Preface

'And God said . . .' we read several times in the first verses of the Book of Genesis, the oldest part of the Bible. 'Dixi et salvavi animam meam' is the other ancient saying often borrowed if someone wishes to underline the moral importance of expressing his/her opinion. And the list highlighting how fundamental and unavoidable the freedom of speech, of expression of ideas and opinions, and the opportunity for free debates on public affairs are could be continued from the beginnings of the history of mankind almost *ad nauseam*.

Freedom of speech is as integral a part of human dignity, as it is understood, as is a leaf on a tree in our terrestrial environment. However, the meaning of a leaf is very different for a tourist, for a farmer, or for a biologist, and its 'message' is more distinct from particular points of view or different resolutions of a scientific microscope. Something similar may be recognised if one tries to comprehend in its complexity every detail of the freedom of speech. Doubts are awakened even regarding the proper object of each analysed legal institution: speech, expression of ideas, debate, communication, opinion, argument, press, media—all these notions are interrelated and related to the regulation and limitation of their freedom. The same complex approach, and minute attention to differences are necessary if we look at the holder of the freedom of speech: 'everyone' or the person involved in a debate or in a formal procedure, a journalist, a publisher, a researcher, an artist, a blogger, or a demonstrator faces a completely different situation, and even if the fundamental core of freedom of speech should be the same in each individual relationship, its limitations caused only by the other participants' rights and liberties cannot be the same.

Anyone can hold an opinion even about the freedom of speech but a judge must decide whether one party to a trial expressing his/her opinion is giving false testimony or is only making a mistake because he/she has forgotten the proper circumstances. Similarly, a police officer must recognise the moment when the exercise of freedom of speech becomes a crime or—as a less frightening example—a professor of law must distinguish between an unusual but well-founded opinion of a student and lack of

knowledge. Other questions should be answered if freedom of speech appears in its dynamics, when one of the conflicting opinions has heavy a social background (media or a significant crowd behind it) while the other opinions are 'alone'.

We are probably not wrong in the conclusion that from the point of view of a jurist the accurate meaning of the freedom of speech is defined by its limitations. Mapping of these limitations is a long and difficult venture for legal writers since the case law of a legal system is in continuous change, and the comparative approach required due to the interaction of different legal systems makes the venture even more wearisome.

This collection of essays by András Koltay does not promise to reach the *Mirage of Freedom of Speech*. Instead, the author, an expert on the topic, shows—as a well-versed mountain guide—the amazing panorama of the history and the present perception of the freedom of speech. The book not only throws light on the ambiguities or controversial approaches but it reveals their depths. It can be heartily recommended for anyone who tries to understand what freedom of speech, one of the most fundamental freedoms of humanity, means and how lace-like its national and supranational case law is.

András Varga Zs.
Professor of Administrative Law
Pázmány Péter Catholic University

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Introduction

The volume that readers are holding in their hands is a collection of loosely connected essays, all of which, however, are related to the issues of freedom of speech and the freedom of the press. The English language literature on this subject is immense and constantly growing. Furthermore, since, due to the rapid changes in the social and technological environment, the relevant body of law and the regulations applied are also in a state of continuous flux, it is difficult to make statements in respect of this field that are both novel and durable. The essays in the book typically focus on major theoretical issues related to freedom of speech and the freedom of the press (always presenting the problems in the context of specific cases, court decisions and statutes) and attempt to express notions that are less conventional in European legal thinking, in order to achieve both novelty and durability.

Most of the essays attempt to find some sort of link between the two paradigms of freedom of speech prevalent on the two sides of the Atlantic that are, more often than not, extremely hard to reconcile with each other; this endeavour may be directed either at some sort of synthesis between American and European legal literature or the identification of the—usually different—answers offered to the same problems under the two paradigms. I happen to live in a country where, for historical reasons, we have been trying to put the modern concept of freedom of speech into practice for scarcely more than two decades so far. This Central Eastern European approach, which necessarily permeates the work of a Hungarian author, may, perhaps, be able to cast new light on the sometimes petrified doctrines of freedom of speech for readers from 'the Europe beyond the Iron Curtain', too.

The first six papers in the book deal with the theoretical aspects of freedom of speech and the freedom of the press. These are followed by texts (Chapters 7–13) investigating the most typical problems of the boundaries of free speech. The last four papers (Chapters 14–17) hardly fit into this framework; however, they are also related to certain issues regarding freedom of speech. Chapter 14 is once again a theoretical discussion, this time about the concept of public service media; Chapter 15 reviews the development and fate

of freedom of speech in Hungary, a country that gained its freedom in 1989; Chapter 16 discusses a decision of the Strasbourg Court that is only indirectly related to freedom of speech, while the text of Chapter 17 was originally intended as the afterword of the Hungarian version of a volume on American freedom of speech.

With some minor differences, some of the texts have already been published in English, too. Chapter 5 was published in the 2013 issue of *Pázmány Law Review*, Chapter 13 partly in *Iustum Aequum Salutare* (No. 4, 2007) and in *Acta Juridica Hungarica* (No. 1, 2013), while a slightly modified version of Chapter 16 was published in the tome *The Lautsi Papers*: *Multidisciplinary Reflections on Religious Symbols in the Public School Classroom* edited by Jeroen Temperman (Leiden: Martinus Nijhoff, 2012). I would like to use this opportunity to offer my sincere thanks to the original publishers who gave their consent to republication.

Thanks are also due to my colleagues who helped with the compilation and publication of the book, especially Reményi Édua, who did a marvellous and devoted job editing it; Nagy Szabolcs, who helped with the English translation of the texts; and all those with whom I had cheerful or even heated debates on various issues connected to freedom of speech. Without them this work would never have been born, so to some extent the responsibility is theirs, too.

Budapest
31 January 2013 *András Koltay*

1

Justifications for Freedom of Speech

> '[The] freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that, without free speech and assembly, discussion would be futile; that, with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty.'
>
> (Louis D. Brandeis, Concurring Opinion to *Whitney v California* 274 US 357 [1927])

Introduction

The rights to freedom of speech, freedom of conscience, and expression of opinion, and the theoretical bases of these rights have, to a greater or lesser degree, occupied thinkers of various eras for a long time. These rights can earn their full, modern meaning only in democratic states. It is no coincidence that, after the disappearance of Greek democracies, they were forgotten for a long time, only to reappear in the context of religious tolerance and, later, to become again the subject of public debate through the ideals of the Enlightenment. The rapid spread and strengthening of modern democracies brought an increased protection of human rights, and, thus, the right to free speech went through a considerable renaissance after World War II.

The modern theoretical foundation of freedom of speech has three main categories. In the following, I will review these three categories and will attempt to find an answer to the question of whether we need to choose among these categories to find solutions to the problems stemming from the practice of the right to freedom of speech.

Searching for the truth

According to the popular view, the first theoretical philosophical foundation of the right to freedom of speech comes from John Milton, and, according to Lord Macaulay, 'Of those principles, then struggling for their infant existence, Milton was the most devoted and eloquent literary champion.'[1] In 1644, during the English Civil War, he published his famous political pamphlet *Areopagitica,* subtitled 'A Speech for the Liberty of Unlicensed Printing to the Parliament of England.' The title refers to Isocrates' fifth century speech for the revival of the abolished Areopagus. Like Isocrates, Milton did not intend his work for public reading either. It was published exclusively in handwriting.

[1] Lord Macaulay, *Essays and Lays on Ancient Rome* (London: Longmans, Green, and Co, 1889) 14.

Milton advocated free speech and press because their restriction could obstruct God's will and love, for it prevents the flourishing of the 'free and scholarly spirit'. God gave man freedom to use them prudently. Man received the burden of responsibility, but, if society restricts his individual freedom and choices, he will not be able to carry the burden. With the help of the gift of reason, everybody must choose independently and by himself from among the available options.

> And yet on the other hand unless wariness be used, as good almost kill a man as kill a good book; who kills a man kills a reasonable creature, God's image; but he who destroys a good book, kills reason itself, kills the image of God, as it were in the eye.[2]

Milton firmly believed in the power of truth and that man, using God's gifts, has the ability to find the truth in the debate of different views.

> Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties. . . . And though all the winds of doctrine were let loose to play upon the earth, so truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and falsehood grapple; who ever knew truth put to the worse, in a free and open encounter.[3]

Milton did not call for unrestricted freedom of the press. He insisted on censorship of the books of 'Papist bigots' and required consistent but posteriori punishment for any abuse of the press. However, he found general oppression of speech unacceptable.

Milton hence approached freedom of speech from theology. His principal work, *Paradise Lost*, is just as important in the examination of his views on freedom of speech as the *Areopagitica* itself. In the epoch, the struggle between God and Satan represents the gigantic battle between truth and lies. According to many, Satan's lines are the most successful parts of the work. Milton gives Satan the chance, too, so that the debate is decided in open battle.[4]

Honouring truth as a fundamental value, independent of theological thinking, has gradually gained ground in philosophical thinking. Two hundred years after Milton, John Stuart Mill, the liberal British economist and philosopher, provided the classical justification for freedom of speech in his fundamental work *On Liberty* (1859), which influences philosophical thinking to this day. For Mill, truth is a fundamental value that is recognisable, and its recognition is a prerequisite for social development. Nobody is infallible. We can never be absolutely certain that what we think to be the truth is indeed the truth. Limitation of free speech is therefore impermissible, because the restricted

[2] J Milton, *Areopagitica* (Oxford: Clarendon Press, 3rd edn,1882) 6.

