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26 The Possibilities of the Restraint of Media Content Prior to Publication

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One of the cornerstones of the freedom of the press is that the censorship of media content is not permissible. Of course, the adoption of this principle depends, to a large extent, on what we regard as censorship and how can we differentiate it from constitutionally allowed prior restraints.

In Part I I shall attempt to distinguish between prior restraints and *a posteriori* restrictions, i. e. restrictions applied subsequently to publication and then classify the forms of the former type of restriction. In Part II, I shall discuss in greater detail the relevant regulations and constitutional concepts of England, the United States and Hungary and mention the key decisions of the European Court of Human Rights (ECtHR) pertaining to the subject.[1] This review is intended to provide evidence that prior restraints exist and are constitutionally permissible to a greater extent than we might expect.

26.1 The Classification of the Forms of Restriction Prior to Publication

26.1.1 The Distinction between Censorship and Liability after Publication

In a certain sense, liability after publication imposes a greater burden on the press: in the event of an infringement it is uncertain whether court proceedings will be initiated and if so, the decision and the amount of damages cannot be foreseen. By contrast, in the case of prior restraint, the only sanction (in the examined legal systems) is the prohibition of publication.

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1 The selection of the presented legal systems may seem arbitrary. Nevertheless, Hungary was an obvious choice, and the very special approach of the English and US legal systems deserve a detailed analysis. The United Kingdom was involved in the most important ECtHR decisions regarding the examined issues, and the US free speech law seems to be more and more influential in European legal debates and the development of the free speech doctrine.

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As the US Supreme Court noted in the *Nebraska Press Association* case,[2] '[i]f it can be said that a threat of criminal or civil sanctions after publication "chills" speech, prior restraint "freezes" it at least for the time.'[3] It is possible that the court and Bickel were not quite precise, because the general practice of consistently administering severe punishments is equally capable of leading to self-censorship and, consequently, to *de facto* restraining publication.

Our misgivings towards all forms of prior restraint are rooted in history rather than rational considerations: any prior restraint of publication awakens bad memories in the public consciousness, making a mockery of hundreds of years of historical tradition. It is therefore necessary to make a conceptual distinction between (inadmissible) state censorship and (in England and in the US narrowly admissible) prior restraint.

Another argument against prior restraint is that, in the absence of such, all ideas may be published at least on one occasion and the law may only prohibit their further distribution. Given the regulations of the present, this argument is hardly effective, since today the forms of prior restraint are only applicable in respect of content that is clearly illegal and has been qualified as such by the court (publication of state secrets, infringement of privacy), and there is general agreement that the publication of such does not serve the interests of the community and so, due to the harm it is capable of inflicting, such publication does not deserve even a single chance.

26.1.2 Typology of Restrictions Prior to Publication

In the following I shall attempt to classify the forms of the restriction of media content prior to publication. Among these, licensing and the duty of registration apply not to any individual content item, but to the market entry of a service provider in general and therefore we tend not to regard them as instances of the phenomenon of prior restraint.

To date, the system of licensing as a precondition to the market entry of media service providers (the start of the provision of media services) is a generally practiced approach. The primary reason for this was originally the scarcity of the frequencies indispensable for the distribution of media services. With the advent of the digital switchover all over Europe, however, this scarcity will soon be a thing of the past. In the case of radio media services, the use of analogue frequencies and, thus, the survival of licensing systems, is still a general phenomenon. In fact, the problem of bandwith and the access to new digital platforms or for example search engines seem to be capable to reproduce the scarcity problem.

2 *Nebraska Press Association v. Stuart*, 427 U.S. 539 at 559, 1976.
3 Citing A.M. Bickel, *The Morality of Consent*, New Haven, Yale University Press, Vol. 61, 1975.

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Media services that use analogue frequencies are granted the license for media service provision on the basis of the tender organised by the state media authority in many legal systems. This could be regarded as a prior restraint of market entry; however, if the appropriate legal guarantees are in place, such restraint is constitutionally acceptable all over Europe. As paragraph 1 of Article 10 of the European Convention of Human Rights (ECHR) states, 'This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.' Accordingly, the jurisprudence of the ECtHR also permits the maintenance of such licensing systems.

Somewhat similar to licensing is the duty of registration,[4] which has two forms. Registration is a simple administrative act, most often consisting of just providing the basic data of the press product or media service (which do not need a licence). If, however, the regulations stipulate registration as a condition for market entry, it may be viewed as similar to licensing, since it is the act that institutes the right to provide the service; i.e. in the absence of registration the service may not be launched. The other form of registration is the administrative duty that is independent from the right, i.e. the latter subsists even if registration is not performed; however, it is the duty of the service provider to register certain data. This latter form cannot be perceived as prior restraint, since the service may be launched independently from registration.[5]

Registration is an administrative act, but in theory, it could have severe effects leading to censorship if the law is applied in an arbitrary manner. The reasons for maintaining it include the interests of the various services, too, as it provides the easiest possibility for preventing market problems arising from using similar or identical names for similar services. The existence of an up-to-date public register is also necessary for the oversight of the services by the authorities or the courts. Several countries reject this solution, while others have been applying it for a long time; if the appropriate legal guarantees are in place, registration and censorship are clearly distinguishable from each other.

In the typology, censorship and prior restraints deserve a more detailed analysis, as they are more closely connected to the restriction of specific contents and are therefore more sensitive from a constitutional point of view.

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4 In English legal terminology, 'registration' can also be considered as a form of licensing, though it is different in many important aspects, as discussed in the following paragraphs.

5 Both of the above mentioned registration systems are present in Hungarian media regulation. In the case of linear media services (television and radio), registration is a precondition to the start of operation (Arts. 41-42 of Act CLXXXV of 2010 on Media Services and Mass Media), while in the case of press products – in contrast to the previous regulation (Para. (2) of Art. 12 of Act II of 1986 on the Press) – publication may be started and pursued independently from registration, although registration has remained mandatory (Arts. 41, 45-46 of Act CLXXXV of 2010 on Media Services and Mass Media). Registration is a purely formal, administrative process that does not include any examination of the substance or merit of the service, i.e. it is not 'licensing'. The regulations only provide for a formal examination during the registration process; the authority has no discretion to adjudge the service; i.e., if the conditions prescribed by the law are met then the authority is required to register the service.

