

Doctoral thesis

**THE FOUNDATIONS OF
FREEDOM OF SPEECH**

*Hungarian, English, American
and European comparisons*

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SUBJECT AND RESEARCH OBJECTIVES

Since 1989 we have been trying to learn and work out the legal materials concerning freedom of speech, and to measure its operability in the everyday life. Obviously we did not have any legal tradition about free speech which we could have built on and which we could have used during the transition from communism to democracy. In the field of freedom of speech not only law, but other social sciences are relevant as well, such as sociology, communication studies, history, literature, and political studies. When we make discussions about the content and the limits of the law, academics sometimes cannot handle the pressure that comes from above, straight from the political sector. Above the arguments of legal reasoning, the shadow of the pure pragmatist mentality, which is only controlled by the daily interests, had been arisen.

The aspect of law is only one of the different possible aspects of this topic, and it is not hard to accept that law cannot possibly solve all the arising problems, at least not in a way that is reassuring to everyone.

The aim of the dissertation was to dig out the basis, the foundations of freedom of speech. In Hungary, before 1989 no discussion could have been held because of the political climate about this subject. So a whole lot of leeway could have been observed, both in the field of the legal practitioners, and in the academic field.

The subject is a very complex one, so putting everything in the dissertation was impossible. Nevertheless, many topics are presented here, which are lying on the border of different fields of law, like constitutional law, criminal law, civil law and media law. The dissertation compares the solutions of the different legal systems in this field, the Hungarian, English, American system and the European Court of Human Rights' case law.

METHODOLOGY

The author started his doctoral studies in 2002 at the Pázmány Péter Catholic University. He searched all relevant Hungarian libraries, spent a summer in Strasbourg in 2003 where he made research in the European Court of Human Rights and in the Institute for Human Rights. In the 2005/06 academic year he studied at the University College London, where he finished an LL.M. course. There he had the opportunity to learn from many prestigious authors in this field. He also had the chance to search in the biggest digital databases HeinOnline and Westlaw. Altogether he collected a bibliography with more than 1.900 titles in it, which helped him to write the dissertation.

THE RESULTS AND THE APPLICABILITY OF THE RESEARCH

We make a lot of discussions about freedom of speech without reaching the most cardinal questions of the topic. The examined field and the debates were predestined to reach the political level, where at this time no constructive dialogue can take place between the two crossing political sides. This is an excellent model of our fragile democracy and explains the reason why we cannot reach any common denominator: talking about free speech means talking about ideologies and the foundations of the “good” society.

When we think about free speech, we arrive to much more comprehensive questions, like the role of the State (with capital “s”) in a modern society; the relation between individual and authority; the newly developed concentrations of power; relationship between the individual and the community; the keeping of the cultural traditions; the future of European identity, and so on.

The dissertation deals (in the **2nd chapter**) with the different free speech theories, naming the three most popular amongst them: searching for the truth; democratic theories; libertarian (autonomy) theories.

The different philosophical foundations underlying freedom of speech all have different visions on it. We can say—though not without the danger of serious oversimplification—that the libertarian (or autonomy-based) theories emphasise it as a negative freedom, that is, freedom from any state intervention, for example from prior restraints. Others claim that it comprises a positive aspect as well—some kind of access to free speech, which should be made available by the state.¹⁷ This view roots in the recognition of the importance of free speech in a democratic society: democracy cannot work without the free flow of information—especially in the media—and freedom should not be the prerogative of those who own the media.¹⁸

The **3rd chapter** is titled as “regulation of free speech”. This encompasses the legal techniques and constitutional doctrines concerning how the different legal systems give special protection to free speech. The chapter also covers the general questions of the possibilities of restriction of speech. Constitutions and international covenants are usually laconic. The text must be interpreted, which is a task for mainly the courts and the constitutional courts. The latter have great

¹⁷ On the positive-negative distinction of rights see ISIAH BERLIN: Two Concepts of Liberty. In BERLIN: *Four Essays on Liberty*. Oxford: Oxford University Press, 1969.

¹⁸ This is the famous aphorism of A. J. Liebling, see LIEBLING: *The press*. New York: Ballantine Books, 1964. 30-31.

powers in their hands, as they are capable of overwriting the will of the parliament and they can be the single most important interpreter of the constitution – as it happened in Hungary.

Where is the place of freedom of speech amongst other human rights? Does it have any privileged position? Is it possible to set up a hierarchy to choose those rights which are more important than others? The compared legal systems all give freedom of speech a special protection. The Hungarian Constitutional Court placed it in the top of the before mentioned hierarchy – just after the right to life and human dignity. Free speech starts to enjoy an almost “holy” status. As Frederick Schauer puts it, in the United States everything can be argued, it is possible to speak about anything, apart from freedom of speech itself – as it is almost illimitable.¹⁹

The 4th chapter deals with the exact definition of “speech” and the content of freedom of speech. What is speech? Are there any categories of speech? Is action “speech”? Is money “speech”?