[3] ibid 50–2.

[4] J Durham Peters, *Courting the Abyss: Free Speech and the Liberal Tradition* (Chicago: University of Chicago Press, 2005) 81–2.

opinion might carry the truth.[5] As such, tolerance is necessary, and this is valid for genuinely true views as well, because if there is no constant debate, that view becomes the unchallenged truth, will be accepted only out of habit, and becomes petrified, *dead dogma*. Moreover, before being recognised, the truth must many times suffer persecution, and, although it is a 'pious lie' that truth prevails despite all persecution, 'in the course of ages there will generally be found persons to rediscover it . . . until it has made such head as to withstand all subsequent attempts to suppress it.'[6] Hence, free debate also serves the truth that had already been recognised.

Beyond this useful function, free speech also belongs to the domain of the individual's freedom, and, as such, it cannot be restricted unless its practice harms others.[7] Mill, who by the way, denied Christianity, similarly to Milton, believed in the individual, whose noble task is to develop his faculties as much as possible. However, even in his strong individualist views, Mill provided a place for the interest of the community too, the development of which requires the recognition of truth.

Mill's arguments have been heavily criticised. First of all, his theory assumes that the publication of the possibly true opinion has the greatest societal importance in all circumstances. On the other hand, however, there may be a number of situations in which the protection of other interests seems more important than the declaration of the potential truth. According to Eric Barendt's example, the restriction of racist and offensive expressions is more important than the examination of whether the given expression has any true content.[8]

According to many, Mill overvalues the role of public debate in society, because, even in the case of full freedom, only a fragment of the people participate in it. For the majority, expressing their opinion is not important at all, and they do not necessarily care which opinion prevails in a given debate. They perhaps do not even care as to what the truth is. Even participants in a debate do not necessarily formulate or modify their opinion based on reason or proper consideration of arguments and counter-arguments. Moreover, short-term interests, such as public order, may override the argument for recognising the truth, which could be a long and even unsuccessful process.[9]

Open debate does not necessarily lead to the truth or better individual or public decisions. Societies where resources to discover the truth are freely available (media, parliament, etc.) are fortunate, but we should not forget that these resources are also capable of operating against the truth.[10]

[5] JS Mill, *On Liberty and Other Essays* (London: Longman, Roberts, Green, 3rd edn, 1864) 34.
[6] ibid 54.
[7] ibid 100–1.
[8] E Barendt, *Freedom of Speech* (Oxford: Oxford University Press, 2nd edn, 2005) 8.
[9] F Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge: Cambridge University Press, 1982) 19–30.
[10] S Sedley, 'Information as a human right' in J Beatson and Y Cripps (eds), *Freedom of Expression and Freedom of Information: Essays in Honour of Sir David Williams* (Oxford: Oxford University Press, 2000) 241.

According to another counter-argument, Mill's principles cannot be applied to all protectable expressions. Mill does not distinguish between facts and opinions, although obviously examining the truth-content of the latter is more difficult—if possible at all. Truth cannot be interpreted regarding speeches not intended for public debate, either because they are obviously untrue or because their truth-content cannot be the object of examination (*e.g.* advertisements calling for shopping, pictures, or acts considered speech). Besides, Mill's theory can only be interpreted in connection with freedom of public debate, and, although in theory, truth could be examined in most private expressions, the law cannot and should not enter these territories. Hence, the 'truth-finding' function of free speech is significantly limited.[11] The theory fails to convince the reader that the disadvantage stemming from the possibility that false views could also spread freely in the absence of restrictions would be necessarily smaller than the disadvantages society would suffer if certain true views fell under the restrictions.[12]

We cannot rule out the possibility that the state is in the best position to define the boundaries of free speech. After Mill, this thought might seem heretical, but the majority has no doubt that freedom of speech should not be absolute and has to be limited. If we accept this, it is hard to turn to any other entity to carry out the task besides the state, more precisely, the legislator and judiciary. According to Lon Fuller's observation, Mill is mistaken when he views social contracts—law, customs, and institutions—as obstacles to individual liberty. These are the functions that provide the possibility of the effective exercise of legal rights, which would be impossible without these instruments.[13]

At times, Mill's theory carries certain self-contradictions. From his words, it appears he believes in the existence of objective truth, but this is contradicted by his assertion that man can never be sure of finding it. Although we should not confuse existence with the certainty of knowledge, if we can never be certain, truth becomes a distorted, distant, and abstract idea. In other places in his work, Mill writes that even unconditional truths require constant debate, otherwise they become lifeless, common, and unconsidered dogmas. However, we can only accept the utilities of false opinion, in other words that they force constant contemplation and the re-interpretation of the truth, if we first reach the objective truth.

We can discover further developments of Mill's theory in *Abrams v United States*, a landmark freedom of speech decision of the US Supreme Court.[14] The irony of history is that it was not the majority but the dissenting opinion of the legendary Supreme Court judge Justice Holmes that became a legal classic. According to Holmes, 'the ultimate

[11] RC Post, 'Reconciling theory and doctrine in First Amendment jurisprudence' in LC Bollinger and GR Stone (eds), *Eternally Vigilant: Free Speech in the Modern Era* (Chicago: University of Chicago Press, 2002) 164.

[12] W Sadurski, *Freedom of Speech and its Limits* (Boston: Kluwer Academic Publishers, 1999) 11.

[13] LL Fuller, 'Freedom: A suggested analysis' 68 *Harvard Law Review* (1955) 1305, 1312.

[14] *Abrams v United States* 250 US 616 (1919).

good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market'.[15]

The 'marketplace of ideas' theorem, based on Mill's theory but emphasised mainly by Holmes (the expression itself does not even appear in Mill's work), had a great effect on the American development of the right to freedom of speech. Later, based on this theorem, the Supreme Court overturned a number of regulations and court decisions that allowed state infringement on freedom of speech, quoting the lack of restrictions in the 'market'. According to this view, the only possible way leading to the truth is through the creation of a free marketplace of ideas, whose potential prime enemy is the state.

Holmes's view can be criticised, too. First of all, he makes the concept of truth highly relative. He finds that the truth is the view that emerges victoriously from market competition. This thought falls far from the idea of Mill, who believed in the existence of objective truth. But does objective truth exist?

Pontius Pilate, who as a Roman citizen had seen a great deal, asks Jesus 'Quid est veritas?' What is truth?[16] With his cynical question, to which he does not even expect an answer, he casts doubt on the existence of truth. Many in today's society also question the existence of objective truth. Although I believe that in most important questions the knowable truth exists, I do not deny anybody's right to err. The theorem that the truth cannot be forced on anyone is also acceptable. However, the denial of at least the theoretical possibility that the truth can come to light, even if we do not share Milton's optimism, has grave consequences for humanity. Not recognising the existence of truth denies the ability of humans to develop through experience and knowledge.[17] The denial of truth denies that man can learn and become closer to the truth through argument and proof.[18] Sometimes this notion confuses certainty about truth with its existence.[19]

If we consider the 'victor of the battle' theory as the truth and we cannot decide based on principles, then Holmes's theory, totally emptying the concept, basically means the denial of the existence of truth.

The 'marketplace of ideas' theory also ignores the fact that the market is not absolutely free. Even if we prevent state interference in the operation of the market, the creation of equal access for those who want to participate in the debate and want to comment on emerging issues is not guaranteed. The market can operate efficiently only with media assistance, to which equal access is free only in theory (although it is undeniably true

[15] ibid 630.

[16] John 18:38.

[17] HH Wellington, 'On freedom of expression' 88 *Yale Law Journal* (1979) 1105, 1130.

[18] K Greenawalt, 'Free speech justifications' 89 *Columbia Law Review* (1989) 119, 132.

[19] Schauer (n 9 above) 17–8.

that in theory everybody can establish a newspaper or television station). Of course, low cost or free channels facilitating market participation exist (Internet, flyers, and public speaking). However, these cannot ensure equal conditions for competition.

Proper operation of the market also assumes that the speaker acted with the intention of participating in the competition for finding the truth. However, this is not necessarily true, for example, in the case of those media products the primary objective of which is to maximize profit.

Just as with the state, private interests can be also a barrier to market access.[20] Moreover, considering that in liberal democracies the state has to keep a distance from basic rights, today, the restriction of the market based on private interests is a greater danger. To correct the imperfections of the market, the state, feared enemy of liberty, has the most effective means of protection. Some are convinced that even the worst but unregulated market is better that the smallest state interference and that the rules and customs of the market create a desired balance.[21] Lee Bollinger finds a parallel between faith in the market's ability to create a balance through self-regulation without outside interference and faith in the divine authority of sovereigns in the Middle Ages.[22] Nonetheless, the majority argues for regulation, and in reality, this solution prevails, as the 'marketplace of ideas', to a certain extent, is regulated everywhere.