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26.1.3 The 'Historical' Censorship

The legal term 'censorship' means the intervention of the state into the content published by the media. During the course of the historical development of the concept of the freedom of the press, it became a generally accepted notion that 'censorship' – as prior and arbitrary intervention into the content – is not permissible, while ex post accountability for the publication of infringing contents is acceptable. The licensing requirement for launching newspapers and official censorship had been formally lifted in England in 1694 and, thanks to Blackstone, the notion that the freedom of the press means freedom from prior restraint became generally accepted. 'The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published.'[6]

In Hungary, the abolition of censorship was the first of the twelve demands of the young revolutionaries in the Hungarian capital at the beginning of the revolution against the Austrian Emperor in March 1848. A good half a century earlier, in the late 18th century, the rules of press censorship had been tightened. The gradually increasing severity of censorship starting with 1793 put a strong brake on the development of newspapers and periodicals reflecting the Hungarian Enlightenment and halted it entirely with the thwarting of the Jacobian movement. The Emperor's decree of 25 June 1793 declared the auditing and licensing of the operation of printing presses to be a royal privilege. By 1795 all periodicals had ceased, the number of newspapers declined and their content became drab. According to a royal patent of 1806, opening book-stores also required the permission of the sovereign. On the basis of the order of the Chancery of 5 June 1818, the business of booksellers and libraries was put under special surveillance. Two forms of censorship had evolved: revision and censorship proper.[7] 'Revision', as provided for by the Sovereign Court's decree of 18 April 1793, consisted of controlling the books and press products imported from abroad. Only books and newspapers approved by the central censorship office were allowed to pass the border. 'Censorship', as provided for by the decree of 25 February 1795, consisted of prior approval by the official censor, including also the post-auditing of books submitted as deposit copies. According to the decree of 18 April 1793, all printing presses were required to hand over three copies of their publications to the censor. The publications were reviewed and, if irregularities (political content unacceptable for the regime) were detected, the competent censor was held liable; this ensured that censors proceeded with utmost care during the course of their work.

6 W. Blackstone, *Commentaries on the Laws of England*, 16th edn, Vol. 4, London, 1825 (first published: 1765-1769) pp. 151-152.

7 M. Bényei: 'Reformkori országgyűlések a sajtószabadságról' [The National Assemblies of the Age of Reform on the Freedom of the Press], 164 *Debrecen* (1994), pp. 15-17.

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Historically, therefore, the concept of censorship had been clearly linked to the state, the potential apparatus of oppression capable of thwarting the freedom of the press. In the modern world of the media, however, from the second half of the 20th century, the scope of the concept was broadened considerably, and censorship, as a legal term, is used in a much wider sense today than previously. On the one hand, the concept of censorship today is not linked uniquely to restraint by the state, since various private interests are also capable of restricting media content, and, on the other hand, censorship is not necessarily a result of external forces, i.e. internal censorship or 'self-censorship' also has to be reckoned with.

According to Frederick Schauer, the meaning of the concept of 'censorship' has become hazy.[8] On the one hand, censorship may result not only from the actions of the state, but from other phenomena of the operation of society, too. Censorship may, of course, still be initiated by the state (according to Schauer's example, this was the case when a Cincinnati art centre initiated criminal proceedings because of the display of Robert Mapplethorpe's pictures), but it may be initiated by private enterprises, too (e.g. if General Motors fires employees who publicly criticise the reliability of Chevrolet cars or if the editor of a newspaper changes the content of an article written by a subordinate). Also, censorship may be direct (if the state or another party expressly intervenes into already finished content) or indirect (e.g. if the state arbitrarily deprives certain artists from state support granted to the arts and thereby these artists are unable to express their views to the public). We may also regard it as an instance of censorship when, due to the opinions – e.g. hate speech – directed at them, someone chooses not to participate in the public debate; this is the so-called silencing effect.

At the same time, the borderline between censorship and acceptable intervention has become blurred. If a picture is removed from the wall of the museum, not by the police or a court of law but by the curator of the exhibition, claiming that it would be a mistake to display that picture, we would tend to treat this issue as belonging under the sole discretion of the curator in question, although its effect is the same as that of the procedure of the authorities. If the dean of a university tells professors what to teach and how to teach it, we might regard this as censorship, while if the professor decides not to speak about a subject that is considered important by others, then this is deemed a part of the freedom of teaching, although, in respect of the students, the effect may be the same in both cases.

According to Schauer, the question is whether the decision of the curator should be preferred over the decision of the state, or whether the forces of the free market should be given preference over the forces of politics.[9] These questions lead us away from the issue

8 F. Schauer, 'The Ontology of Censorship', in R.C. Post (Ed.), *Censorship and Silencing – the Practices of Cultural Regulation*, Getty Research Institute for the History of Art and the Humanities, 1998, pp. 147-168.
9 *Ibid*., p. 162.

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of censorship: they are about the functions and decisions of institutions created and maintained by the state which nevertheless enjoy autonomy (arts foundations, schools, libraries, etc.).

26.1.4 State Censorship vs. Private and Self-Censorship

From the point of view of our investigation, the manifestations of so-called private or self-censorship cannot be regarded as forms of prior restraint either. The concept of censorship is historically tied to a state body (authority, court of law). The media themselves, however, can also engage in 'screening' activities which, when all is said and done, are rather similar to censorship. This is conceivable in several ways and situations. On the one hand, the media may refuse to publish a particular text (article) or recording, or may refrain from discussing certain topics on the basis of the given medium's general programming policy, editorial line or interests. This is a voluntary decision on the side of the media, albeit one that bars certain content from the given public forum. On the other hand, due to external (legal, political, social) circumstances, the media may decide that it is wiser to avoid confrontation, the dangers of legal proceedings or informal political attempts to intervene, and to refrain – although involuntarily and against its will – from discussing certain topics and affairs. It is this latter type of restraint, caused by indirect force, that we tend to regard as self-censorship, even though the former is an almost everyday phenomenon in the media.

At the same time, regulations that are not sufficiently precise may also lead to self-censorship. In the *Lakewood* case,[10] the US Supreme Court ruled that the uncertain standards of the issuing of permits (for the placement of newsracks on public grounds), i.e. the discretion granted to the issuer of the permits, prompts the applicant for the permit to exercise self-censorship and, consequently, is constitutionally unacceptable.

It is also conceivable that the law itself demands the publication of certain content. Examples for this are the statements published as a result of the exercise of the right of reply or the obligation of public media service providers to publish political advertisements during election periods. There is no general right of access towards the media available to all; however, if a media provider complies with the provisions applicable to its operation, it cannot be sued successfully for refusing to publish certain contents.[11]

As we have seen, intervention into the freedom of the media may not only come from the outside; it may also originate from *within*. It is a basic truth that the media, which costs a pretty penny, are sustained not by the readers, listeners and viewers, but by the advertisers.

10 *City of Lakewood v. Plain Dealer Publishing Co.*, 486 US 750 (1988).
11 M.E. Price, 'An Access Taxonomy', in A. Sajó and M.E. Price (Eds.), *Rights of Access to the Media,* 5th edn, Kluwer Law International, Boston, 1996.

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The logical inference lends itself that, on the basis of the business nature of the enterprise, it is not the articles and programmes produced by the media that are the 'goods' offered for sale. If this were not so then the media – at least in the present form and to the present extent – could not sustain themselves. The 'goods' are actually the viewers, the listeners and the readers who are offered to the advertisers for advertising fees directly proportionate to their quantity. The reason for offering popular products, i.e. newspapers and programmes, is to attract many prospective customers and turn them into consumers of the given medium and, thus, the advertisements carried by it. The advertisers are the primary force behind the entire process, even if their effect is usually indirect and remains unperceived. In the market, where large amounts of money are at risk, tough rules prevail: advertisers like to see their ads appear in the media environment they consider appropriate, if possible, close to programmes that are popular, non-controversial and entertaining and which emanate peace and bliss or, on the contrary, generate excitement and tension without any real risk. Show programmes, series, game shows, magazine programmes and action movies are the perfect vehicle for this; much less so are programmes that dwell on real problems, involve investigative journalism or higher culture or are simply of interest to a smaller segment of the population's strata without significant purchasing power.[12] On the level of the large, mainstream media (nationwide television services); this leads to the homogenisation of the offerings of the competing programme flows. Free competition, which allows the operation of several competing media providers, is primarily conducive to *quantity*, but not necessarily to *quality*. Advertisers categorise their potential customers (the target group) on the basis of financial situation (purchasing power), suggestibility and other characteristics that hardly fit the democratic principle of 'one man, one vote',[13] or the constitutional right to equality.

