement of democratic order. Well, the proponents of state intervention argue for the role play of the State not because of some sort of totalitarian devotion but because they sensed the restricting effect of the private sphere. Today the State has a rather narrow margin for action; a series of constitutional safeguards guarantee the rights of the individual. However, against the media operating in the private sphere, no similar guarantees would be available. In the center, the media’s obligatory function stands. If somebody disrupts that function, it is essential to stand up against it.

Robert Post argues that the views demanding accountability from the press for democratic principles are self-contradictory. That is to say, democracy, at least if we try to fill it with actual content assumes free, autonomous, and independently thinking and decision-making individuals. Hence, *democracy* and *individualism* do not contradict each other (as we have already asserted it in connection with the theories justifying freedom of speech). If in the name of democracy we limit the individual’s (media owner and journalist) margin for action and simultaneously with this in a *paternalistic* manner facilitate that the “ideal democrat” as we imagined, appropriately receive information, then we contradict the principles of this very democrat, because we this way limit the strengthening of individual autonomy.<sup>40</sup> Accepting its content of truth, the force of the argument is significantly weakened by the fact that in practice, the liberty of mass media can only create the *false illusion of individualism*. Lack of information, our “democrat,” raised with the assistance of the media, under the spell of endless entertainment, in reality, is incapable of making autonomous decisions. The market by itself does not advance the perfection of his personality.

It has to be asserted as a note of general validity that the indirect existence of access to less popular channels accessible only to limited circles is not sufficient for “ticking off” the democratic duties of the media. We have to take into account reality. Adequate catering to public interest must be assured through forums accessible (both in technological and financial sense) to the majority of society, where practically “majority” ought to mean the entirety of society. Currently, this forum primarily means national televisions. If the majority receives information from there, the appropriate flow of information must be assured through that channel.

## Media and Culture

Beyond the system of relationships between the media and democracy, the other fundamental group of issues in the focal point of debates in determination of the content of media focuses on the relationship of the *media* and *culture*. Again, the issue is more complicated rather than only lawyers could be entrusted with giving the answers, but they can define also some of the *cornerstones* of the topic. The starting point is the assertion that the media and culture have a complicated and controversial relationship. The modern mass media is capable of delivering cultural products to a much wider audience than before, ensuring thus their preservation and

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<sup>39</sup> Schauer, i. m. [5. jegyzet] 128. o.

<sup>40</sup> Post, Robert C.: Meiklejohn’s mistake: individual autonomy and the reform of public discourse. *University of Colorado Law Review*, Fall 1993. 1109. o. és úó: Equality and autonomy in First Amendment jurisprudence. *Michigan Law Review*, May 1997. 1517. o.

further development. At the same time, because of its unique nature and the logic of the market condemned many times, the “mainstream” media does not view the broadcast and introduction of higher cultural products as its responsibility. What is more, the media not only channels the content, characteristically aiming at mere entertainment, demanded by the masses, but it also creates and forms the new “cultural” environment.

Mass media has significantly reformed the means of access to culture and influenced its general quality. Today, the general level of culture is determined not by a narrow elite but by the standards of average citizens. This was the price of becoming multitudinous. The next dimension of becoming multitudinous is the development that began two-three decades ago with the emergence of *global media*. The spreading of multinational media enterprises, the demolition of the Iron Curtain, and the global marketing of American cultural products resulted in the first sprouts of shared, supranational, global culture. Simultaneously with, and as a response to, this tendency, soon emerged certain initiatives for the preservation of individual national cultures. According to the most horrific scenario, the global media industry in the long run will result in the total destruction of national cultures. Perhaps this script envisions dangers, because the preservation of national cultures is not only the role of the media, and the global media market could even assist in sustaining national cultures (for example, with the help of Internet publication of previously hard to access content; let us not forget that the Internet, making with the press of a button and for free of charge, national cultures available, is itself the product of the global media industry). The new universal culture can actively contribute to a supranational, common identity; of course, it is important on what kind of elements this new identity is built. Namely, the appearance of American “cultural imperialism”<sup>41</sup> in certain television programs, movies, and musical pieces characteristically are not among the products of “high culture.” Regarding their financial means, creators of the products of national culture are unable to compete with the makers of products at the global market. Therefore, other *protectionist* measures are necessary.