Service of democracy

Although the idea of free speech as a condition for creating a just society appeared in the philosophical thinking of antiquity, it was later consigned to oblivion for a long time. (In Plato's *Republic*, Socrates responds as follows to the question on the nature of democracy: 'In the first place, are they not free; and is not the city full of freedom and frankness—a man may say and do what he likes?')[23] The theory, according to which freedom of speech is not only the exclusive right of the individual but also an instrument that serves making common societal decisions, gained ground in the *Utilitarian* (functional) theories of the modern era. According to John Stuart Mill's father James Mill[24] and Jeremy Bentham,[25] good governance could only become reality through freedom of speech and the press.

[20] S Ingber, 'The marketplace of ideas: A legitimizing myth' *Duke Law Journal* (1984) 1, 38–45.

[21] eg LR BeVier, 'The invisible hand of the marketplace of ideas' in Bollinger and Stone (n 11 above) 232–55.

[22] LC Bollinger, *The Tolerant Society* (Oxford: Oxford University Press, 1986) 161.

[23] Plato, *The Republic* (Maryland: Wildside Press, 2008) 302.

[24] J Mill, 'Liberty of the press' in *Essays on Government, Jurisprudence, Liberty of the Press and Law of Nations* (Fairfiled: Augustus M. Kelley Publishers, 1986).

[25] J Bentham, 'On the liberty of the press and public discussion' in J Bowring (ed), *Works of Jeremy Bentham,* vol. II. (Edinburgh: William Tait, 1843).

Modern legal thinking connects the foundation of democratic justification for free speech, often forgetting the predecessors, to the American philosopher Alexander Meiklejohn.[26] In his writing, which greatly influenced both American legal theory and judicial practice, Meiklejohn explains that the primary objective and purpose of the right to free speech is citizens' participation in the debate of, and decisions about, public affairs. Hence, the essence of law is to establish democratic self-governance. Participation must be effective, and this effectiveness can be achieved only with the establishment of certain rules.

We need to differentiate among various speeches based on their content. Speech relating to political debate (interpreted widely as speech including all public matters) enjoys special protection, while speech not necessary for decision-making in public affairs may be more strictly limited.

This theory considers speech primarily as an instrument. However, the desired objective is not to reach a higher ideal but to ensure the proper operation of society, which, in the case of democratic systems, is impossible without extensive and public decision-making. Meiklejohn envisages this type of decision-making as something similar to the old-time town meetings,[27] which of course cannot become reality without the intermediary role of the media and certain democratic processes (elections, referendum, etc.). Individual rights become secondary to public interest. 'The important thing is not that everybody is allowed to speak but that everything is said.'[28] Meiklejohn's theory was glorified in the landmark decision of the US Supreme Court in *New York Times v Sullivan*,[29] which stated that the primary objective of free speech is 'that debate on public issues should be uninhibited, robust, and wide-open'.

The most frequent criticism is that this theory leaves 'non-political' speech, those not contributing to expression of democratic will, defenceless. Meiklejohn soon refined the types of speeches he found worthy of protection to include any views connected to education, philosophy, science, literature, and the arts, as well as opinions emerging from any debates on public affairs, which are protectable in the name of democratic foundations.[30] Reading literature, for example, increases the knowledge of the individual

[26] His first *opus* in this subject matter was *Free Speech and its Relation to Self-Government* (New York: Harper, 1948), later published under a new title and with extended content: *Political Freedom: The Constitutional Powers of the People* (Oxford: Oxford University Press, 1960).

[27] A Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (Oxford: Oxford University Press, 2nd edn, 1965) 24.

[28] ibid 26.

[29] *New York Times v Sullivan*, 376 US 254 (1964). Meiklejohn's influence on the decision was confirmed by the judge making the resolution, see WJ Brennan, 'The Supreme Court and the Meiklejohn interpretation of the First Amendment' 79 *Harvard Law Review* (1965) 1, 1–20.

[30] A Meiklejohn, 'The First Amendment is an absolute' *Supreme Court Review* (1961) 245, 256–7.

who, in turn, will participate more effectively in public debate. The original version of the theory was criticised because it was overly narrow, and its refined version because it was limitlessly broad.[31]

Nevertheless, Judge Bork would draw stricter limits. He explains in his essay[32] that, if we want to assign real and enforceable substance to the right to freedom of speech, it can include exclusively ‘political’ speech, the purpose of which is to contribute to decisions over public affairs. Although Bork acknowledges that the example above is valid because literature plays an important role in public decision-making, he believes that this can be also true with regard to other behaviours for which the law does not explicitly provide constitutional protection. If we want to avoid extensive inflation of freedom of speech, in which case speech including, for example, advertisements and obscene expressions would also be protected, and, thus, the level of protection would decrease, only political speech should be provided with constitutional protection. This does not mean, as his critics often point out, that besides political speech all other speech would remain unprotected: by the way, even Meiklejohn does not believe this of speech outside of the categories he defines, but Bork would leave it to the discretion of society and its elected representative to determine the level of protection, which, naturally, could even allow the utilisation of legal instruments but would not be able to reach the degree of constitutional protection.[33]

As Bork himself admits with a half-sentence reference, this solution would be able to work only in old, ingrained democracies. The main weakness of his theory is that he attempts to create rules to govern the right to freedom of speech as if it were an undivided whole, although nothing justifies the necessity that all problems require the same solution, and that we do not provide different answers to different problems. Even if we believe that speech relating to public affairs deserves increased protection, we could still afford somewhat weaker constitutional protection for other speech.

Meiklejohn’s critics note that if we regard the assurance of the proper functioning of democracy as the primary purpose of freedom, this could include the possibility that the practitioner of rights in a democracy gives up his freedom. In other words, the majority decision of the public or their elected representatives restricts freedom of speech, thus realising the ‘tyranny of the majority’ over the individual. As Frederick Schauer points out, any restriction would contradict the sovereignty of the people, even the exclusion of the right to free speech from among the questions about which a decision can be made, through democratic means, even if the decision is limiting.[34] Although the state is often depicted as the potential prime enemy of freedom of speech, if, either directly or indirectly, a decision restricting individual freedom was made using democratic means,

[31] Sadurski (n 12 above) 21–2.

[32] RH Bork, ‘Neutral principles and some First Amendment problems’ 47 *Indiana Law Journal* (1971) 1.

[33] ibid 27–8

[34] Schauer (n 9 above) 41.

we should not necessarily consider it as some sort of imaginary, mythical monster, but as a democratic decision based on the principle of the sovereignty of the people.[35] Because, if we automatically deny that the majority can make decisions restricting the fundamental rights of the minority, constitutionalism, and within that the definition of protectable rights, becomes impossible, too, for there would never be an historical moment when full agreement on basic issues could be reached.[36]

However, democratic systems always incorporate guarantees to prevent excessive violation of individual rights. Democracy considers individuals who belong to the minority that 'lost' a given public debate as moral beings having equal rights and deserving equal respect. On the one hand, they should be provided with the same opportunities for the expression of their views, and, on the other hand, other general guarantees for freedom of speech should be created to ensure that legal restrictions do not exceed a generally acceptable level. (Legal regulations should be fortified, for example, by determining the range of two-thirds majority laws, designating certain constitutional rules irrevocable, or enhancing the judicial protection of political speech, but, most of all, by the creation of the necessary political and public culture.)

It can be held against Meiklejohn that his ideal of public debate (the modern 'town meeting') in practice is rather limited. To equalise access which, as we could see, applies not to every individual but rather to every relevant opinion, requires regulation, primarily the regulation of the media. Regulation is only possible exclusively by the state, which always carries some danger.

Recognising this threat, one of the branches of democratic thinking considers freedom of speech as insurance against state instruments capable of restriction.[37] One of the major representatives of this view is Schauer.[38] For him, state or government behaviour, especially in regulating speech, is always suspicious. The danger of abusing its vested power is always a possibility. Freedom of speech is a sort of warranty against state power, and if the state attempts to regulate this freedom, we have to be very cautious before accepting its decision. Certain elements of this theory surfaced with John Stuart Mill too, when he talked of the petrification of conventional truths or denial of infallibility.

The sharp separation of speech from other areas is questionable, since the theory permits in other places (for example, using available material resources, rendering certain government decisions, or restricting other basic rights) that the state enjoys greater if not unrestricted freedom because certain guarantees and checking mechanisms exist in these questions. Is it certain that speech is such a unique value that it deserves different

[35] Bollinger (n 22 above) 50.
[36] Sadurski (n 12 above) 29.
[37] RC Post, 'Meiklejohn's mistake: individual autonomy and the reform of public discourse' 64 *University of Colorado Law Review* (1993) 1109; Post (n 11 above) 165–7.
[38] Schauer (n 9 above).

treatment? This justification clarifies why we must not trust the state, but it does not justify why freedom of speech should be highlighted among the numerous other territories ceded to state regulation.

A more serious argument is that this justification does not place enough emphasis on non-state, private restrictions of speech. The state in democratic countries is forced to keep away from limiting basic rights, while warranties to prevent interference are considerably less available against private actors. For example, the media, governed by private interests, can easily control public debate.