Nevertheless, private censorship applied on the basis of subordination to maximising profits (although it may just as well be a result of the personal interests or political convictions of the owners or employees of the media, which correspond to the interests of the advertisers) cannot be identified with external censorship exercised by the powers that be. In the case of the former there is no state despotism, nor any otherwise acceptable external intervention closely scrutinized in the light of legal guarantees. Under the rule of law,

12 R.W. McChesney and B. Scott (Eds.), *Our Unfree Press – 100 Years of Radical Media Criticism*, New Press, New York, 2004, pp. 119-176; E.C. Baker, *Advertising and a Democratic Press*, Princeton University Press, 1994; R.K.L. Collins and D.M. Skover, *The Death of Discourse*, Carolina Academic Publishers, 2005; D. Croteau and W. Hoynes, *The Business of Media – Corporate Media and the Public Interest,* Thousand Oaks, and London, New Delhi: Pine Forge Press, 2006; E.S. Herman and N. Chomsky, *Manufacturing Consent: The Political Economy of the Mass Media*, Pantheon Books, New York, 1988; R.M. McChesney, *The Problem of the Media. US Communication Politics in the 21st Century,* Monthly Review Press, New York, 2004; Lawrence Soley, *Censorship, Inc. – The Corporate Threat to Free Speech in the United States*, Monthly Review Press, New York, 2002.

13 O.M. Fiss, *The Irony of Free Speech*, Harvard University Press, Cambridge, Massachusetts, 1996, p. 54.

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censorship has long been a thing of the past in any case. Its new form, however, private censorship indirectly exerted by business interest groups ordering the advertisements, has a similar effect as its 'ugly sibling', the original, express form of censorship based on direct external force: it may present major obstacles to, or may even render impossible, the fulfilment of the public duties of the media. According to Jürgen Habermas:

> [T]he newspaper, as it developed into a capitalist undertaking, became enmeshed in a web of interests extraneous to business that sought to exercise influence upon it. The history of the big daily papers in the second half of the nineteenth century proves that the press itself became able to be manipulated to the extent that it became commercialised. Ever since the marketing of the editorial section became interdependent with that of the advertising section, the press (until then an institution of private people insofar as they constituted a public) became an institution of certain participants in the public sphere in their capacity as private individuals; that is, it became the gate through which privileged private interests invaded the public sphere.[14]

On the basis of the consistent practice of the ECtHR, as well as according to the text of Article 10 of the ECHR, it is the task of the media to publish information of public interest and opinions related to such; in fact the media has duties and responsibilities to impart matters of public concern.[15] At the same time, it is hardly conceivable that an infringement against the freedom of the press could be established in respect of any medium on the basis of non-compliance with the provisions of Article 10.[16]

According to a number of US authors, the freedom of the press is not primarily an individual entitlement, but pertains to the media as an institution.[17] According to this view, the right is an institutional one that does not primarily protect the journalists and editors working in the media, but the institution itself, therefore, besides the additional rights related to the freedom of the press, the additional responsibilities are also borne by the institution. According to this concept, the freedom of the press is clearly an instrumental right, the purpose of which is to further public interest by creating an exchange of infor-

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14 J. Habermas, *The Structural Transformation of the Public Sphere*, MIT Press Cambridge, Massachusetts, 1989. p. 185.

15 *See* e.g. *Observer and Guardian v. the United Kingdom* (Appl. No. 13585/88, Decision of 26th November 1991), *Sunday Times v. the United Kingdom* (No. 2) (Appl. No. 13166/87, Decision of 26th November 1991), *Thorgeir Thorgeirsson v. Iceland* (Appl. No. 13778/88, Decision of 25th June 1992), *MGN Ltd. v. the United Kingdom* (Appl. No. 39401/04, Decision of 18th January 2011), *Uj v. Hungary* (Appl. No. 23954/10, Decision of 19th July 2011).

16 Herdis Thorgeirsdottir argues for the recognition of the duties of the journalists and the media in free pseech doctrine, *see*: 'Journalism Worthy of the Name: An Affirmative Reading of Article 10 of the ECHR', 22 *Netherlands Quarterly of Human Rights* (2004), p. 601.

17 P. Stewart, 'Or of the Press', 26, *Hastings Law Journal* (1974-1975), pp. 631.

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mation and ideas, overseeing the government and operating the public fora.[18] Justice William Brennan did not consider the freedom of the press to be as broadly beyond restriction as the freedom of speech. As he stressed, the media have to accept that, in the course of their work, they must take into account several different or even conflicting interests and must meet certain duties placed upon them by the community.[19]

Chief Justice Burger described the fiduciary duty of the press:

> that the extraordinary protections afforded by the First Amendment carry with them something in the nature of a fiduciary duty to exercise the protected rights responsibly – a duty widely acknowledged but not always observed by editors and publishers.[20]

In certain cases, journalists and editors are entitled to freedom from the owner of the press product or media service; this is known as the so-called 'internal' freedom of the press. Act XIV of 1914 in Hungary had already provided for the legal relationship between the publisher and the journalists, granting the latter certain rights if the publisher 'demanded that they write announcements' [Articles 5760]. But how could the independence of journalists and editors from the influence and pressure of the owner be granted in the media landscape of today?

Examining the operation of the printed press, in 1977 the British Royal Commission on the Press raised the issue of the guarantee of editorial independence and formulated certain principles that might serve as the foundation for future legal regulation that have not, after all, been enacted. For example, the Commission defined as a fundamental right of the editors to refuse the publishing of any material originating from the owner, to decide freely about the content of the paper, to decide upon the utilisation of the available budget at their discretion, to reject any advice related to editorial policy, etc.[21]

In Hungary, Act CIV of 2010 on the Freedom of the Press and the Fundamental Rules of Media Content attempts to ensure the aforementioned 'internal freedom' of the press for journalists and editors by preventing certain forms of self-censorship and ensuring freedom for media workers from both the owners and the advertisers and sponsors. Article 7 of the Act stipulates:

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18 *See* e.g.: R.P. Bezanson, 'Institutional Speech', *Iowa Law Review* (1995), p. 823; E. Barendt, 'Inaugural Lecture – Press and Broadcasting Freedom: Does Anyone Have Any Rights to Free Speech?', *Current Legal Problems* (1991), p. 79; F. Schauer, 'Towards an Institutional First Amendment', *Minnesota Law Review* (2005), p. 1256.

