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On the Dogmatic Aspects of Free Speech in Media Law

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Freedom of the press must be examined with regards to both the owners of press organs and the journalists and editors working for them, who are also covered by certain aspects of press freedom. When is the press completely free? When every person may convey any thought at any time and any place; excluding those strictly interpreted cases that violate human dignity. Plurality is essential for an all-encompassing freedom of the press. Digital media have fundamentally changed media relations. The finite nature of frequencies has disappeared. (Let us add that the combined persuasive power of image and sound effects still exists as a specific regulatory reason.) The evolution of the online environment has also had a significant impact on fundamental rights in other respects.
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In the event that we seek to separate freedom of the press from free speech in general, imbuing the media with certain extra rights in comparison to a simple street preacher, it stands to reason to also attach to it a number of additional responsibilities.[1] This would evidently necessitate the intervention of the state, which can steer us to very dangerous waters.

According to a different view, the press must be given additional freedoms without the imposition of such extra responsibilities in exchange. This is clearly problematic, for how exactly would such privileges be justified? Rights and responsibilities constitute an indivisible whole.

This brings us to a synthesis: freedom of speech and freedom of the press are indeed different, and media organs must indeed be granted additional rights and additional responsibilities alike. From this perspective, freedom of the press is not an individual right, but a right wielded by the press as a social institution.[2]

1 András KOLTAY: *A szólásszabadság alapvonalai*, Századvég 2009 Budapest, p. 198.
2 An approach first espoused by U.S. Supreme Court Justice Potter Stewart, later reinforced by William Brennan.

These freedoms being institutional rights, they do not protect the individuals working for the press (who, themselves, are covered by the general rules of free speech), but the institution, which, as a consequence, also bears the extra rights and responsibilities thus allocated. According to this view, freedom of the press is clearly a tool, a means to advance the public interest through the realisation of the exchange of information and ideas, as well as providing avenues for the public expression of such.

Freedom of the press must be examined with regards to both the owners of press organs and the journalists and editors working for them, who are also covered by certain aspects of press freedom. But what happens when these rights conflict with the owner's property rights? Could the editor's independence from the owner's influence even be guaranteed? Interestingly, this seems to be a highly neglected topic in academic literature and – especially – legislation.[3]

It is worth noting that the instrument-like nature of press freedoms is generally embraced even by jurists who otherwise consider the individual aspect and personal autonomy the primary consideration of free speech.[4] Freedom of speech can be justifiably considered a limitless right of the natural person; it cannot be extended to freedom of the press. Because the media is a social institution driven primarily by financial interests, its public presence is expressed in a less personal way, preventing the right of natural persons to free expression from becoming the dominating legal factor in its communications, rendering the individualist approach invalid.

Plurality is essential for an all-encompassing freedom of the press. When is the press completely free? When every person may convey any thought at any time and any place; excluding those strictly interpreted cases that violate human dignity. Naturally, this is but a mirage, because full media freedom does not exist. Regarding plurality, the main object of our scrutiny must be the diversity of the opinions that do actually fluctuate in the press.

In the event that the media falls under the steady influence of a few (or especially *one*) social groups, which are thereby able to exert considerable influence on public thinking and exclude outsiders, the situation is skewed and needs to be remedied.[5]

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3 Once again highlighted by Koltay on p. 216 in the previously quoted publication. Even though many court decisions emphasised the importance of editorial freedom, none lay down any theoretical principles regarding it (unlike the SCOTUS).

4 A reference to the „liberty model" of Edwin Baker, quoted from p. 200 of Koltay's book.

5 A reference to a series of constitutional court decisions from Germany titled BVerfGE 73, 118 and 160. Gábor POLYÁK: *A médiarendszer kialakítása*, HVG-Orac, Budapest 2008., p. 51.