Vincent Blasi, who considers the checking value of freedom of speech as its primary although not exclusive function, in his theory (which is similar to Schauer's), argues that the state always has far more effective resources to control speech and, through it, the entire public sphere. Hence, even in the most securely fortified and most well-balanced democracies, suspicion, constant monitoring, and restriction of state power are necessary.[39]

In *New York Times v United States*, one of the most important decisions regarding freedom of speech, the Supreme Court highlighted the importance of the checking function:

> The power of the state to exercise censorship over the press was abolished in order to ensure that the press would always possess the freedom to criticise the state. Protection is granted to the press in order to enable it to uncover and to disclose to the people the secrets of the state. Only a free and unrestricted press is able to expose the abuses committed by the state.[40]

The theory of Bollinger is quite original and may be classified among democratic views only with some generosity. For Bollinger, the most important function of free speech is to assist in the creation of social tolerance.[41] In his theory, contrary to the others, the response to the speech is more important than the value of the speech itself. Free speech helps the intellectual development of society as a whole in a manner in which, through the practice of this right, the individual learns to respect different opinions and tolerate offensive speech. If we consider freedom of speech as the instrument of this necessary intellectual maturation, that is fairly innocent and incapable of causing serious harm, argues the author, then the resulting increased social tolerance can shine on territories of community life outside of public debate and freedom of speech. However, according to August W. Schlegel, tolerance is a form of arrogance because it degrades questions of fundamental importance into mere private matters.[42] Bollinger, unlike others, finds tolerance important because of its benefits for public rather than individual interests.

[39] V Blasi, 'The checking value in First Amendment theory' 2 *American Bar Foundation Research Journal* (1977) 521.
[40] *New York Times v United States* 403 US 713, 717 (1971).
[41] Bollinger (n 22 above), especially 104–74.
[42] Durham Peters (n 4 above) 100.

A weakness of the theory is that it cannot be extended to a number of obviously protectable areas of speech. The theory is articulated regarding racist expressions and primarily makes sense in that context. Although we can speak of the necessity of tolerance, and for its sake, of the protection of free speech, in cases of violation of personality rights, for example, the improvement of society as a result of tolerance cannot be considered as a primary interest.

Another obvious criticism challenges the proposal according to which free speech necessarily leads to societal tolerance. After the change of regime, even the Hungarian Constitutional Court believed that wide protection of freedom of speech would by itself lead to the developments of healthy public opinion and public debate because treating citizens as adults would provide them with the chance to reject certain, in some cases abusive, opinions based on their own discretion resulting from the conclusions of a train of thought and not because of paternalistic rules forced onto them from above.[43] Today, many years later, we can reasonably doubt that the lack of restriction, if you will, the marketplace of ideas uninfluenced by the state, is indeed capable of creating by itself free public debate or at least contributing to the collective and proper decision-making of society. It is also doubtful that, even if the much desired tolerance develops in public debate, one of the areas of public life, it can influence other parts of life.

Bollinger's theory, which almost challenges to a manly duel any opinions wishing to operate against, or explicitly aiming to overthrow, democracy, not only is certain that democracy is strong enough to tolerate these opinions, knowing that they cannot become strong enough to realise their objectives, but also that these opinions serve to benefit democracy by increasing the tolerance of the community, thereby improving the human qualities of its members. This brave and genuine American theory, which considers community interest the most important, thereby justifies its place among other democratic theories. However, only there, in the homeland of two hundred years of uninterrupted constitutional development, can it be a subject of debate; the European eye looks at it as a curiosity.

The fundamental criticism of democratic views is that they classify speech entirely as the interest of the community and fail to provide adequate protection for the rights of the individual. This, however, is a rather simplifying and deformed generalisation. To ensure proper operation of the community, obviously, we need individuals with extensive and undisturbed autonomy. Communities are made up of individuals and if the state restricts their rights too much, they cannot not be adequately prepared for, and able to make, appropriate decisions. Thus, individual autonomy is very important in democratic theories, too, with the caveat that in certain situations where the interests and freedoms of the individual and community must be weighed against each other, and the former is not automatically prioritised, sometimes in the interest of the community, individual

[43] Decision No. 30/1992. (V. 26.) AB, V./3.

autonomy must be limited. Generally, everybody accepts that, in most areas of life, the state is entitled to make decisions, but in the case of freedom of speech, this is not necessarily true.

Individualist justifications

Modern, individualist justifications may be divided into two main groups, one of which considers freedom of speech as a value in itself and not as an instrument serving to achieve some other goals.[44] In this sense, man deserves free speech because the existence of freedom in itself contributes to the creation of a 'good life'. According to Ronald Dworkin's interpretation, man is entitled to this right, because in a just political system, the state treats every adult citizen as a 'responsible moral being'.[45]

The other, most populous group of individualist justifications, similarly to justifications aiming at the search for truth and the function of democracy, considers the right to freedom of speech as an instrument, an instrument to improve character, perfect the individual's personality, and attain autonomy.

Proponents of individualist views think that the developers of the opinions discussed before err when they mistake fundamental values for instruments serving to reach them. The effective functioning of democracy and finding the truth are not the fundamental values, but merely tools that help achieve the truly fundamental value, helping to attain and fulfil the freedom of the individual. Freedom of speech is not merely a right that derives from a chosen social order. Its values are not exclusively and primarily the result of the democratic system, but they come from the respect of the individual, which is a morally based, innate value. It is not democracy that brought about the protection of free speech but, on the contrary, the assurance of practising our freedom demands the functioning of democracy.[46]

Neither group can answer the question as to why free speech is so important for the development of personality. It is not proven at all that granting the right to freedom of speech is the most obvious way to achieve individual happiness. Most people would probably rather choose, for example, adequate access to work, the right to housing, or higher quality education as the necessary want of perfecting their personality. Joseph Raz calls this question the unsolved enigma of liberalism.[47] Although one could counter

[44] MH Redish, 'The value of free speech' 130 *University of Pennsylvania Law Review* (1982) 591, 603–4.

[45] R Dworkin, *Freedom's Law. The Moral Reading of the American Constitution* (Oxford: Oxford University Press, 1996) 199–202; and R Dworkin, *Taking Rights Seriously* (Massachusetts: Harvard University Press, 1977) 266–78, 364–8.

[46] J Laws, 'Meiklejohn, the First Amendment and free speech in English law' in I Loveland (ed), *Importing the First Amendment. Freedom of Expression in American, English and European Law* (Portland: Hart Publishing, 1998) 135–7.

[47] J Raz, 'Free expression and personal identification' 11 *Oxford Journal of Legal Studies* (1991) 303.

that providing freedom of speech is simpler and cheaper, this argument does not establish the necessity of the enhanced protection of this right. And if, with the enhanced protection of freedom of speech, we send a signal to people as to what we find to be the primary values in society, we restrict the most important value liberalism seeks to protect, that is individual autonomy or the freedom of choice stemming therefrom.[48]

The other problem arises from the difficulty of differentiating between the individualist justification for freedom of speech and the justification for the principle of general freedom. The autonomy of the individual could just as well be manifest in the expression of opinion as in other acts. And if we accept that the state has the right to control 'other acts', we cannot explain merely with the individualist approach why free speech should enjoy special protection.[49] Naturally, this right is an indispensable condition for the development of the individual and is necessary for the full perfection of what is human in us. However, this statement is just as true for specific cultural resources, such as the opportunities for access to education. Furthermore, contrary to these, speech is capable of causing damage and harm. And if we argue that, to a certain extent, we have to endure these grievances and tolerate free speech, this obligation cannot be justified by the principle of individual autonomy. However, it becomes individual autonomy if we explain it from democratic principles or from the principle of searching for the truth. The principle of autonomy does not answer how to solve the conflict when freedom of speech collides with other basic rights. Why should we give priority to autonomy manifesting through free speech rather than the autonomy of the individual offended by the speech?

According to the individualist justifications, the role of the state in maintaining freedom of speech is reduced to the prohibition of intervention and maintenance of distance, or, perhaps the state, which, according to its traditional role is enemy number one of free speech and is to be kept away from intervention by all possible means, may assist in certain narrow instances to create and preserve the conditions of the free market. According to Sir John Laws, this panic-like fear of state power in modern democracies is already an exploded notion. As a reaction after the fall of totalitarian regimes, it was absolutely justified that the negative side of fundamental freedoms, those demanding state distance from intervention, were emphasised, setting the rights of the individual on a 'moral throne'. However, if we really want to realise the ideals of liberty and justice, we must recognise the weaknesses of this concept. Modern societies have learned their lessons, respect the rights of the individual, but know little about the obligations of the individual or objective values.[50]

[48] SD Smith, 'Believing persons, personal believings: the neglected center of the First Amendment' *University of Illinois Law Review* (2002) 1233, 1257.

[49] T Győrfi, *Az alkotmánybíráskodás politikai karaktere* [*Political Character of Constutional Adjudication*] (Budapest: Indok, 2001) 118–9.