19 W.J. Brennan, 'Address', 32(173) *Rutgers Law Review* (1979).

20 *Nebraska Association v. Stuart*, 427 US 539, 1976.

21 O.R. McGregor (Ed.), *Royal Commission on the Press. Final Report July 1977* (Cmnd. 6810), Stationery Office Books, London, 1977.

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Persons employed by or engaged in any other work-related legal relationship with the media content provider shall be entitled to professional independence from the owner of the media content provider or from natural or legal persons or business associations without legal personality sponsoring the media content provider or placing commercial communications in the media content, as well as to protection against any pressure from the owner or the sponsor aimed at influencing the media content (editorial independence and journalistic freedom of expression). No sanctions set forth in the labour laws or originating from any other work-related legal relationship may be applied against any person employed by or engaged in any other work-related legal relationship with the media content provider for their refusal to comply with any instruction that would have violated editorial freedom or the journalistic freedom of expression.

The purpose of this rule is to ensure professional independence and is based on the recognition that not only the state, but also certain private interests may jeopardise the independence of the media and the performance of their tasks in the public interest. The owners may naturally still define the direction and the character of their media, but may not issue direct instructions to journalists and editors that would violate their independence. According to the Act, no sanctions set forth in the labour laws or originating from any other work-related legal relationship may be applied against journalists or editors for their refusal to comply with any instruction that would have violated their journalistic freedom of expression (at the same time, the owner may, of course, freely decide whether to employ them or not).

According to Herdis Thorgeirsdottir, self-censorship constitutes a violation of the freedom of the press; the duty of the media to report appropriately on issues and debates of public interest is more than just a declaration of principle. At the same time the author, too, is aware of the difficulties of law enforcement in respect of this issue.[22]

26.1.5 Prior Restraints

It may be worth narrowing down the doctrine of restrictions prior to publication, to make it applicable in legal disputes, as state (legally enforced) censorship seems to be a traumatic memory from the past in the legal systems under assessment. As a first step we may agree that censorship is not identical to prior restraint, which exists in several states today. In the censorship system of Hungary in the 18th – 19th centuries under the Habsburg rule, the prior audit was traditionally conducted by an administrative authority or state official who – perhaps relying on a set of broad principles in need of continuous interpretation – decided at their discretion whether to permit publication. No legal remedy was available

22 H. Thorgeirsdottir, 'Self-Censorship among Journalists: A (Moral) Wrong or a Violation of ECHR Law?', 4 *European Human Rights Law Review* (2004), pp. 383-399.

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against their decision; judicial review was barred. In such a system, publication without permission in itself constitutes a punishable offence, even if the disputed text itself is not in breach. On the basis of historical experience, the censors within the public administration system performed their duties strictly, for if they let everything pass through their filters that would have called the very reason for the existence of their position into question.[23] Criticisms directed at the government were particularly sensitive issues: these had little chance against a government employee, but other considerations, too, had a role to play in denying permission.

The system of censorship violates the constitutional principle of the separation of powers, too, for, according to that principle, only a court of law may decide in issues related to the exercise of fundamental human rights.[24] In systems that apply censorship, usually no clear borderlines are defined in advance; one can never know for certain what is permissible and what is not. This, in turn, results in the self-censorship of publishers wishing to avoid severe financial losses, and such self-censorship may be even stricter that actual external control. In the Hungarian system, censorial injunctions were served after printing, but prior to distribution, and so if such an injunction was applied the entire issue of the paper or a part thereof (the page-pairs concerned) had to be destroyed then reprinted.

In theory, prior restraint, partly still in existence today, is able to eliminate these evils of censorship. The prohibition of publication may only be decided by a court of law by summary proceedings after hearing both parties. In the *Freedman v. Maryland* case[25] the US Supreme Court defined the guarantees ensuring the constitutionality of prior restraint. On the basis of these, the burden of proof lies with the applicant; the final decision on the restraint must be passed by a court of law and the procedure must be concluded in a timely manner. If the court is fair and passes its decision on the basis of hearing the parties, this practically precludes the possibility of barring valuable content from publication.[26]

Usually the applicant is required to provide such strong grounds for its claim that in practice publication is only prevented if it is virtually certain that it would lead to an infringement of rights and, if appropriate guarantees are given, the question may then well be asked whether it is sensible to make any sharp distinction between prior restraint and subsequent liability.[27]

It is therefore worthwhile to distinguish the various forms of prior restraint from censorship and, rather, to view them in parallel with the forms of subsequent restraint, also

23 T. Frank, 'Liberális cenzor Metternich Magyarországán. Reseta János' (*J. Reseta: A liberal censor in Metternich's Hungary*) 5 *Századok* (2003).

24 M.I. Meyerson, 'The Neglected History of the Prior Restraint Doctrine', 34(2) *Indiana Law Review* (2001), p. 295.

25 380 US 51 (1965).

26 M.H. Redish, 'The Proper Role of the Prior Restraint Doctrine in First Amendment Theory', 70 *Virginia Law Review* (1984), pp. 55-58.

27 J.C. Jeffries, Jr.,'Rethinking Prior Restraint', 92 *Yale Law Journal* (1982-1983), pp. 409.

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because the criteria for the examination of the legality of prior restraint need to be identical or at least similar to the criteria applied during the official or court examination of content that has already been published.

26.2 Existing Prior Restraint in Specific Legal Systems

26.2.1 England

English law has provided for the possibility of the prior restraint of the publication of content deemed to be infringing upon personality rights via the institution of *interim injunction*. The injunction limiting the freedom of speech by temporarily banning publication must be temporary in nature: it may only last until the court decides by due process upon the legality or illegality of the content concerned. If it is found to be in breach, the content may not be published subsequently, either.

According to Lexis ® Library

> injunction is a remedy whereby the court orders a defendant to do, or refrain from doing, a certain thing. It is an equitable remedy, and is available but has an interim remedy pending the final disposal of an action, and as a final remedy.

A 'super injunction' (or 'super-injunction') is an injunction which also prohibits the reporting of its own existence; the first known origin of the term was a 2002 issue of The Guardian. The great British injunction controversy started in 2011, when tabloids started to publish stories about unnamed celebrities who requested super-injunctions from the courts in order to protect their privacy.[28]

The old common law had already provided for rather narrow limits in respect of the issue of interim injunctions, only allowing such if the fact of the infringement in the event of publication were evident.[29] In defamation cases the courts hardly ever favoured injunction (on the basis of the consideration that the disputed statement should be given a chance, and it will be sufficient to order the publishers to provide proof or otherwise exculpate themselves later on. Furthermore, indemnification is an appropriate instrument for restoring damaged reputations – in other cases, however, such as the violation of privacy

28 The 2011 report of the committee convened by the Master of the Rolls discusses the issue of super-injunction in detail (Report of the Committee on Super-Injunctions: Super-Injunctions, Anonymised Injunctions and Open Justice, available at www.judiciary.gov.uk/Resources/JCO/Documents/Reports/super-injunction-report-20052011.pdf).

29 *Bonnard v. Perryman*, 1891, 2 Ch 269, CA.