In Germany, it is the constitutional court's practice that freedom of the press *does not serve the individual expressions of the owners or workers of media organs, but instead the global enforcement of the freedom of opinions*, which also entails a free and comprehensive flow of information.[6]

The right to free expression is eminent even among fundamental rights. Typically, only the violation of another fundamental right, such as the right to human dignity can bring about any restrictions. Upon closer inspection, however, we can observe that certain superficial „infringements" upon the right to free expression (deemed as such by overly individualistic views) only serve to reinforce and expand the social prominence of this right.

Let us visualise the realisation of the right to free expression through an individual example, a „personalised fiction manifestation". Often, the archetypical hero of this particular freedom is the lonely and conscientious orator making a stand for the sake of principles and against tyranny.

When does someone possess freedom of expression? When they are able to communicate their thoughts without restrictions. Can anyone be forced to relay others' thoughts? Normally, the answer is no. Yet, exceptions certainly arise on moral grounds.[7] For instance, if a storm approaches the scene of a public speech, can the speaker not be expected to interrupt the address and warn the audience of the impending danger? Furthermore, while others' ideas cannot be forced to be conveyed as someone's own, they can still be transmitted with a reference to their origins.

An even more expressive scenario would be to envision an agora, *a forum of public speaking.* The electronic press is indeed a type of modern *agora*, its main function being the dissemination of information, from which the public can make educated decisions on their common affairs.[8] Undoubtedly, this is the cornerstone of the communal view on press freedoms. The number of speakers here is limited. Who may enter first? Is it dependent on the order of arrival? Are there people with a substantive right to participate, regardless of this order? These questions are just as valid for the media in general.

The state-directed distribution of the limited amount of radio frequencies physically available is virtually a necessity; without it, chaos and „piracy" would reign. According to the fiction theory, it is akin to wishing to enter a locked room to engage in conversation there: one must first ask for the key. After a while, however, the room gets filled and latecomers will not be able to enter. Obviously, the advent of digital media substantially decreased the significance of this matter.

6 POLYÁK, p. 26.
7 LAJOS Edina: A jog és erkölcs összefüggésének alapjai, *KRE-DIt*, 2023/1., 164–169.
8 KOLTAY 2009., p. 212.

Certain theorists of constitutional law (such as Antal Ádám) do not even consider free speech the human rights basis of media freedoms. Instead, it is the freedom to express and publish information, which encompasses not only subjective opinions, but also neutral facts and other types of information serving the public interest. As such, freedom of expression is the *genus proximum* of communication freedoms.[9] On the national level, it becomes the freedom of mass-communication, further reinforcing the communal theory.

The freedom of individual opinions must be integrated in a way that also allows for the cumulation of opinions to be free.

The principles of complete press freedom and no censorship were discarded with the appearance of electronic media, because the finity of frequencies physically eliminates the possibility that everyone gets to express their opinions. In other words, it is possible to print any number of newspapers, but not to run an unlimited number of media channels.

The facts above possess such cardinal importance exactly because they are the main legitimating factors of media regulation.

First to respond to this challenge were the Radio Act of 1927 and the Communications Act of 1934 in the United States, establishing the Federal Communications Commission for the purpose of regulating radio frequencies. They would lay down the principle that while freedom of expression must entail both the freedom of individual expression and institutional media freedoms, the rights of listeners and viewers enjoy primacy when pitted against the rights of the broadcasting station. Therefore, a balanced environment of mass-communication demands the prevention of the market's monopolisation.

In 1981, the constitutional court in Germany specified the matter even further, ruling that provincial legislators have two options in implementing balance. „Internal pluralism" would force every individual media organ to provide a balanced set of content, while „external pluralism" concerns itself only with the overall diversity of programmes visible across all channels. It is the former of these two that ultimately bestows a better protection upon the rule of law. It was here, in West Germany, that the idea first prominently emerged regarding the necessity to not only privatise some of the media-related aspects of public service, but also that here too, outside the public sector, there have to be guarantees for the constant diversity of views and against the monopolisation of opinions.

Once again, it is important to note that back then, the main reason for regulation was the limited nature of frequencies.