The State has important functions in the preservation of national culture. At least, thus far, nobody was brave enough to openly dispute this. The European approach to the protection of national culture accepts state intervention as a definitely valid reason. Regarding the manner of intervention, however, certain level of uncertainty can be sensed, and not without reason. To protect national culture, the State would have to go into battle with company giants reigning over the media market of the world, while at the same time states are bound, on one hand, by international treaties and their monitoring bodies, and on the other, regulations of the internal market dictated by European integration. It is worthy, however, to return to the cradle or, yet even, the conception of European unity. Jean Monnet, one of the fathers of integration, stated that if we could start it all over, we should begin with culture.<sup>42</sup> The idea according to which Europe is primarily a *spiritual and cultural unity*, originally counted as the intellectual foundation of the entire integration effort. Therefore, based on the original intentions, the European integration process should have assisted in the preservation of national cultures and, at the same time, define the elements of the European culture existing according to popular belief and resting on an integrated foundation (Robert Schuman’s essay, *For Europe* is built on this idea. Even the title of one his chapters is telling: Europe “before becoming a military alliance or an economic entity, must be a cultural community in the highest sense of the term.”<sup>43</sup> Practically, this has not happened in the more than half a century passed since the beginning. The Audiovisual Media Services Directive, beyond defining

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<sup>41</sup> Briggs – Burke, i. m. [30. jegyzet] 248. o.

<sup>42</sup> Idézi Collins, Richard: *Media and identity in contemporary Europe: consequences of global convergence*. Exeter: Intellect, 2002. 25.

<sup>43</sup> Schuman, Robert: *Európáért*. Pécs: Pannónia Könyvek, 1991.

general minimal content requirement and practically ensures the right of Member States to control television contents, primarily through certain limitation of the market, tries to protect national and European identity. Union law, for example, allows the existence of public service broadcasters, although their state financing is to the contrary of the requirements of free market competition. Further, the Directive requires that television-programming services must broadcast European works in more than fifty percent of their content. The weak point of the regulation is that it tries to protect cultural identity based exclusively on formal criteria (practically, public service broadcaster is what is called that way, and European work is what was created by a company with its head office in a Member State), and it does not introduce content regulation. Thus, the end result does not achieve the desired objective: a great portion of public service broadcasters do not significantly differ from commercial ones, and practically, anybody can produce a European work, not to mention that there is no remedy against the practical phenomenon that, for example, an European work can follow American patterns and contain no elements of European culture at all.

## Conclusion

How to define ultimately the concept of freedom of the press? Would A.J. Liebling be right, whose *bon mot* quoted a number of times states “freedom of the press is guaranteed only to those who own one.”<sup>44</sup> No, his not right at all. However, the disagreement between the proponents of free market and state intervention seems to be irreconcilable. Nonetheless, nobody denies that, on the one hand, after the emergence of new media, and on the other, recognition of the weaknesses of earlier regulation, rethinking of the foundations of regulation would be necessary. Of course, it is true that no change could be a pressing interest for those who have an interest in maintaining the *status quo*, the current situation.<sup>45</sup> However, “press freedom cannot be absolute without contradicting the ethical basis for its existence”<sup>46</sup>

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<sup>44</sup> Liebling, A. J.: *The press*. New York: Pantheon Books, 1981 (3. kiadás).

<sup>45</sup> Schauer, Frederick: The political incidence of the free speech principle. *Colorado Law Review*, Fall 1993. 949.

<sup>46</sup> Laws, John: The limitations of human rights. *Public Law*, 1998. 265.