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or the disruption of the proceedings of the court, subsequent accountability is not suitable as a remedy for the injury caused[30]).

The Human Rights Act of 1998 touches upon the regulation of 'prior restraint' that is still based on common law. According to the provisions of the Act, before the application of prior restraint, both parties must represent themselves before a court of law. Without this, the applicant is required to prove they have taken every expectable measure to notify the other party or that such notification is impossible for reasons of sufficient gravity. Prior restraint may be awarded if the court has ascertained that 'the applicant is likely to establish that publication should not be allowed'[31] at a regular trial, too. Likelihood, however, does not mean full certainty, not necessarily even probability, but simply that there is a good chance that the applicant would be able to prove that they are right.[32]

English courts still do not admit prior restraint in defamation cases[33]; the applicant may only prevail in respect of communications made in relation to privacy and court proceedings.

Injunction, however, is far from being the only instrument within the legal system that results in prior restraint. In the case of media services – to which the above-discussed common law rules equally apply – the media acts and the agreements providing for the operation of the BBC have enabled the government to intervene in the operation of the media by censorship measures. The effective law – Section 336 of the Communications Act of 2003 – authorises the minister of culture or any other member of government to order the media to publish their announcements. On the basis of this provision, the government is also entitled to bar the discussion of any subject from the media. The dual duty only applies to Broadcasting Act licence holders (*Channel 3* and *Channel 5*). In the case of the BBC, this right of the government is based on Point 81 of the 2006 Agreement, which provides, however, that the government may only exercise this right in the event of a national emergency or for purposes of the defence of the realm.[34]

Although the Communications Act of 2003 does not explicitly provide so, application of government censorship is only permissible for a compelling reason in the interest of society. Since the start of broadcasting, the government has only made use of this instrument on six occasions and, with the exception of the last occasion, mainly gave general instructions to the BBC (e.g. to maintain balanced coverage).[35] The last occasion when the government instructed the BBC and the media authority supervising commercial broadcasters

30 *Fraser v. Evans,* 1969, 1 QB 349, CA.
31 Human Rights Act (1998) Series 12, Para. 3.
32 Eric Barendt, *Freedom of Speech*, 2nd edn, Oxford University Press, Oxford-New York, 2005, pp. 127.
33 *Cream Holdings v. Banerjee*, 2004, 4 All ER 617, *Greene v. Associated Newspapers*, 2005, 1 All ER 30.
34 Department for culture, media and sport broadcasting, An Agreement Between Her Majesty's Secretary of State for Culture, Media and Sport and the British Broadcasting Corporation Presented to Parliament by the Secretary of State for Culture, Media and Sport by Command of Her Majesty, July 2006.
35 E. Barendt, *Broadcasting Law – a Comparative Study*, Clarendon Press, Oxford, 1993, pp. 36.

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on the basis of this provision (or, more precisely, its predecessor) was in 1988; then the order was to refrain from the presentation of the positions of certain Northern Irish political organisations. Amongst the – once again – aggravated circumstances at the time, the Home Office deemed the partial deprivation of terrorists and their supporters from publicity to be necessary and in the interest of national security. A matter of interest is that the injunction only extended over direct presentation and could be bypassed by television stations by distorting the voices of the speakers; nor did it extend over speeches made during the course of election campaigns. The National Union of Journalists filed a court complaint against the decision of the ministry; however, the court rejected the complaint (and could not have done otherwise taking into account the provision of the law).[36] The court emphasized that it had limited its examination to the specific facts of the case and, on the basis of that, had established that the intentions of the government (i.e. the suppression of terrorism) had been directed at a perfectly legitimate objective. Under the English legal system and according to the English conception of the law, the task of the judges was limited to this and they had no competency to examine the constitutionality of the injunction. The provisions of the law are recognised as evidently mandatory by even the highest levels of the judiciary.

In England there exists a prior categorisation system of cinematic and video films which, in practice, may conduct censorial activities (and the theoretical possibility of the oversight of the content of theatrical plays was only abolished by the 1968 Theatres Act). According to the Cinemas Act of 1985, it is the task of the British Board of Film Classification (BBFC) to age-rate the films in distribution according to which age groups may be permitted to view them. The Act places the right of the final decision into the hands of the local authorities, but these rarely diverge from the decision of BBFC.[37] The BBFC decides upon the classification of films on the basis of the Classification Guidelines that had been drawn up on the basis of public consultation, and only very rarely prohibits the distribution of a film entirely. In the interest of classification into a lower age-group, the Board may request the producer to cut certain parts of the film; if the producer opts not to do so, then the film remains in the original category. On the basis of the Obscene Publications Act of 1959, the Board prohibits the distribution of films with illegal, e.g. obscene content.

In respect of video cassettes and DVDs, the BBFC applies stricter standards than for cinematic works, since the films on these media can be freely wound forward and backward on the home player, allowing viewers to focus on violent or erotic scenes, and also because these are more easily accessible to minors. As opposed to the films shown in theatres, however, in the case of videos there exists a so-called ‘R18’ category. This category is

36 *R. v. Home Secretary*, ex parte Brind, 1991, 1 AC 696.

37 About the supervision system, *see*: G. Robertson and A. Nicol, *Media Law*, 4th edn, Penguin Books, London, 2002, pp. 727-767; E. Barendt et al., *Media Law: Text, Cases and Materials*, Pearson, Harlow, 2014, pp. 33-36.

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expressly reserved for pornographic works, which may only be sold in special licensed stores catering to such needs.[38]

26.2.2 The United States

The legal literature and practice of the United States interprets the concept of 'prior restraint' broadly and includes, under this heading, not only the possibility of the issue of injunctions in respect of specific content, but the various licensing systems as well.[39]

The US Supreme Court has tried several cases related to the licensing of media products. In the *Lovell v. Griffin* case,[40] the subject of the examination of constitutionality was the ordinance of the City of Griffin, which required approval for the distribution of press products for free or in exchange for consideration. According to the decision of the court, this restriction was contrary to the First Amendment. The major risk inherent in licensing systems is that they do not provide any clear standards, on the basis of which distribution may be prohibited, and this allows broad scope for orarbitrary decisions. The court passed a similar decision in the City of *Lakewood v. Plain Dealer Publishing* case,[41] and ruled the city ordinance authorising the mayor to grant or deny applications for annual permits for publishers to place their self-service news-racks on public property, without clearly defining the limits of the exercise of this authority, as unconstitutional. The peremptory circumstance in both cases was the fact of inadequately defined, 'standardless', licensing.

The background to the *Freedman v. Maryland* case[42] was that the appellant screened a film in a theatre without first submitting it to the State Board of Censors; the film itself, however, was not obscene or otherwise in violation of the law. The court ruled unanimously that the law requiring prior checks of films was invalid on the basis of the First Amendment. What the court found to be objectionable was not that the check could prevent the initial showing of content that might prove to be obscene later on, but that the restriction could affect constitutionally protected content, too. The reasoning of the decision specified the guarantees necessary for the constitutionality of prior restraint:

> First, the burden of proving that the film is unprotected expression must rest on the censor […] Second, while the State may require advance submission of all films, in order to proceed effectively to bar all showings of unprotected films, the requirement cannot be administered in a manner in which would lend an effect of finality to the censor's determination whether a film constitutes pro-

38 Barendt et al., *ibid.*
39 G.R. Stone et al., (Eds.), *The First Amendment*, 3rd edn, Aspen Publishers, New York, 2008, pp. 119-133.
40 303 US 444 (1938).
41 486 US 750 (1988).
42 380 US 51 (1965).