Regarding the challenges posed by digital media, the same constitutional court provided that „the end of the special situation (Sondersituation) caused

9 ÁDÁM Antal: *Alkotmányi értékek és alkotmánybíráskodás*, Osiris, 1998. Budapest, p. 141.

by the finiteness of broadcasting frequencies does not not necessitate the elimination of legislation it brought into being, regardless of the technological advances of recent years and the multiplication of broadcasting capacity. The significance of media regulations lies in the immense social influence, timeliness and persuasive power of their subject. (...) *All these effects are magnified by the fact that these new technologies extend and differentiate the scope, the methods and the service types of broadcasting.*" (BVerfG, 1 BvR 2270/05)[10].

In many countries – despite the technological advances present in Europe –, there still remain a significant number of people without access to digital television, restricted to ground-based (and therefore, limited) broadcasts they get to receive without licence fees.[11]

According to Gábor Polyák, the Constitutional Court of Hungary confused the aims and means of media regulation in a related decision: external and internal pluralism cannot be construed as goals in their own right.[12] Pluralism and diversity are instruments that legislators have a wide array of options in implementing. The contradiction is aggravated by the ruling of the same body that *„mandating internal pluralism for commercial radio and television stations is necessary only when they represent a significant opinion-shaping force".* Consequently, legislators would be required to clearly define the criteria of being such a signficiant opinion-shaping force and regulate only the broadcasters falling under this category.[13]

Wolfgang Hoffmann Riem differentiates several „dimensions" of media diversity.

- diversity of content, ensuring a pluralism of views and providing a platform to as many of the opinions holding a relevant presence in society as possible, preventing the monopolisation of ideas,
- diversity of persons, organisations and institutions involved with the media, opening it up to as many layers of society as possible,
- diversity of subjects, providing pluralism in terms of the content being broadcast and presenting different topics and life situations
- diversity of locations, offering territorial pluralism through regional, national and international programmes alike
- thematic diversity, creating a media environment working with many different themes and forms of communication

10 POLYÁK, p. 27.
11 KOLTAY 2009., pp. 209–210.
12 POLYÁK, p. 395.
13 On the other hand, Polyák remarks that if – in principle – content providers with a significant opinion-shaping force are allowed to operate, complete external pluralism becomes outright impossible.

- diversity of reception, enabling citizens to access content with a wide variety of devices

In addition to this, Meier and Trappel also list the diversity of media functions as a further requirement, which includes entertainment, education, providing general news and so on.[14] Never refers to pluralism as a form of weighted diversity, whose legal requirement constitutes a „central planning of opinions", twisting the process of how opinions are formed: „By placing emphasis on the equal representation of already established views, the court hinders the institutional guarantees existing to help facilitate the appearance of new ideas."

In his view, the diversity of ideas is nothing but a „product of the freedom of opinions previously established", concluding that diversity cannot be definitively prescribed by law; instead, it manifests only as the result of an entirely free competition of ideas.

Accordingly, legislation must not endeavour to weigh and rank opinions, but only to guarantee as much freedom as possible for new players to enter the media system and its great marketplace of ideas.

Contrasting the system of institutional guarantees prevailing in Germany, this concept adheres to the subjective-individualistic approach regarding freedom of the press.

Keeping to the „central planning" allegory, a way to a consensus between the two main viewpoints on the freedom of the press would be to relegate this state planning to the realm of entrepreneurial freedoms; and how best to broaden and safeguard them.[15]

Digital media have fundamentally changed media relations. The finite nature of frequencies has disappeared. (Let us add that the combined persuasive power of image and sound effects still exists as a specific regulatory reason.)

And here arises the „evergreen" question of our time: how far do the institutions of „new media"[16] interfere the traditional understanding of freedom of expression? In other words, is it possible to sanction not only those who express their thoughts (who post, etc.), but also the ones who own or manage the platforms? Fake news can cause social problems on an astonishing scale; some opinions even link it to war conflicts. Decades of globalisation have been exaggerated by the ‚new media' on a massive scale, which has been exacerbated by the pandemic. Due to current restrictions of state of emergency,

14 POLYÁK, p. 48.
15 POLYÁK, p. 56.
16 Denis MCQUAIL: *A tömegkommunikáció elmélete,* Complex Kiadó, Budapest, 2015. 664–665.

people trapped in the virtual world are heavily influenced by news (including fake news) and many have lost their sense of proportion and reality.[17]

It can be argued that, in addition to clarifying and tuning our legislation, especially on ‚new media', the definition and differentiation of the concept of „media" itself is an important factor.