[50] J Laws, 'The limitations of human rights' *Public Law* (1998) 254, 255.

Individualist views fail to explain why full protection of freedom of speech should be provided to those whose aim, when exercising this right, is not to perfect their personality but more to achieve financial benefits or simply to provide a livelihood, for example, in the case of the majority of media speech (advertisers, journalists, television or radio show hosts, etc.). To extend the right to legal personalities or institutions seems unjustified based on individualist theories, because in those instances the practice of individual autonomy is not emphasised. Although a journalist may of course utilise the space and opportunity available to freely express his opinion, it is restricted by numerous internal, institutional mechanisms, and, in addition, those in the press able to improve their personality by exercising their right to free speech during their work, form only a narrow minority.

An often-voiced criticism of views placing the individual in the centre is that they do not emphasise sufficiently the interests of the community. Freedom of speech cannot be interpreted exclusively as an individual right, because the nature of speech as a basic human act has a primarily community nature. When we exercise our freedom of speech, we usually speak to someone to achieve something. It is a different question that nobody might listen, and, of course, we can consciously write for the drawer, too. However, these instances are the exceptions. The individual lives in a community, and the community is comprised of individuals. Hence, Friedrich A. Hayek, the libertarian icon himself, stressed 'the silliest of the common misunderstandings: the belief that individualism postulates (or bases its arguments on the assumption of) the existence of isolated or self-contained individuals, instead of starting from men whose whole nature and character is determined by their existence in society.'[51]

An argument against individualist justifications is that if we place autonomy at the centre of freedom of speech, regulating various speeches, differently providing them with different levels of protection, is impossible.[52] If the freedom of the speaker is the primary interest, what he says does not matter. Because each speech belongs to the speaker's autonomy, the level of protection remains the same in each instance, whether he is expressing his opinion in a public debate, or wants to sell products he manufactured, or, perhaps, wants to exhibit pornographic photographs. In this case, the legislator may choose between two avenues. Either he strictly protects even really harmful speech in the name of the supremacy of autonomy or, decreasing the threshold of protection, he restricts speech as part of public debate. Neither would be desirable.

In his theory,[53] Thomas M. Scanlon also emphasises the importance of autonomy. However, he places the listener instead of the speaker at the centre of fundamental freedoms. The individual can be considered autonomous when he has the opportunity to weigh the various arguments himself in a public debate and freely decide which views to

51 FA Hayek, *Individualism and Economic Order* (Chicago: University of Chicago Press, 1948) 6.
52 CR Sunstein., *Democracy and the Problem of Free Speech* (New York: Free Press, 2nd edn, 1995) 141.
53 TM Scanlon, Jr, 'A theory of freedom of expression' 1 *Philosophy & Public Affairs* (1972) 204.

accept. This is only possible if he has access to all relevant opinions. Speech must not be restricted based on the possibility that it can be harmful or could encourage the listener to commit harmful acts, because it would be an aggressive interference with autonomy. Scanlon believes he builds on Mill's theory in formulating his own. However, contrary to Mill, he does not define speech as an instrument, and does not find that its function is to discover the truth. He believes, in a Kantian manner, that autonomy, to be achieved by freedom of speech, is an end in itself.[54]

Scanlon extends protection to almost all speech, not only to speech connected to community matters, stating that the practice of individual autonomy requires full freedom. Restriction is only possible in very narrow circumstances, for example, regarding military secrets or oral speech that only provides technical information for the listener to commit a harmful act.

Later, Scanlon reassessed and modified his previous opinion and restricted the circle of speech that, in his view, deserves protection.[55] He accepted the limitation of speech not serving the listeners' interest in making autonomous decisions, as with, for example, false advertising.

However, the theory places too much emphasis on the listener, disregarding the interest of the speaker. Thereby, it sharply contradicts other individualist theories. It seems strange, for example, in the case of racist expressions, to refer to the autonomy-interest of the listeners rather than the speakers, unless we accept Bollinger's theory above. (The listener's human dignity could be violated.)

Scanlon does not take into account that most people, because of their situation, circumstances, and also intentions, are incapable of really practising their legal autonomy. They do not think rationally about the issues raised, and perhaps they do not even care about deciding upon them. In addition, to ensure that the relevant information reaches listeners, the available forums, primarily the media, require significant regulation. Autonomy, be it either the speaker's or the listener's, will remain a mere myth while access to channels promoting the efficiency of speech are limited. Tolerating the speaker's autonomy and free speech is easy because most of them have no means of channelling their opinions to the masses. The appearance of autonomy is in vain if the speaker has no real opportunity to influence public opinion and can only voice his views on a street corner or express his opinion at an Internet site nobody visits. And if an opinion somehow still reaches the media, numerous methods of censorship and other institutional limitations generally ensure that it is not especially effective.[56]

However, since there is no express limitation regarding access and there are forums, even if peripheral, through which the opinion may be freely expressed, the representative

[54] Barendt (n 8 above) 16.

[55] TM Scanlon, Jr, 'Freedom of expression and categories of expression' 40 *University of Pittsburgh Law Review* (1979) 519.

[56] Ingber (n 20 above) 78–85.

of the state can be as much at ease as if he had provided the citizens with real autonomy. The opposite is also true. If it is impossible that all relevant opinions reach the listener, we cannot speak of autonomous decision-making.

The autonomous person, or his community, after careful consideration, can provide the state with the right to limit speech if it determines that the danger posed would be excessive. This also belongs to the exercise of freedom of autonomy.

The 'freedom of speech model' (*liberty model*) developed by Edwin C. Baker finds this right justifiable primarily through individualist arguments. According to him, Meiklejohn is wrong and it is not important that we express everything but that society does not restrict anybody's right to free speech.[57] This is the principle rule of non-intervention already mentioned. However, Baker does not extend the validity of his theory to all types of speech. Only those that can really be viewed as the manifestation of the individual enjoy full protection. If the goal of the speech is primarily or exclusively generating profit, as, for example, in the case of commercial media (which, according to Baker, are no different from other, precisely regulated commercial enterprises), the freedom of these speeches is only justified if they are beneficial for society.[58]

Reconciliation of justifications

All justifications for freedom of speech can be criticised. Hence, some authors conclude that, because none of the theories could be employed to solve all problems relating to this right, in other words, none of the theories protect all speech deserving protection, or at least not sufficiently; the theoretical foundation of freedom of speech is an enterprise predestined to fail.[59]

Indeed, it is impossible to force all speech worthy of protection into the 'Procrustean bed' of a single, predetermined value.[60] However, pessimism is only justified if we consider freedom of speech as a value or goal in itself and not as an instrument helping to realise other values. In this case, supporting this right is really impossible, because we cannot justify why we should highlight it among the general categories of freedoms and provide free speech with greater protection.[61]

Nothing prohibits us from accepting the theory that freedom of speech serves at the same time, even if independently, other values that are loosely or tightly connected with each other. The three groups of justifications discussed above do not exclude the

[57] EC Baker, *Human Liberty and Freedom of Speech* (Oxford: Oxford University Press, 1989) 23.

[58] ibid 194–249.

[59] L Alexander and P Horton, 'The impossibility of a free speech principle' 78 *Northwestern University Law Review* (1983-1984) 1319, 1350–1.

[60] RC Post, 'Recuperating First Amendment doctrine' 47 *Stanford Law Review* (1995) 1249, 1272.

[61] F Schauer, 'Must speech be special?' 78 *Northwestern University Law Review* (1984) 1284, 1301–3.

possibility that, in a given question, we could apply several or even all three at the same time. Most categories of speech can be considered worth protecting under each theory. Even if there are certain categories not protected or provided less protection by some of the justifications, the different justifications are not mutually exclusive in any case.[62] While exercising freedom of speech, we can discover complex and substantially different issues (protection of personality rights, racist expressions, advertisements, content regulation of the media, etc.) that require individual examination and response. If a given question, based on two justifications, reached different solutions, it would not mean that in other cases the two could not coexist. Neither should be rejected simply because they collide with each other from time to time. In *Handyside v the United Kingdom*, a landmark decision on the interpretation of freedom of speech, the European Court of Human Rights in Strasbourg held that this right is an indispensable foundation of a democratic society *and* is a necessary and fundamental condition for the development of every person.[63]

One of the classic formulations of the synthesis of different values behind freedom of speech comes from Justice Brandeis of the US Supreme Court:

> Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that, in its government, the deliberative forces should prevail over the arbitrary. They valued liberty both as an end, and as a means. They believed liberty to be the secret of happiness, and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that, without free speech and assembly, discussion would be futile; that, with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty, and that this should be a fundamental principle of the American government.[64]

In these elevated thoughts, the values behind all groups of justification find their place. Brandeis's self-conscious commitment to the interest of the individual and the community at the same time is not a novel idea. According to Blasi, the study of ancient classics, especially Pericles' famous Funeral Oration, had a great influence on Brandeis, and this shines through his decisions.[65]

[62] Dworkin, *Freedom's Law. The Moral Reading of the American Constitution* (n 44 above) 201.

[63] Application No. 5493/72, judgement of 7 December 1976, Art 49 ('Freedom of expression constitutes one of the essential foundations of a [democratic] society, one of the basic conditions for its progress and for the development of every man.').

