

HOW TO LIVE WITH THE FREEDOM OF PRESS. IS GERMANY AN EXAMPLE IN EUROPE?

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The freedom of the press —a concept which stands nowadays for the freedom of all media— is one of the fundamental principles of democratic Germany. In my opinion, it has contributed tremendously to our post-war fortune and has brought us after all this unspeakable horror unexpectedly quickly freedom, success and prosperity, as well as respect. The last sixty years of successful German history are associated with the name “Federal Republic of Germany”, which are connected with economic prosperity and democratic stability. Responsible for this are the founders of the country and also their successors who have tried to cautiously improve on these achievements.

The founding mothers and fathers of the republic, the authors of the constitution, were politicians whose experience was also marked by the terror of the dictatorship the national-socialist regime.

The negotiations of the Parliamentary Council which created in 1948-49 the Basic Law of the Federal Republic of Germany which is still in force — and thereby its constitution, reflect these sad experiences. The members of the constitutional assembly discussed the freedom of the press and of opinion in the light of the then just recently terminated twelve-year reign of terror.

It is significant that the in 1948/49 already existant experiences with the press politics of the socialist reign of terror in that part of Germany which was occupied by the Soviets are hardly mentioned. Although the Soviets continued the practice of national-socialist press work with their own brutality, that found hardly any echo the deliberations in Bonn. The

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success of Hitler's propaganda minister Goebbels were the bogey which the fathers of the constitution wanted to ban once and for all. They have achieved their goal.

That they were successful can be attributed to the assistance of the Western Allies. They carefully guided the Germans who at that time were still the vanquished and only slowly turned into partners and friends. And the Germans took advantage of this — in low spirits because of their historical crimes and full of joy about their new chances.

This fateful cooperation has been a unique historical chance. Present-day Germany is a Western country formed by the ideas of French enlightenment and the experiences of Anglo-American democracy. A German, especially a former West-Berliner, should never forget this contribution of the Western Allies.

The press politics of the Western Allies, their sponsorship of the reorganisation of the broadcasting system in Germany have influenced up to this day the structures of the media landscape of the Federal Republic of Germany. I would like to add to my extensive excursion into history the remark that historical odds can rarely be changed —which in our case has been fortunate—.

Most of the media landscape corresponds exactly to the political system of a state. The short and lucky history of the Federal Republic of Germany shows the continuous triumphant progress of the freedom of the press in spite of many attempts to bridle its rapidly increasing excesses.

Under the protection of our Constitutional court this triumph of the freedom of the press has been an uninterrupted success story up to these days, but which is increasingly being criticized. This criticism can no longer be ignored. It is caused by the real or imagined lack of restraint of the press which disregards the honor, the private sphere and the family relations of its victims, only to satisfy an almost all-encompassing demand for information by the general public. It is not rare that this demand for information turns out to be just the business interest of the publication in question. Newspapers and magazines in our country have assumed long ago the role of a public pillory, this medieval punishment of public exposure which has been for a long time considered to be degrading. Whether gloating or public exposure, the reproaches of a lack of constraint of the press are getting louder in Germany.

We jurists are in an awkward position in this incipient quarrel on the limits of the freedom of the press especially because we created the con-

ditions for the present problems. Legislation could not create a compulsory canon of values for the press and legislate acceptable measures to enforce these values. This is prohibited by the protection of the constitution which—as I already mentioned—for historical reasons puts the freedom of the press above almost everything.

The judges of the Constitutional Court in Karlsruhe have encouraged this development from the very beginning. The basic right of the freedom of the press which originally—just like the freedom of opinion—was a defense right, intended to protect the citizen from any limitation of his freedom, has been objectivized—as we jurists would say—by the constitutional judges. This was based on the following argumentation: because the freedom of the press goes beyond the individual citizen and is—as expressed by the judges of the Constitutional Court—“of fundamental importance for the total social and political process” the individual defense right directed against the state is completed by an objective legal institutional importance of this basic right, which—according to the court, guarantees “the institutional independence of the press from the gathering of information to the publication of news and opinion”. Both parts of this basic right are of the same importance. Therefore the Constitutional Court formulates for more than 30 years:

The function of the free press in a democratic state corresponds to its legal position in the constitution. The basic law guarantees in article 5 the freedom of the press. By this is guaranteed first—corresponding to the systematic position of its definition and its traditional meaning, namely in the basic rights chapter—a subjective basic right for the persons and enterprises active in journalism, which guarantees them freedom from state control and guarantees them under certain conditions a privileged legal position, at the same time this right has also an objective-legal aspect. It guarantees the institution of a Free Press. The state is obliged, independently of the subjective rights of individuals, to respect the postulate of press freedom everywhere where its legal norms touch the press. The obligation of public authorities to give information is a logical consequence, but one could also think of the obligation of the state to prevent dangers which could threaten the press by the formation of opinion monopolies.

So far our Constitutional Court in the since 1966 unrevoked jurisdiction.

In no case—that should be noted at this place—does the institutional content of the freedom of the press empower the state to interfere or to change the private economical structure of the press.

While jurists discuss intensively and with excellent arguments who should enjoy the privileges of press freedom and to what extent, the daily journalistic work does not bother about such theoretical considerations. For the press in our country almost everything seems to be allowed. Limits are found only in the protection of the youth, an interdiction of pornography and violations of personal honor. But these two last facts have lost their importance in the conflict with the mass media during the last ten, twenty years. The tension between the right of the person and of the press is aggravated by the fact that every injury to the private sphere is known to to a large circle of persons, whereas the subsequent correction of this insult does not attract as much interest as the initial injury. According to the legislation the press has in the interest of the protection of the individual the obligation to verification and truth which has been limited according to journalistic requirements and narrowed down to a professional and press-related accuracy. However, in contrast to private persons, politicians have to tolerate critical questions of general interest. Therefore the protection of the good name of a person has to be weighed against the interest in a free political discussion.