In the European context, the 2011 Recommendation of the European Council on the protection and promotion of the universality, integrity and openness of the Internet, which seeks to define the category of media, is worth highlighting. The Recommendation is based on the premise that the ‚new media ecosystem' includes all the new actors involved in the process of producing and distributing media content, potentially reaching large numbers of people, and of which they have editorial influence or control over the content.

The Recommendation sets out six criteria, all of which, when met, fall under the definition of media:

- the intention to behave as media,
- operating according to the aims and intentions of the media (producing, collecting and distributing media content),
- editorial control,
- operation according to professional standards,
- Intention to reach the masses, dissemination,
- meeting audience expectations (accessibility, diversity, reliability, transparency, etc.)[18]

András Koltay, also taking into account the ideas of Sonja R. West (along the lines of the US Supreme Court decisions), points out that the excessive extension of the concept of media to new types of services also has side effects.[19]

17 Forensic linguists can help in assessing such cases. For more on this, see: Arató Balázs: Quo vadis, igazságügyi nyelvészet? Magyar Jogi Nyelv; 2020/2.; pp. 8–15. https://joginyelv.hu/quo-vadis-igaszsagugyi-nyelveszet/. On constitutional guarantees, see: Arató, Balázs: A tisztességes eljáráshoz fűződő jog, különös tekintettel a tisztességes igazságügyi szakértői eljárásra; in: Tóth J. Zoltán (ed.): Az Abtv. 27. §-a szerinti alkotmányjogi panasz. Tanulmányok a „valódi" alkotmányjogi panasz alkotmánybírósági gyakorlatáról; Budapest, KRE-ÁJK; Patrocinium; 2023; p. 216.; pp. 9–30.

18 KOLTAY András: *Tíz tanulmány a szólásszabadságról*. Wolters Kluwer, Budapest, 2018. 276.

19 BALÁZS Géza: Az internet népe. Ludovika Egyetemi Kiadó, Budapest, 2023; BALÁZS Géza: Újmédia-kislexikon. IKU, Budapest, 2023. (IKU-Tár 22.); KOLTAY András: *Az új média és a szólásszabadság, A nyilvánosság alkotmányos alapjainak újragondolása*. Wolters Kluwer, Budapest, 2019. 63., TÖRÖK Bernát: *Szabadon szólni, demokráciában. A szólásszabadság magyar doktrínája az amerikai jogirodalom tükrében.* HVG-ORAC, Budapest, 2018. 184.

The evolution of the online environment has also had a significant impact on fundamental rights in other respects. Vast amount of personal data collected, with or without consent, provides potential opportunities for economic actors, in addition to political actors, to target advertising or to engage in exclusionary economic practices against undesirable social groups. Reflecting the importance of data protection concerns in the online space, legislators are seeking to create an appropriate legislative environment, albeit essentially at a disadvantage; privacy in this segment must also be ensured.[20] The status of new subjects of the fundamental right to expression may arise. (They like to classify themselves not as content providers but as technology companies with fewer constraints.[21]

20 ARATÓ Balázs: *A titok fogalma a jogban*. In BALÁZS Géza (et al.) (ed.): A titok szemiotikája. Magyar Szemiotikai Társaság, Budapest, 2019. 29–39; and BALÁZS Géza: A titok antropológiája és szemiotikája, In BALÁZS Géza (et al.) (ed.): A titok szemiotikája. Magyar Szemiotikai Társaság, Budapest, 2019. 15–28.
21 CHEUNG, Anne S. Y.: Az internetes tárhelyszolgáltatók felelőssége rágalmazási ügyekben, *In Medias Res,* 2014/1., 47.