[64] *Whitney v California* 274 US 357, 375–8 (1927).

[65] V Blasi, 'The First Amendment and the ideal of civic courage: the Brandeis opinion in *Whitney v California*' 29 *William and Mary Law Review* (1988) 653, especially 681–2. For a detailed and comprehensive summary of Brandeis' freedom of speech concept see P Strum, 'Brandeis: The public activist and freedom of speech' 45 *Brandeis Law Journal* (2007) 659.

Actually, the values protected by the various justifications are not independent from each other. They are sometimes in a weaker and sometimes stronger connection with each other.[66] For example, Holmes's theory of the marketplace of ideas, which considers the essence of the right to free speech is the facilitation of joint decision-making, is very close to the democratic theories. Although, according to some individualist views, speech is a value in itself, most individualist theories deny this idea and consider speech as an instrument, namely, an instrument for the perfection of personality.

These values not only exist in parallel to each other but also relate to each other. The function of democracy requires a multitude of free, independent, and individual decision-making, not only in the polling booths but also in everyday life. Free decision-making cannot exist without the autonomy of the individual; autonomous decision-making requires the free marketplace of ideas, and the speaker needs autonomy as much as the listener. All relevant views must reach the latter if he wants to make an independent decision. To achieve this, even the speaker's freedom could be limited to a certain degree to allow equal access. Meanwhile, it is not at all necessary that we give up the hope of Milton, Mill, Brandeis, and others that, through debate, we might discover the true answer to the issue in question. According to Raz, the value at the centre of justification is a plural, multi-coloured society, which comes into existence through free speech, in which different opinions exist next to each other, and in which these opinions also tolerate the existence of others. This value appears in every group of justifications.[67]

In all three groups of justifications, we can discover elements which emphasise the interest of both the individual and the community as a whole. This task requires constant balancing, because we must consider simultaneously the widest possible expansion of individual freedom (autonomy) and the formal equality of all members of the community (regarding access both to information and to channels of expression) that is necessary for joint decision-making. If, during the balancing act, we are forced to choose between differing interests, sharply differentiating between the individual and the community does not make sense, because people are individuals and unique assets, and inseparable parts of the community at the same time. As John Donne, the Archdeacon of Saint Paul's Cathedral in London, once wrote:

> No man is an island, entire of itself; every man is a piece of the continent, a part of the main. If a clod be washed away by the sea, Europe is the less, as well as if a promontory were, as well as if a manor of thy friend's or of thine own were: any man's death diminishes me, because I am involved in mankind, and therefore never send to know for whom the bells tolls; it tolls for thee.[68]

[66] J Lichtenberg, 'Foundations and limits of freedom of the press' in J Lichtenberg (ed), *Democracy and the Mass Media* (Cambridge: Cambridge University Press, 1990) 334.

[67] Raz (n 46 above).

[68] J Donne, *Devotions upon Emergent Occasions* (Ann Arbor: University of Michigan Press, 1959) 108–9.

2
What is 'Speech'?

Before providing a conceptual definition of freedom of expression, we need to overcome a number of terminological issues. Besides the terminology used in the Hungarian Constitution, the fundamental right subject to our examination may also be denoted by the terms 'freedom of speech' (as first used by King James I of England),[1] 'freedom of opinion' or 'freedom of expression', and the various versions thereof. The question arises whether there is any basis for distinguishing among the spheres of application of these terms and whether the term 'freedom of expression', as used in the Constitution, is the most appropriate, most accurate and most sophisticated term available. When pondering over this question, it soon becomes clear that none of these terms is entirely accurate: the freedom in question is obviously not limited to 'speech' (*i.e.* verbal expression), nor is it solely intended to protect 'opinions' (*i.e.* the free expression of people's personal positions on certain issues). The 'freedom of the expression of opinion', on the other hand, is somewhat tortuous and it is also not quite accurate. Legal scholars use the three categories as interchangeable.[2] Accordingly, we, too, shall regard them as equivalent to each other.

The versatility that may be observed in the terminology usage of legal documents also supports this interpretation. In France, the 1789 Declaration of the Rights of Man and the Citizen proclaimed the free expression of *opinion,* while two years later the First Amendment to the Constitution of the United States of America codified *freedom of speech* and the *freedom of the press*. The first Hungarian Press Act of April 1848 declared the freedom of *thought* and the *press*, while, in the subsequent historical tradition of the country, the expression 'freedom of speech' was used almost exclusively. At the same

1 See LW Levy, *Emergence of a Free Press* (Chicago: Ivan R. Dee, 2004) 3–4.

2 See eg A Sajó, *A szólásszabadság kézikönyve* [*The Handbook of Freedom of Speech*] (Budapest: KJK-Kerszöv, 2005); G Halmai, *A véleményszabadság határai* [*The Limits of the Freedom of Opinion*] (Budapest: Atlantisz, 1994); A Ádám, 'Kifejezési szabadság és képviselői mentelmi jog' [Freedom of expression and parliamentary immunity] *Magyar Jog*, 1999/3.

time, Act I of 1946 ('On the Form of the State of Hungary') provided for the freedom of *thought* and *opinion*. In the Constitution of 1949 these were replaced with the term '*freedom of speech*', which expression was used until the comprehensive amendment of the Constitution in 1989. The text of the Constitution, effective as of 31 October 1989 (which was left unchanged upon the entry into force of the new Fundamental Law in 2012), intentionally returned to the terminology of the 1946 Act at several points and uses the term '*the free expression of opinion*'.

Having clarified the terminology issue, our task now is to provide at least a rudimentary definition of the concept of 'speech' that will satisfy our purpose. Obviously written and printed expressions qualify as speech, too, as do the various media programmes and cinematographic works. Images or other visually perceptible objects and depictions, such as works of art, may also qualify as speech. At this point the boundaries of the concept of speech start to become blurred, but in most cases it presents no problem to decide whether we are dealing with speech or not.

There are a number of verbally uttered or written expressions, in respect of which the protection of the freedom of speech is simply inconceivable: in the case of false testimony, the oath of marriage or an incitement to commit a felony, the question of whether these, too, should be granted the protection of free speech does not even arise. The words of an illegal threat themselves constitute the felonious act; false testimony is a felony in itself that is committed in the form of a verbal utterance; the 'yes' uttered before the priest or the marriage registrar itself constitutes the act of marriage; and verbal termination of employment is itself the act of firing the employee. Although these are all verbal expressions, none of them may be regarded as a manifestation of the freedom of speech.[3] At the same time, there are certain non-verbal acts which enjoy the protection granted to the freedom of speech, although they do not involve any utterances, for example silent protests, strikes, badges or the wearing of clothes (*e.g.* a uniform) that express an opinion.

As we have seen in the previous chapter, the fundamental right to freedom of speech enjoys special constitutional protection. Such protection requires a clear definition of its scope. Defining what is to be regarded as speech from the perspective of the protection of the fundamental right does not imply any degradation of the acts that are not included in the definition. Sufficient food, drink, work and love are all very important to mankind, yet eating, working and falling in love do not belong under the scope of the freedom of speech.[4] When defining the scope of the protection of the fundamental right, however, we need to know what belongs there. Of course, the definition of the scope of the right is not fully possible using exact categories and detailed, taxonomic enumerations. The right can only be described in abstract form; it is up to practice to define the specific forms of its manifestation.[5]

[3] CR Sunstein, 'Words, conduct, caste' 60 *University of Chicago Law Review* (1993) 795, 836–40.

[4] CR Sunstein, 'Low value speech revisited' 83 *Northwestern University Law Review* (1988-1989) 555, 555–6.

[5] L Sólyom, 'Mit szabad és mit nem?' [What is allowed and what is not?] *Valóság,* 1985/8., 12–4.

A distinction must be made between *drawing the boundaries of the concept of speech* and the *extent of the protection* granted to the categories thereby defined. First, it must be decided whether the expression or act in question may be regarded as speech; then, if the answer is yes, the next step is to decide the extent of protection granted to it. The categorisation of the protected forms of speech is a perilous task, as such categorisation may be based on the relative value of the forms of speech, and the act of evaluation always runs the risk of abuse. The method of categorisation is primarily used in the legal system of the US, but 'political speech', for example, enjoys stronger protection than the other forms in all legal systems. Similar caution is required when drawing the limits of speech, as this entails the exclusion of certain expressions/acts which will, therefore, not enjoy the protection of the fundamental right.

In theory these risks may be avoided if, rather than defining the scope and specific categories of speech, we posit, as a general principle, that no predefined boundaries exist; therefore, according to the general assumption, every form of conduct which expresses something automatically enjoys protection. In this case, only the limitation of such protection needs to be justified.[6] This method, however, would lower the level of protection: if we do not know what belongs under the scope of freedom of speech then we are not able to provide the special protection, as required by the constitution, to what does belong there.