These rather reasonable results of a balanced legal discussion and legislation to solve the unavoidable tensions between the ambition of the media to report on everything and the understandable claim of the victims to protect their private sphere, does not stand the test of practical journalistic work. It doesn't care about the lofty intentions of legislators and the fine tuned arguments of jurists. The story is everything, sales success even more. Thus interviews are invented, a politician is exposed by television as a homosexual, although he isn't one, and a fashion designer is stigmatized because he allegedly is disgusted by invalids. Nothing is true, but everything has been published. The freedom of the press—one may deplore this—protects also the “evil, the bad” press. There have been no interdictions and there should be none. The protectors of our constitution, the judges of Karlsruhe—as much as they were ready to defend the freedom of the press—have not neglected appeals and prescriptions concerning the duties of newspapers and magazines, and especially those of their editors.

This has been of little help. Even the legal institution of *Gegendarstellung* (correction of facts by the concerned person) —known since the French revolution— has been of little help. This is the right of an individual to defend himself by publishing a correction or a substantial completion of a challenged first journalistic information. From a juridical point of view this legal possibility does not constitute the right to participate in the opinion market, but only a remedy against the impact of a single media on his protected private sphere. It is limited to the statement of facts. Subjective opinions, commentaries can not be remedied by a correction. But then the publications still have the right to contradict which discourages many individuals.

But maybe a look over the fence will help. This time to our Western neighbours from where as already mentioned so many good things came, especially our Anglo-American colleagues know the institution of damages payments for slanderous publications which hurt the rights of the person. For a long time this experience was foreign to the German legal system. Honor can't be compensated with money was the certainly very respectable opinion. But in the meantime market economy has made some progress even in our country. It is almost a joke that the favorite object of the yellow press, princess Caroline of Monaco has become a person of German legal history. She and her clever lawyer have caused the highest German civil court to punish wrong reports with the right to correction and payment of damages. Who does not want to feel, must pay. Maybe this could be a way out of the increasing lack of restraint on behalf of the press.

The power of the press is founded not only on the power of words. Also the concentration of publishing rights brings with it the danger of an opinion dominating power which is not democratically legitimized, and especially brings with it uncontrolled market domination.

In Germany it is less the concentration of economic interests in the hands of foreign capital groups which plays a role. Also the danger of the well-known German big publishing houses is not as aggravating as it is often presented in German publications. More important is the fact that in many parts of the German province only one regional newspaper dominates the market. These newspapers have such an importance for local and regional politics that they are resented as too influential by the local elected democratic representatives. But in these cases the refined

system of German anti-concentration rules does not apply. The antitrust regulations of the press fusion control in Germany are only effective against big publishing houses. But it is a pleasure to see that here too the market acts as remedy against many ailments of this world. To this regional market dominating newspapers a competition has appeared in the form of advertisement papers or urban district papers that form a kind of alternative public opinion. But here again there is a tendency of big newspapers and publishing houses to control even this market.

The great variety of other media is a buffer against opinion dictatorship in these regions. The immense German magazine market with its thousands of titles, the great number of radio and TV programs and the rapidly increasing expansion of other electronic media are quite confusing for the normal citizen. The electronic media market uses also the privilege freedom of the press which should better be called freedom of the media. The foundations which were laid by the Western Allies during the years after the war can still be felt. They created what I have called in a different context the “heritage” or “Germany’s favorite occupation baby”: they created the public-legal broadcasting system. In opposition to Goebbels’s propaganda machine this public-legal system is not a government program. It was created to guarantee to all socially relevant groups a participation in the electronic opinion market. For many years the obstinate judges of the Constitutional court have opposed the opening of the market to private companies. But again modern technics have triumphed over jurists. Nowadays we have in Germany a flourishing radio and TV-market in private hands which politicians are trying to regulate again. But global developments —electronic media do not respect the frontiers of countries— have brought about recently proposals to remove regulations.

My description of the situation in Germany in spite of the flourishing market which it depicts contains little encouragement for those who think that independence and national identity are important principles of a media market. I am describing the German reality because it would not be honest otherwise, but also because the development has not been able to damage the credibility of democracy in Germany. On the contrary, the capacity to recognize undesirable developments, to call exaggerations by their name, to describe wrong developments, helps to find a way out. Long ago our politicians, our associations, our artists have learned to

handle our media system. The media do not dominate us, we dominate the media.

It is a hidden but a wrong goal of the media to educate its users. As opinion polls prove, in Germany the users are also about to evaluate their media. So far nobody knows the answer to the question how important is the influence of the media on the state and its citizens, or to say it otherwise, what is the contribution of the media in the creation of a virtual reality. We don't know the answers. It will not be easy to find them.

A living society will try to find the answers. Journalists and editors have tried to exert some self-control on excessive reporting. The German Press Council which was conceived as an exemplary institution manned in equal parts by publishers and journalist is not very effective. Although it is part of the codex of the German press to publish admonitions of the Press Council even if the own paper is concerned, this institution can not really be considered representative of a credible self-control.

What can be the resumé of the state of affairs in the media? It didn't help to regulate everything. The rapid development has removed all doubts and barriers, shame and honor were often injured. But still the media market in Germany is enjoying a continuous boom, politicians and jurists are on the defensive. And they will stay in this status of defence, because the rapid technical progress in communication will make it still easier to overcome all attempts to regulate them. So my recommendation to politicians, soldiers, judges and other people, who —by the way— have the honor to be servants to the public, not its commanders: we have to learn again to live with the freedom of the press.