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> tected expression. [...] only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint. ...the exhibitor must be assured, by statue or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film. Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution. [...] [The] procedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license. Without these safeguards, it may prove too burdensome to seek review of the censor's determination.[43]

The legal system of the United States does not entirely preclude the possibility of injunction as a form of prior restraint either, but confines its exercise within very narrow bounds. In the *Near v. Minnesota* case[44] of 1931, the Supreme Court ruled a Minnesota law that prohibited the publication of malicious or scandalous content in newspapers and allowed the prior restraint of publication as unconstitutional unless the publisher was able to prove the truth of the statements to be published and the good intention and justifiable objective of the publication. According to the decision, the possibility of prior restraint was admissible, but the requirement of prior proof violated the freedom of the press.

> [According to the statute] public authorities may bring [a] publisher of a newspaper or periodical before a judge upon a charge of conducting a business of publishing scandalous and defamatory matter [and] unless [the] publisher is able [to prove] that the charges are true and are published with good motives and for justifiable ends, his newspaper or periodical is suppressed and further publication is made punishable as a contempt. This is the essence of censorship.

That is, in theory prior restraint is admissible in the United States and does not necessarily violate the protection of the freedom of speech granted by the First Amendment. However, it is not sufficient if the procedure is conducted according to the guarantees defined in the aforementioned *Freedman* case; the application of the law based on the American concept of the freedom of speech allows even less grounds for prior intervention than the English courts do.

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43 *Ibid.*

44 283 US 697 (1931).

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In the *Bantam Books Inc. v. Sullivan* case[45] the American judges qualified as inadmissible prior restraint a mere 'notice' issued by the police that had no legal effect whatsoever. (In the notice the authority alerted distributors to the fact that the publications they sold might have violated the law on obscene publications.)

In the well-known *New York Times Co. v. United States* case,[46] the Supreme Court had to decide whether to prevent the publication of confidential documents, the disclosure of which the government believed would jeopardise state security. The Court first issued a temporary restraining order; subsequently, however, after getting to know the positions of the parties in detail and four days of thought, it rejected the government's request in a 6-3 decision, saying that the government had not met its burden of demonstrating that the gravity of the presumed danger justified the necessity of prior restraint. This decision reinforced the notion that, in general, there are extremely strong presumptions against the admissibility (constitutionality) of prior restraint. The judges submitting dissenting opinions stressed that the procedural guarantees protecting the publisher did not necessarily protect the applicant – according to them, the government had not been granted the proper time and means to justify its position in the given case. The temporary prohibition of publication could even provide the courts with sufficient time to weigh the opposing arguments before ordering final prohibition.

In the *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*[47] case, the Court upheld an order which prohibited the newspaper from carrying sex-segregated advertisements for the future. The Court argued:

> [This Court] never held that all injunctions are permissible. [A] special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that is unprotected by the First Amendment. The present order does not endanger arguably protected speech. Because the order is based on a continuing course of repetitive conduct, this is not a case in which the Court is asked to speculate as to the effect of publication. […] [Because] no interim relief was granted, the order will not have gone into effect before our final determination that the actions of Pittsburgh Press were unprotected.'

The words of Martin Redish provide a succinct summary of the reasons for the aversion of the US legal system towards prior restraint:

45 372 US 58 (1963).
46 403 US 713 (1971).
47 413 US 376 (1973).

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> [Injunctions] are appropriately disfavoured [because] of the coincidental harm to fully protected expression that results [when] a *preliminary* restraint [is] imposed prior to a decision on the merits of a *final* restraint. [Such] interim restraints present a threat to first amendment rights not found in subsequent punishment schemes – the threat that expression will be abridged, if only for a short time, prior to a full and fair hearing before an independent judicial forum to determine the scope of the speaker's constitutional right. […] the doctrine should strike down [injunctions] imposed *prior* to a full and fair judicial hearing.

Although the US Supreme Court never expressly precluded the prior control of the content of films, the expression of the freedom of speech via cinematographic works has enjoyed constitutional protection almost from the very beginning.[48] As a result of the guarantees postulated by the decision in the *Freedman* case, public administration level control as it exists in the United Kingdom has become almost impossible. In the United States today there only exists a voluntary rating system that is operated by the film industry.

26.2.3 Hungary

In the fledgling Republic of Hungary in 1989 there were no immediately applicable guidelines available as to what exactly the free speech provision in the newly modified text meant. It seemed logical that this should be done by the freshly established institutions, in particular, as regards the interpretation of the Constitution, by the Constitutional Court. The new public structures had to be filled with content—within the latitude provided for by the laws and regulation, or sometimes slightly expanding them—at that time. In its decisions, the Constitutional Court wanted to protect several interests comprised in the right to freedom of speech—with special attention to the development of individual autonomy and democratic public opinion, as the tribunal made clear at the first possible opportunity in Decision No. 30/1992 (V. 26) AB, which may be regarded as the 'fundamental decision' of freedom of speech. Thus, both the right of the individual and the interest of the community appeared in the interpretation—manifested in the openness of public debate and the free shaping of public opinion—and this double foundation remained valid for future decisions, too. Freedom of speech was placed in an exclusive position in the imaginary hierarchy of fundamental rights: According to the interpretation of the Constitutional Court, it is afforded second place, immediately below the right to life and right to human dignity, which are bound together in an inseparable unit. Although this did not mean that, in the event of conflict of interest, almost every other fundamental right would

48 *Burstyn v. Wilson* 343 US 495 (1952).

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have to yield to freedom of speech, it does mean that the right placed on the opposite side of the scale has to be interpreted restrictively, and it should be presumed that, if there is tension between the two, freedom of speech enjoys priority.

In Hungary the provision of the Press Act (Act II of 1986, repealed in 2011), allowing prior restraint, had been effective until 1997. On the basis of paragraph (3) of Article 15 of the Act, if the exercise of the freedom of the press would have resulted in a criminal act or instigation to commit such an act, then this would have violated public morals or someone's personal rights. Furthermore, if a newspaper were distributed prior to registration on the basis of mandatory notification, then, upon the motion of the public prosecutor, the court could have prohibited the 'public communication' of the press product concerned. Until the decision was passed by the court, the public prosecutor had the right to temporarily suspend publication.