The categories of speech

Within the protected scope of the freedom of speech there are certain forms of speech that enjoy greater protection than others. All legal systems provide special protection to '*political speech*', *i.e.* debates and expressions of opinion on public affairs, even if such speech infringes the rights of others. This is a logical consequence of the arguments positing the search for the truth as the objective of the freedom of speech and the group of democratic arguments. Political speech, therefore, may be viewed as the 'inner core' of the freedom of speech that enjoys the strongest protection. In the *Handyside* case[7] the Strasbourg European Court of Human Rights (ECtHR) stated that freedom of speech primarily protects political speech. In the *Sunday Times* case[8] the Court added to this that the margin of appreciation of states party to the Convention in respect of freedom of speech does not extend over the protection of political speech.

[6] T Campbell, 'Rationales for freedom of communication' in T Campbell and W Sadurski (eds), *Freedom of Communication* (Aldershot, Dartmouth, 1994) 18–9.

[7] *Handyside v the United Kingdom,* application No. 5493/72, judgement of 7 December 1976.

[8] *Sunday Times v the United Kingdom,* application No. 6538/74, judgement of 26 April 1979.

Of course, it is no easy matter to define this category either. Certain legal systems only regard speech related to the operation of the parliament as belonging to this category,[9] Robert Bork also interpreted the part of political speech worthy of protection in a restrictive way.[10] Most authorities, however, understand the category in a much broader sense: Alexander Meiklejohn included literature and the arts, too,[11] while, according to Eric Barendt, all utterances that may possibly contribute to the shaping of public opinion in such a broad field of subjects as an intelligent citizen may regard to be public affairs are to be regarded as political speech.[12]

It is possible that even political speech is restricted; however, this may only be done for special reasons, such as the prohibition of the broadcasting of political advertisements in the various media.

That is, in general political speech is 'more valuable' than other forms of speech. However, the American distinction between '*high*' and '*low value*' is also not without risk. Obviously, speech deemed as having lesser value must also be protected, but the level of protection granted to it will necessarily be lower. The grouping, at least along the lines of the distinction between political and non-political, however, is nevertheless necessary, for in the absence of such categorisation the same standard would apply to all forms of speech, which would result either in an undue increase in the protection of speech of lower value (*e.g.* pornography, advertisements, hate speech), or a decrease in the protection of speech involved in the debate on public affairs. Within the specially protected category, the level of protection is not contingent upon the extent of the damage caused by speech, *i.e.* in certain cases speech is granted priority even if it is injurious. For example, it is the interest vested in the open discussion of public affairs that serves as the rationale behind certain limitations of the protection of individual reputation and honour. In the case of speech of lesser value, however, protection may be denied to speech that causes excessive injury to a person or an interest protected by the constitution. The unification of the two categories would demand the exclusive application of only one of the two solutions.

Full precision is also impossible in respect of the distinction between valuable and less valuable speech. If, for example, a pornographic cinematographic work is produced that mocks a political figure, can this be presented on television? Such a film has actually been produced in Russia, featuring a look-alike of Yulia Timoshenko, the former prime minister of Ukraine. On the one hand this is a political statement, but, on the other hand, it is also a piece of pornography, which is classified as a less valuable form of speech.

[9] See eg the judgement in the Australian High Court *Lange v Australian Broadcasting Corporation* (1997), 189 CLR 520.

[10] RH Bork, 'Neutral principles and some First Amendment problems' 47 *Indiana Law Journal* (1971-1972) 1.

[11] A Meiklejohn, 'The First Amendment is an absolute' *Supreme Court Review* (1961) 245.

[12] E Barendt, *Freedom of Speech* (Oxford: Oxford University Press, 2nd edn, 2005) 162.

That is, the boundaries may be blurred but the difficulty of drawing them does not mean that they are not necessary—in the vast majority of cases, speech can be categorised clearly.[13]

There is also a question whether speech related to public affairs automatically enjoys special protection by virtue of its nature, or whether the various instances of speech may be limited on the basis of their *form*. Opinion related to public affairs may be expressed not only by way of refined and rational argumentation, but also in a coarse manner. The most important case in the US related to this was the *Cohen v California* case,[14] where the defendant appeared before the local court wearing a jacket bearing the phrase 'Fuck the draft' in protest against the mandatory draft during the Vietnam war. The US Supreme Court acquitted Paul R. Cohen, saying that an opinion may not be restricted due to the manner and the coarseness of its expression. This ruling contains a grain of the general principle of equality: not everyone is able to expound their decisions rationally; there may be opinions that are not perfectly founded and reasoned and not everyone has the chance to express their opinion to the public at large; however, drastic action, like Cohen's, may serve to amplify the otherwise hardly audible voice of the individual. It is an entirely different matter that, if we accept it, the question then arises as to whether this principle is restricted to expressions of actual and identifiable opinions or is applicable to what is simply offensive or denigrating speech (or, perhaps, we should also consider such speech as the statement of an opinion). At any rate, the Strasbourg Court stated that the shocking, outrageous or disturbing nature of speech does not in itself provide adequate grounds for limitation if no protected interests are violated.[15]

From among the possible justifications for the freedom of speech the protection of outrageous and abusive opinions that carry no content other than the sheer manner of their expression (pure swearing, for example) could, perhaps, be conceivable on the basis of the autonomy of the individual, but even this does not clearly constitute adequate grounds, since such speech hardly contributes to the perfection of the personality of the individual. In general, such speech may be restricted if it causes injury to others. Its protection is possible on the basis of the consideration of the above-mentioned principle of equality or on the grounds that, with regard to such speech, substance is identical to form: the expression of sheer fury, anger, or outrage.

The issue of hate speech gives rise to yet another question: in the case of this, the dignity of the targeted (ethnic, religious, or other) community is certainly injured, but usually it may be regarded to fall within the category of the 'debate on public affairs'. Different legal systems offer different answers as to how balance may be achieved between the two opposing interests.

[13] F Schauer, 'Categories and the First Amendment: A play in three Acts' 34 *Vanderbilt Law Review* (1981) 265, 294–5.

[14] 403 US 15 (1971).

[15] *Handyside v the United Kingdom,* application No. 5493/72, judgement of 7 December 1976.

Within the concept of freedom of speech, usually a distinction has to be made between *statements of fact* and *statements of opinion*. Naturally, both enjoy protection, but the degree of protection may be different. Although, in its decision in the *Gertz v Robert Welch* case, the US Supreme Court stated,[16] somewhat theatrically, that 'under the First Amendment there is no such thing as a false idea', this does not mean that the protection of opinions is unlimited in that country either. The Hungarian Constitutional Court had also declared that the fundamental right 'protects opinion, irrespective of the value or veracity of its content,'[17] however, this does not grant full immunity with regard to the expression of opinions either, since such 'external' restrictions as honour and human dignity may limit the freedom of the expression of opinions, even if veracity obviously cannot be considered in the case of such. Statements of fact, however—since, in contrast with opinions, their veracity may be put to scrutiny—are adjudged more strictly: false (unproved) statements of fact are not granted the protection of freedom of speech.

The sphere of less valuable speech is rather broad; practically all expressions that cannot be considered as part of the dispute on public affairs belong here, such as speech intended to achieve business purposes, *e.g.* advertising, obscene and pornographic expressions and works, as well as the violation of the reputation of private individuals in connection with affairs of a private nature. The possibility of the application of more severe limitations to such forms of speech is not the effect of any 'penalty' on the part of the legislator on the basis of their lesser value, although considerations of value are clearly necessary when making the decision. In the case of these, too, the stricter limitation is only admissible if such speech causes injury (misleading advertisements are damaging to consumers, the unlimited broadcasting of pornographic films impairs the development of minors, etc.), and since such speech is not a part of a debate on public affairs, in its case there is no reason to 'tolerate' the damage caused on the basis of the service of some higher purpose, such as the openness of public debate.[18]

The sphere of the freedom of speech has gradually broadened during the past decades. This process is clearly noticeable in Europe, too, but it is most fully-fledged in the US where today it extends not only over advertisements, but the issues of the financing of political campaigns and the distribution of state subsidies or even striptease performed in nightclubs. According to Frederick Schauer, this process is detrimental to the right to freedom of speech, as it extends over forms of conduct which, although not entirely void of communicative content, are not primarily intended at communication. However, since the Constitution does not provide for any specific rights upon which their protection could be based, in the absence of any better solution these too are included

[16] 418 US 323 (1974).
[17] Constitutional Court Decision No. 36/1994. (VI. 24.), Point II./1.1.
[18] JM Shaman, 'The theory of low-value speech' 48 *Southern Methodist University Law Review* (1995) 297.

under the scope of the freedom of speech. The consequence of this is a distortion of the original purpose of the right, be that the guarantee of undisturbed public dispute or the upholding of the autonomy of the individual.[19]

Speech and action

The categories of speech and action are almost inseparable. We are able to express a message, an opinion, through action; it does not require any text, whether uttered or written. Certain signs and symbols qualify as speech in themselves.

The argument of equality may be used here, too, in the interest of recognising the speech-like nature of actions: there are many people who are only able to express their message via certain, often shocking actions, by protest, the burning of the draft papers, etc.