In most democratic states the level of protection of political speech is higher than the “average” level of free speech protection. The legislators and the courts accepted that free discussion of political and public matters “is at the very core of the concept of a democratic society”.²⁰ Explicitly or not, they created a special category of political speech, which enjoys a higher degree of free speech guarantee.²¹

Freedom of speech contains a positive and a negative aspect. The negative aspect means the obligation of recognition and the forbearance of the state from influencing the practising of the right. The positive aspect means the duty of the state to create and protect real opportunities to the effective exercising of freedom of speech.²²

Freedom of speech has many connections to other fundamental rights, the dissertation tries to analyse these links. These rights are: freedom of

¹⁹ SCHAUER, FREDERICK: The First Amendment as ideology. *William and Mary Law Review*, Spring 1992. 853-869.

²⁰ *Handyside v. United Kingdom* (1976) 1 EHRR 737. para. 42.

²¹ For a brief overview on the justifiability of this privilege see IVAN HARE: Is the Privileged Position of Political Expression Justified? In JACK BEATSON – YVONNE CRIPPS (eds.): *Freedom of Expression and Freedom of Information. Essays in Honour of Sir David Williams*. Oxford: Oxford University Press, 2000. 105.

²² KARST, KENNETH L.: Equality as a central principle in the First Amendment. *University of Chicago Law Review*, 1975. 20-68.

information, religious freedom,²³ freedom of assembly,²⁴ right to associate, educational and academic freedom,²⁵ language rights, right to property and freedom of art.

Chapter 5 deals with the freedom of the press. Leaving behind the political change of 1989, now we have the opportunity to freely make heated debates about the real meaning of press freedom, but these disputes hardly reach the core of the problem, since they mostly serve some actual political or other interests. In the European conception, press freedom and freedom of speech are two distinct human rights.²⁶ Both entails a negative and a positive nature at the same time (applying Isaiah Berlin's distinction). The negative character of press freedom originally only meant the prohibition of censorship or any other preliminary monitoring, but now we should recognise the censoring power of the private sphere, which is carried out by the owners and the editors of the press.

The positive character means that the press should play a vital role in the shaping of the democratic system. The media are the only fora where the disputes concerning the whole community can be carried out. The owners should respect this role, and give some space to the ideas which are present in the society.²⁷

Press freedom is a distinct right, which can be separated from freedom of speech. The press (or, the media exactly) has special social responsibility, and cannot be only a field where the individual can practice his autonomy rights. The press has different "press rights" (access rights, tax discounts etc.), rights which can only be practised by the workers of the press.

The so-called claim-rights²⁸—which are recognised in most jurisdictions—must be narrowly construed, and the right balance must be found between the two different aspects of the right to free speech. Monroe Price suggests four broad categories of law-imposed access to the media: ownership access, producer

²³ TAYLOR, PAUL M.: *Freedom of religion – UN and European human rights law and practice*. Cambridge: Cambridge University Press, 2005.

²⁴ BARENDT, ERIC: Freedom of assembly. In JACK BEATSON – YVONNE CRIPPS (szerk.): *Freedom of expression and freedom of information. Essays in honour of Sir David Williams*. Oxford, New York: Oxford University Press, 2000. 161-176.

²⁵ SCHAUER, FREDERICK: Is there a right to academic freedom? *University of Colorado Law Review*, Fall 2006. 907.

²⁶ BARENDT, ERIC: Inaugural lecture – press and broadcasting freedom: does anyone have any rights to free speech? *Current Legal Problems*, 1991. 63-82.

²⁷ BARRON, JEROME A.: Access to the press – A new First Amendment right. *Harvard Law Review*, 1967. 1641-1678.

²⁸ ERIC BARENDT: *Freedom of Speech*. Oxford: Oxford University Press, 2005 [2nd edition]. 102.

access, common carrier access and “Hyde Park corner” public access.²⁹ The second category contains regulation that requires a television station or cable operator to take certain categories of programmes (for example news or children’s programmes), give access to certain individuals or bodies to make the political process work (parties, individual candidates), or give access if certain circumstances occur. The right of reply fits into this latter category, as it is only available if “something” happens—usually a person is attacked in the media or some defamatory allegations are published about him.

There are visible differences between the regulation of press and broadcast media. Press (which exists in written form only) usually enjoys greater freedom, whereas broadcasting are more controlled. In the past this distinction was supported with the thesis of frequency scarcity. Nowadays, scarcity no longer exists, but the much greater influence of the broadcast media on the whole society still justifies the stricter regulation.³⁰

The problem of public service media is another “hard case”. The existence of PSB (public service broadcasters) mean a great restriction of the free flow of goods and services. The privileged position of the PSB channels is justified by the special significance broadcasting reached in the previous decades. Television and radio became the most important and effective potential transmitter of culture and they can also help to create a strong social cohesion.