A number of authors regarded this rule as clearly censorial in nature[49]; however, it was merely prior restraint (as, for the most part, it provided clear criteria for the decision that was ultimately left to the court). According to a petition submitted to the Constitutional Court, the rule unconstitutionally restricted the freedom of the press. The Court found the provision to be partially unconstitutional and, since a single sentence contained both constitutional and unconstitutional content and the Court has no power to 'write into' the law, it struck down the disputed provision in its entirety. (Constitutional Court Decision 20/1997 (III. 19) AB). Since it was not the freedom of the press upon which the examination of the provision in question was based, *implicitly* the Court acknowledged that prior restraint is not incompatible with fundamental rights. The majority of the court took the position that the provision of the law according to which the public prosecutor had the right to propose the prohibition of publication in the event of a violation of the personal rights of others (and, in the case of crimes, of private prosecution, even independently of the intentions of the injured parties), was in violation of the right to self-determination. By contrast, prior restraint applied with reference to public morals, in the case of crimes of public prosecution or in the event of failure to comply with the requirement of notification, is not unconstitutional.

The decision was accompanied by two dissenting opinions. The first of these (by László Sólyom and Tamás Lábady) went beyond the majority decision and deemed prior restraint in the interest of the protection of public morals to be unconstitutional, because public morals constitute an abstract value that is 'among the values that are the least applicable to the limitation of the freedom of speech according to constitutional criteria'[50]; furthermore, the judges raised the issue of the lack of procedural guarantees ensuring the timely conclu-

49 G. Halmai, 'Az előző vizsgálat eltöröltetvén örökre…?' ['Prior examination abolished for good…'?], 1 *Fundamentum* (1997), p. 58.
50 Constitutional Court Decision 20/1997 (III. 19), dissenting opinion of Tamás Lábady and László Sólyom.

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sion of the procedure as well. In sharp contrast with this, two other judges of the Constitutional Court, Ödön Tersztyánszky and János Zlinszky, believed that the disputed provision had been entirely constitutional. According to their argument, the procedure resulting in prior restraint may not be construed as an obstacle to the right to self-determination before a court, as it is in no way related to the civil and criminal lawsuits that may be instituted due to the violation of personal rights. All that the court is required to decide, upon the motion of the public prosecutor, is whether the content to be published objectively constitutes a criminal offence or violates a personal right. Following this, the injured party is free to decide whether to assert their rights and file charges. This argument is not quite sound, because if the court decides in favour of prior restraint, the legal violation constituted by publication cannot occur, which means that no court proceedings could have been initiated in the first place. (However, one could hardly protest rightfully against the intervention of the court as a result of which their rights are not violated.)

That is, the majority decision established the fact of unconstitutionality solely on the basis of the violation of the right to self-determination. In his aforementioned paper, Gábor Halmai was sharply critical of the decision of the Constitutional Court.[51] He rejected the – tacit – proposition of the decision that, in the interest of the protection of personal rights, the injured party may, in theory, constitutionally demand the prohibition of publication. As regards procedural guarantees, the law was indeed wanting in some respects; however, the fact that the procedure in question is brought before a court of law providing certain guarantees renders the label 'censorship' uncalled for. The temporary suspension right of the public prosecutor may, indeed, be problematic from the aspect of free speech, as it does not meet the conditions examined above that ensure the constitutionality of prior restraint. It is also true that, in itself, the requirement that the procedure be conducted 'with priority' did not guarantee its speedy conclusion. The critique also disputed the contention of the majority of the court that the application of prior restraint with reference to public morals or non-compliance with the duty to register was constitutional. Well, with respect to the justification of its existence and objective, it is perhaps indeed not these breaches of the law where the institution should be applied, although it is also true that the Hungarian public prosecutor's office and the courts have never applied this rule in practice.

On the basis of the motion of the President of the Republic, the legal restriction of the right of convicts to make statements to the press was deemed to be unconstitutional. In respect of this issue, the statement of reasons of Constitutional Court Decision 13/2001 (IV. 14) AB contains the following statement of principle:

51 Halmai, *supra* note 49.

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> The institutional, operational and security interests resulting from the responsibilities of the organisation executing the detention require and demand a certain degree of control over contacts between the person in detention and the media, in the course of which a staff member of the penal institution may have access to the content of the information to be published. It follows, however, from the high constitutional esteem of the freedom of expression and freedom of the press that the communication so controlled shall only be withheld if its public disclosure would lead to serious consequences. [Constitutional Court decision 13/2001 (IV. 14) AB, statement of reasons, Point IV. 3. 1].

According to the majority opinion, it is also important 'to define clearly in the statutes not only the causes of the preliminary restrictability of such rights but also the scope of communication covered by the restriction.'[52]

From all this it follows that the relationship between the detainees and the media may be regulated, and may even be subjected to prior restraint, so long as the restriction is clearly defined and is necessitated by the protection of a fundamental right or constitutional value beyond the freedom of speech.

Constitutional Court Decision 34/2009 (III. 27) AB ruled unconstitutional the provision of the previous press act that prohibited the registration (which, until 2011, was a precondition for distribution) of press products are presumed to constitute criminal offences, violate public morals or commit a violation against personality rights and ordered the deletion from the register, without further consideration, of any periodical publications that commit the above (Press Act, Articles 14-15). According to the Constitutional Court:

> By prescribing not only the notification of the title and purpose of periodical publications but also the examination of the notified purpose – i.e. the prior examination of content – in essence the legislator provides for the supervision of the accessibility and distribution of information. As such, the decision right of the authority responsible for registration includes the prior law enforcement supervision, and the assessment and evaluation of the content of the ideas intended for communication via the press product from the aspect of their suitability for distribution in the form of a press product. This constitutes censorship. According to the position of the Constitutional Court, the objective to be achieved – preventing a possible abuse of the freedom of communication, i.e. the risk of an abstract future violation of rights – and the severity of the violation of the fundamental right committed in the interest of this objective are not commensurable with each other. The fact that, according to the position

52 Constitutional Court decision 13/2001 (IV. 14), Reasoning, Point IV. 3. 1.

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> of the authority deciding upon the registration on the basis of the objective of the press product as stated in the notification, it may be presumed that a violation of personality rights will be committed in the future does not constitute sufficient grounds for denying registration, especially since personality rights derive from the human being as subject and, according to the principal rule, may only be asserted personally.[53]

Advertisements and commercial communication also enjoy the protection of the freedom of speech, although to some extent different considerations apply to the restriction of these forms. Constitutional Court Decision 23/2010 (III. 4) struck down the provision of the Advertising Act (Act XLVIII of 2008) that enabled the proceeding authority or the court to prohibit the publication of advertisements in violation of the law prior to their initial publication. The court did not regard this provision as censorial in nature, because the applicable provision, Article 27 of the Advertising Act did not require prior examination. Nevertheless, the provision was deemed unconstitutional because it entailed a disproportionate restriction of the freedom of speech. According to the Constitutional Court:

> [T]he interest vested in the prevention of an individual legal violation or a specific objective of public interest may, in exceptional cases, render necessary the prior restraint of publication. However, this may only be enforced constitutionally in contrast with the freedom of the press if there are definite guarantees that ensure that no disproportionate restriction will be applied to the fundamental right. (…) Article 61 of the Constitution demands, even in respect of commercial communications which are granted a lower level of constitutional protection, that the communications to be affected by the justifiable restriction be clearly defined, that the authority pass its decisions in a predictable manner and that the legal consequences to be applied be commensurable with the justification of the restriction.[54]

It should be mentioned that, on the basis of the authorisation conferred by Act CXIII of 2011, on National Defence, the media may be subjected to special restrictions in the case of state of emergency or national defence situations; *inter alia*, the prior control of press products and communications and the licensing of their publication may be ordered (Article 68).