However, a difference must be made between actions that express some content *in themselves* and those that are required for the expression of a 'classic' instance of speech. Handing out flyers enables the dissemination of their content; the organisation of a street rally gives publicity to the position of the participants. If we limit these actions, we do not directly restrict speech; such limitations only have an indirect effect on speech. This, of course, does not mean that, in the case of such actions, 'anything goes', since, for example, restricting street demonstrations would imply a significant violation of the freedom of speech.

Nevertheless, in general in these instances, the scale of restriction is lower and it is sufficient if the limitations are not (even indirectly) discriminative and are proportionate and reasonable.

Acts may constitute speech, but where should we draw the boundary? We could hardly say that shooting the American president would be an exercise of the freedom of speech, although it is certainly an act that is capable of conveying a message (the assassin's misgivings towards the policies of the president). Identifying this boundary is essential, since any action may be regarded as conveying a message (if I drive a Mercedes-Benz, that is just as good an expression of my social status and world-view as if I only wore Hugo Boss products). Given this, if we do not identify the boundary of the application of the freedom of speech, it will necessarily merge into the general principle of freedom and thus lose its special protection.[20] This task is necessary, even if we can tell in advance that no clear boundary may be drawn between what is and what is not protected by freedom of speech.

[19] F Schauer, 'First Amendment opportunism' in LC Bollinger and GR Stone (eds), *Eternally Vigilant: Free Speech in the Modern Era* (Chicago: University of Chicago Press, 2002).

[20] F Schauer, 'Speech and "speech": Obscenity and "obscenity". An exercise in the interpretation of constitutional language' 67 *Georgetown Law Journal* (1978-1979) 899, 912.

Drawing this boundary is possible from several aspects. We may examine whether the given act furthers an objective that we are ready to accept as the justification for freedom of speech. Does it contribute to democratic decision-making or the exercise of the autonomy of the individual? We can examine the act from the aspect of the actor, too. Does the actor intend to express something with the action? If the answer is yes, that does not automatically entail the protection of freedom of speech, since we cannot say, for example, that non-payment of taxes is an acceptable form of giving expression to deep misgivings towards the current economic system.

Approaching the issue from the opposite direction, we may pose the question what significance could the *understanding* of the expression have, *i.e.* for an act to be regarded as speech and, thus, to enjoy the protection of the freedom of speech, is it necessary that the opinion expressed by it be understood by someone? If yes, who and how many people should be able to comprehend it? For example, one of the circuit courts of the US rejected the argument of the defendant, according to which parking a wrecked car in front of the defendant's house was not in breach because the defendant intended to express his protest against the conduct of the police, who had caused the damage to the vehicle. According to the court, not many people would interpret this act as an expression of opinion.

According to Cass R. Sunstein, the two aspects should be combined, *i.e.* an act may be regarded as the exercise of free speech if it is intended to express a message and this message is understood. Of course, on the basis of this, the assassination of the president could be interpreted as free speech. Sunstein's reply to this is that, in this case, an interest of appropriate weight would exist, in the name of which freedom of speech may be limited.[21] For my part, I would not go so far when defining the scope of freedom of speech, since Sunstein's theory fails to answer the question as to which are those acts that qualify as speech that are not restricted on the basis of the damage they cause, because in their case a higher threshold of tolerance is applied as they contribute to public debate. Since acts that qualify as political speech (protests, wearing badges, uniforms, etc.) are granted the same (heightened) protection as any other instances of political speech, if we do not limit this scope somehow, the assassination of the president would therefore also qualify as political speech, although it is an act that hardly deserves special protection.

According to Robert C. Post, speech is not valuable in itself and should only be granted legal protection if it carries some *constitutional value* (which may be the service of democracy or the autonomy of the individual).[22] This reminds me of an exhibition held a couple of years ago in the Budapest Műcsarnok, entitled *Light and Shadow*, which intended to present visitors with a comprehensive overview of five centuries of French painting. At the end of the exhibition, among the works of contemporary artists, a

[21] Sunstein (n 3 above) 833–6.

[22] RC Post, 'Recuperating First Amendment doctrine' 47 *Stanford Law Review* (1995) 1249.

battered picture frame was put on display. This is a good example of just how important the intentions of the communicator and the understanding of the recipients are for speech to be given protection: had the artist put this very same picture frame on the street in front of their Paris home, they would probably have received a fine for littering. In the Műcsarnok, however, this very same object was transformed into a recognised piece of art which, according to the catalogue, intended to express that nothing, not even the painting itself, can step in the way of the spreading light. One of the reasons that we regard this work as an instance of speech is that we assume that it intends to express something and that perhaps there are some who understand what it intends to express, simply because it was put on display. The intention of communication and its value *automatically* created by that intention, therefore, may be an important consideration in recognising something as speech. However, it is inappropriate as a criterion for delimiting the sphere of protected actions, as it cannot tell us *where speech ends*.

The most promising method for drawing the boundary is if we approach the issue not from the aspect of the message or nature of the act, but examine the reason for restriction instead. If, for example, someone were to paint a piece of graffiti on the Millennium Monument in Budapest Heroes' Square, this action would be punishable even if the perpetrator claimed that the act was exclusively motivated by a grudge against King Béla IV of Hungary. For the reason behind the restriction of speech, *i.e.* the protection of public monuments, is a legitimate objective, while the person who committed the act could also have expressed their opinion in a different, legitimate way. This yields the following general principle: restriction is admissible if it is based on *another legitimate interest* and is not expressly directed at the limitation of speech. The would-be assassin of the president is arrested by the police in the interest of saving the president's life rather than in the interest of the restriction of the expression of the assassin's political opinion. If, however, such restriction incidentally limits freedom of speech too, it should be examined rigorously whether the legislator was indeed motivated by a different legitimate interest, rather than just claiming such an interest in order to limit the freedom of speech.

Actions that are restricted in this way simply cannot be regarded as instances of speech (here, we reach a conclusion opposed to that of Sunstein on the basis of the same principle; according to Sunstein, any action may be regarded as speech, and it is on the basis of the harm caused by it that we may decide whether to grant it protection or not). According to the position of the Criminal Department of the Hungarian Supreme Court issued in September 2008, throwing rotten eggs at a public gathering may not be regarded as the expression of opinion. The reason for the issue of the position was that, following the 2008 summer gay march in Budapest, where eggs were hurled at the participants, a part of the public opinion claimed that this action may be regarded as the exercise of freedom of speech and may not, therefore, be sanctioned. The position of the court refuted these assumptions and established that throwing objects is illegal and may, on the basis of the facts of the case, constitute a disturbance of the peace or defamation by action. If throwing eggs disturbs a registered gathering then, depending on the

circumstances of the case, it may constitute the 'offence of preventing another person in the exercise of his right to association or assembly' (Criminal Code, Article 174/C).

In the *United States v O'Brien* case,[23] the US Supreme Court ruled that although burning draft papers may certainly be regarded as an expression of one's opinion (David P. O'Brien's action had been clearly demonstrative in nature), it violates the state's interest related to the routine and undisturbed management of the draft. As such, the rule on the basis of which the destruction or defacement of the draft order is punishable and on the basis of which O'Brien was convicted is not expressly directed at the limitation of freedom of speech, but serves the protection of another legitimate state interest. Consequently, O'Brien's conviction had been legal and the legal provision applied was not unconstitutional.

If we take the purpose of the limitation as our ordering principle in defining the limits of freedom of speech, we are presented with the problem that it is not always easy to identify the reasons behind the actions of the legislator. However thoroughly we examine whether the limitation of speech is only collateral damage or whether it had been the express intention of the legislator, this is something that cannot be decided in every case. In our example set in Heroes' Square the answer is clear, while in the *O'Brien* case we cannot be as certain, given the intensity of the protests against the Vietnam War (the cult movie *Hair* also starts with a scene where the actors burn their draft papers). On the other hand it is a fact that, even in cases where the express purpose of the limitation is to prevent certain instances of speech or communication, this does not automatically constitute a limitation of freedom of speech—in this respect it is sufficient to cite false testimony or fraudulent contract.

The ever-broadening interpretation of freedom of speech is apparent from the standard practice of the US Supreme Court, according to which striptease and other dances performed by scantily dressed ladies in nightclubs are part of free speech.[24] Although the court sourced its inspiration from other corners, the theoretical support of the decision was provided by John Milton, who wrote that, if censorship were to be reinstated, there 'must be licensing dancers, that no gesture, motion, or deportment be taught our youth but what by their allowance shall be thought honest'.[25]

The subject of the legal disputes that arose was usually the order issued by the given local government that restricted the issue of the licences required for opening night clubs. Such restrictions were countered by reference to the freedom of speech, claiming that the dance of the ladies was actually an exercise of their First Amendment rights, which were thus violated by the local government. Although—as no lesser figure than Milton confirms—dance is certainly capable of being a form of the exercise of freedom of speech, the truth of this statement may be called into doubt in the case of the specific

[23] 391 US 367 (1968).

[24] See eg *Barnes v Glen Theatre* 501 US 560 (1991); *City of Erie v Pap's A.M.,* 529 US 277 (2000).

[25] J Milton, *Areopagitica* (Oxford: Clarendon Press, 3rd edn, 1882) 24.