The dissertation deals with the different forms of content regulation, as the doctrine of pluralism, impartiality, objectivity, accuracy, content quotes, listed events.

Freedom of the internet is also different than broadcasting and press freedom, but law still cannot handle the problem of this new medium. There are several newly born questions arising when looking at the internet: personality rights, the questions of responsibility, public service media, all works differently in the web.

Personality rights and free speech (the **6th chapter**) also contains many different topics, all concerning the conflict of freedom and the rights of persons (human dignity, protection against defamation and privacy).

The defamation of public figures is a question where law stepped back and accepted that for a specified group of persons (“public figures”) a much weaker

²⁹ MONROE E. PRICE: An Access Taxonomy. In SAJÓ ANDRÁS – MONROE E. PRICE (eds.): *Rights of Access to the Media*. Boston: Kluwer Law International, 1996. 1., at 3.

³⁰ BARENDT, ERIC: *Broadcasting law – a comparative study*. Oxford: Clarendon Press, 1993.

protection should be given in this field.³¹ The Hungarian solution can be interpreted as some kind of “clone” of the American rule set out in the *New York Times v. Sullivan* case, which is an interesting example of legal transplants.

Protecting privacy is another “hot” topic, especially after the *Von Hannover* decision of the ECHR in 2004.³² The distinction between public figures and private persons is also relevant here, but this does not mean that public figures cannot possibly get greater protection than in the case of defamation law.

“Hate speech as free speech” says the title of the **7th chapter**. Hate speech generated many harsh arguments in the previous years.³³ This is another field of freedom of speech in Hungary, where a previously unknown American doctrine (the clear and present danger test) was introduced in the legal system. This did not happen after the Constitutional Court’s 1992 decision – though many think it did –, but happened many years later, in two decisions in 2003 and 2004.

The problem of hate speech can also arise in the civil law context. Civil law tries to avoid protecting specific communities, where no recognisable individual is hurt by the act. Nevertheless, it is not worth ruling out the possibility of the involvement of civil law into this area.

Holocaust denial is also a current problem. The main question about it concerns the possibility to choose a historical event and give special protection to its facts. Holocaust was in a way a unique event in history, but legal techniques are limited in giving constitutional protection to it and this way make it a dogma.³⁴

Blasphemy is a question concerning free speech which is usually neglected. But in the 21st Century, when religious sensitivities create situations no one could have ever imagined in the past, it is worth discussing the possibilities of limiting free speech because it is considered blasphemous.³⁵ Religious feeling is one of the most important aspect of human dignity.

³¹ BRENNAN, WILLIAM J.: The Supreme Court and the Meiklejohn interpretation of the First Amendment. *Harvard Law Review*, November 1965. 1-20.

³² *Von Hannover v. Germany*, Application no. 59320/00. Judgment of 24 June 2004.

³³ FISS, OWEN M.: The Supreme Court and the problem of hate speech. *Capital University Law Review*, 1995. 281-291.

³⁴ KAHN, ROBERT A.: *Holocaust denial and the law: a comparative study*. New York: Palgrave Macmillan, 2004.

³⁵ UNSWORTH, CLIVE: Blasphemy, cultural divergence and legal relativism. *Modern Law Review*, 1995. 658-677.

Is it allowed to restrict free speech because of the protection of public morals (8th chapter)?³⁶ Is immoral speech “speech”? Can law define pornography, indecency, immorality? Who is protected by the restrictions? The youth? The harmed individual? The whole community? The author lays down the thesis, that the protection of morals is necessary in the modern society, and this contains free speech limitations as well. No one could explain for example why law should protect giant street posters that portrays explicit nudity only for selling a specific product or service. Pornographic and indecent speech has its place in society but should not get the protection political speech does.

The conclusion of the dissertation is maybe hard to accept to many: “...it is possible to be passionately committed to a limited but realistic concept of free speech... It is not an absolute right... ...the way forward is to accept the power of words that the media conveying them have changed, and that in many ways free speech is costly. None of this means that we should weaken our commitment to a properly understood freedom of speech. It does mean, however, that we should begin by accepting that difficult, sometimes even tragic, choices have to be made between competing values.”³⁷

³⁶ DWORKIN, RONALD: *Freedom's law. The moral reading of the American Constitution*. Oxford, New York: Oxford University Press, 1996.

³⁷ SIMON LEE: *The Cost of Free Speech*. London, Boston: Faber and Faber, 1990. 25-26.