On the basis of Act II of 2004, on Motion Pictures, a precondition for the distribution of cinematographic works is that they be classified according to the categories provided

53 Constitutional Court Decision 34/2009 (III. 27), Reasoning, III. 3.2.
54 Constitutional Court Decision 23/2010 (III. 4).

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for by the Act (Article 19, Articles 20-24). On the basis of the recommendation of the Classification Commission, the 'motion picture authority' decides on the age rating classification. The authority has no right to propose or demand changes or cuts and may not deny classification either, therefore all works 'fit' into the strictest category ('recommended for adults only'). As opposed to the British solution, this regulatory system may not even be viewed as prior restraint.

26.2.4 *The Jurisprudence of the European Court of Human Rights*

The ECtHR does not, in principle, preclude the application of prior restraint. This is clear from the earlier jurisprudence of the Court[55] and has been explicitly stated in the judgements in the *Sunday Times v. the United Kingdom (No. 2.)*[56] and the *Observer and Guardian v. the United Kingdom*[57] cases. In order to ensure that the restriction does not violate the freedom of speech and the freedom of the press as granted by Article 10 of ECHR, however, the court is required to examine such cases with utmost care.

The background to the *Sunday Times v. the United Kingdom* case[58] was that between 1958 and 1961 a pharmaceutical called Thalidomide had been marketed in the United Kingdom which had severe adverse side-effects and caused birth defects in pregnant women and their babies. The Sunday Times intended to publish an article about the tragic events, however, the courts forbade this, claiming that the publication would jeopardise the ongoing court procedure. The position of the ECtHR was that, in the given case, the freedom of the press was worthy of greater protection than the impartiality and freedom from external influences of court procedures. The Strasbourg Court took into account the fact that the scandal and its legal aspects had already received press publicity for ten years by then. Furthermore, according to the Court, such an article was not capable of jeopardising the independence of British courts.

In the *Sunday Times v. the United Kingdom (No. 2.)* and the *Observer and Guardian v. the United Kingdom* cases, the British courts issued interim injunctions preventing the press publication of articles written by a former MI5 intelligence officer. The articles were taken from the author's book of memoirs entitled Spycatcher, so the cases also gained publicity under this name. The texts affected by the prior restraint had already been published in other countries at the time, but according to the position of the British courts they nevertheless posed a threat to national security. According to the findings of the ECtHR:

55 *Sunday Times v. the United Kingdom* (Appl. No. 6538/74), Judgement of 26th April 1979, Markt Intern Verlag and *Klaus Beerman v. Germany* (Appl. No. 3/1988/147/201), Judgement of 25th October 1989.
56 Appl. No. 13166/87, Judgement of 26th November 1991.
57 Appl. No. 13585/88, Judgement of 26th November 1991.
58 Appl. No. 6538/74, Judgement of 26th April 1979.

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> […] the Convention does not in terms prohibit the imposition of prior restraints on publication, as such. […] On the other hand, the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest.[59]

Despite the fact that in theory they were admissible, the interim injunctions applied in the specific case were in violation of Article 10 since the information in question had already been published in the United States and Australia, and therefore the justification for the prior restraint was not national security, but merely the effectiveness and reputation of the security services.

The fact that the further publication of Spycatcher material could have been prejudicial to the trial of the Attorney General's claims for permanent injunctions was certainly, in terms of the aim of maintaining the authority of the judiciary, a 'relevant' reason for continuing the restraints in question. The Court finds, however, that in the circumstances it does not constitute a 'sufficient' reason for the purposes of Article 10 (art. 10). "[…] …the interest in maintaining the confidentiality of that material had, for the purposes of the Convention, ceased to exist by 30 July 1987".[60]

In the *RTBF v. Belgium* case,[61] a television service provider intended to report on the complaints related to the activities of a physician. As an interim measure, the physician applied for prior restraint before the programme was broadcast, and was granted it by the court in the interest of the protection of his reputation. In the case, the ECtHR established the violation of Article 6 due to procedural errors and, in respect of Article 10, declared that the injunction ordering the prior restraint must also meet the requirements of the ECHR, i.e. its application should conform to the law and be predictable. The lack of accurate and detailed provisions may lead to uncertain standards in jurisprudence where the courts apply different tests to printed and audio-visual media and would enable a broad scope of persons fearing the attacks of the media to temporarily block news. Since Belgian law had created such an uncertain situation, the ECtHR declared the violation of Article 10 as well.

On the other hand, the states party to the Convention have more elbow-room in issues related to national security, public morals and religious tolerance. In the *Purcell v. Ireland*

59 *Sunday Times v. the United Kingdom*, No. 2, Para. 51, and *Observer and Guardian v. the United Kingdom*, Para. 60.

60 *Sunday Times v. the United Kingdom*, No. 2, Para. 54, and *Observer and Guardian v. the United Kingdom*, Para. 68.

61 Appl. No. 50084/06, Judgement of 29th March 2011.

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case,[62] the European Commission of Human Rights rejected the complaint submitted claiming the official state censorship of Irish broadcasters. The facts of the case were similar to the intervention by the British government in 1988 discussed above, which had also occurred in the interest of national security and was directed against Northern Irish terrorism. In *Wingrove v. the United Kingdom*,[63] the Strasbourg Court did not judge the British decision that banned the distribution of the film *Visions of Ecstasy* which depicted the erotic fantasies of St. Theresa of Avila to be contrary to the Convention. According to the British authorities and the Court, the screening of the film would have been an act of blasphemy, which was still a criminal offence in England at the time. Accordingly, the film was not classified into any category; consequently it could not be distributed. With reference to the principle of the margin of appreciation of Member States, the Strasbourg Court did not see this as reason for establishing a violation of the European Convention on Human Rights. The *Editions Plon v. France*[64] and the *Stoll v. Switzerland*[65] cases also make it clear that the continuous or permanent application of an injunction restraining publication 'must be subordinated to a stringent review as to the existence of 'compelling' countervailing interest.'[66]

26.3 Summary

In conclusion we may note that today, according to the modern concept of the freedom of the press, the old, historic institution of censorship is not permissible in the countries examined in the present paper. If, however, a state does attempt to influence the contents of the media via undesirable means, then such an attempt should be clearly set apart from other types of restrictions that are constitutionally permissible. In this paper I have argued for the differentiation between prior and post publication restrictions, and in the case of the former, the distinction between censorship and prior restraints. I have also argued that the concept of censorship may be further subdivided, and distinction has to be made between the censorship exercised by the state and private or self-censorship that operates within the media itself, and can be hardly legally regulated.

62 Appl. No. 15404/89, admissibility decision.
63 Case No. 19/1995/525/611. Judgement of 22nd October 1996.
64 Appl. No. 58148/00, Judgement of 18th August 2004.
65 Appl. No. 69698/01, Judgement of 10th December 2007.
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