

129 Der verfassungskonforme Ausgleich zwischen den verfassungsrechtlich fundierten Persönlichkeitsrechten und den Grundrechten der Medien wird daher auch in Zukunft eine der sensibelsten Aufgaben bleiben, mit denen sich die Rechtsordnung einer demokratischen Gesellschaft konfrontiert sieht, die auf einer lebendigen öffentlichen Diskussion beruht, aber genauso gut auf dem Schutz der Integrität des Einzelnen. Insofern ist sie letztlich unteilbaren Menschenrechten verpflichtet,¹²⁸ in deren Bezugsfeld keine Position einen absoluten Vorrang beanspruchen kann, weder die Meinungsfreiheit noch der Schutz der Persönlichkeit des Menschen vor einer nachteiligen Berichterstattung. Der Rückgriff auf die Verfassung wird dann zu „richtigen“ Ergebnissen führen, wenn man in der Verfassung (oder auch im europäischen Grundrechtskatalog) den Ausdruck jener grundsätzlichen Wertungen sieht, über die sich eine freiheitliche demokratische Gesellschaft einig sein kann. Das Grundrecht der Meinungsfreiheit wird von durchaus prägnanten Wertungen gestützt, von denen auch die Medien profitieren. Sie finden eine Deckung in der Verfassung. Die Verfassung gewährleistet freilich auch den Persönlichkeitsschutz und es ginge darum – so die abschließende These dieser Untersuchung – auch diesem Schutzgut deutlichere Konturen zu geben, die in der Abwägung mit der Meinungsfreiheit zur Geltung gebracht werden können.

¹²⁸ Vgl. zum Topos der „unteilbaren“ Menschenrechte VfSlg 13.981/1994.

Media Liability in the Information Society

Vincenzo Zeno-Zencovich

1 Through the last century tort law has increasingly expanded both by occupying new fields and by changing its rules, which have shifted from fault-based systems to strict liability systems. The reasons for this phenomenon have been widely investigated and discussed: tort law is considered one of the most effective social regulators, allocating losses in modern societies and fostering a sense of justice in redressing wrongs. At the same time the economic role of tort law has been enhanced by its connection with insurance: strict liability is an efficient way of selecting competitive enterprises. The risk of damages is turned into the certainty of the insurance premium, the cost of which is passed on to the consumer by a slight increase in the price per unit. Against this background, which is common to practically all human and economic activities, the role of tort law in the media sector is strikingly anomalous, without distinction between civil law or common law countries. While the whole tort system moves toward strict liability, in this sector fault (if not malice) is the rule and the ascertainment of liability is strewn with exemptions, privileges, and limitations. The reason for such a broad departure from rules that are firmly established is that the media industry, and their most prominent employees, journalists, enjoy a privileged constitutional status which grants them immunity from the application of the ordinary tort rules by which they would otherwise, and undoubtedly, be held liable. Such a situation does not appear to be consistent with a wholly modern tort law system and should be questioned first of all on the ground on which, assertively, it is built: the constitutional protection of the media.

2 In the European tradition, both continental and British, freedom of expression is an individual right and belongs to the “body politic”: the citizens and their various forms of association (political parties, trade unions, etc). There is a striking difference between the First Amendment to the US constitution (1791) which affirms the principle of “freedom of the Press” and the French Declaration of Rights (1789) where (art. 6) the right to print is clearly instrumental to individual freedom of expression. The European legal and political traditions have always resisted the idea that “the media” should be vested with constitutional rights which belong, instead, to the citizens.¹

¹ J. Lichtenberg, Foundations and limits of freedom of the press, in: Ead (ed.), Democracy and the Media (1990).

- 3 The recent inclusion in the European constitutional treaty of art. 11 of the Nice Charter on fundamental rights does not appear to represent an exception. Paragraph 2 states that "freedom of the media and their pluralism are respected", but such a statement is clearly ancillary to the individual right to receive information which is stated in paragraph 1, and can reasonably be interpreted as requiring a relaxation of a great number of administrative restrictions to the media business (especially electronic media) such as registration requirements, licences, special liability of editors, content control, and so on.
- 4 If one looks at the media industry from an economic standpoint it is clear that there are no differences between it and other industries: those who control the business, and who often have a wide range of economic interests in other businesses, aim to make a profit. Such a goal is perfectly legitimate and, when the company is listed in the stock-market, is also an obligation towards investors. It is difficult to understand, from a constitutional perspective, why equally socially important industries (e.g. pharmaceutical companies) should fall under general rules, and media industries (which might be controlled by the same group) should receive a special status. It is generally affirmed that the special status of media industries is a consequence of their role in the political and democratic process: free – extremely free – media are essential in a democratic society. Behind this theory lies a further misconception of the constitutional principles which should govern the matter. While in the past 50 years in Europe (and even earlier in the US) there has been a growing request for accountability of all those who have a role in the government of a country – whether in the public or in the private sector – the media industry is (and would be) exempted from such a process and represents a case – the only case in modern democracies – of power without responsibility.²
- 5 One should add that the current theories of the constitutional role and privileges of the media industries are the denial of modern democratic political theory because it substantially expropriates freedom of expression from the citizens – who are left with insignificant "speaker's corners" – and hands it to industry, which surely has an important role in modern societies but cannot be given the rights that belong to the body politic.³
- 6 If the media do not (and should not) have a privileged status, the same is to be said of their employees, the journalists. Firstly, the category has a doubtful legal standing (is it the fact of being a member of some private, semi-public, or public association that confers special rights? Or is it the fact that someone has been hired by a company rather than another?).⁴

² This is the title of the classical book by J. Curran/J. Seaton, *Power Without Responsibility* (1997).

³ T. Gibbons, *Regulating the Media* (1998).

⁴ M. Gurevitch/P. Elliott, *Le tecnologie della comunicazione e il futuro delle professioni radiotelevisive*, in: G. Bechelloni, *Il giornalismo come professione* (1980), 46.

7 Secondly, it is quite clear that – apart from statistically modest exceptions – journalism is simply one of a score of intellectual professions in which the employee uses his skills (writing/speaking) under the direction and in the interest of his employer. The employer decides on what, when, where and how the journalists shall report. They cannot express themselves at random but must follow precise directions. What they write is not necessarily published, and the decision to publish is not up to them. What they write can be abridged and is substantially changed by adding titles, sub-titles, photos and other graphical markers. In any case the result of their work does not belong to them: the publisher, and not the journalist, owns copyright over what is published in the press or aired on television. In crude terms, the paradox is that journalists – as such – are not entitled to freedom of expression any more than a ticket controller on a train is entitled to freedom of circulation.⁵

8 A serious debate on the freedom of the media, instead of fostering privileges that are inconsistent with both constitutional and private law, should challenge the rationality of all those measures that discriminate media industries from other kinds of business and do not appear to be justified by a balance-of-interests test.

9 Despite the dogma of "freedom of the press", printing activity, since Gutenberg, undergoes a number of administrative constrictions which not only are not applied to other industries, but also vary from media to media:⁶ it is sufficient to compare the striking differences between press, movie industry, radio, television and the internet. The dissemination of the same content may be subject to a variety of rules, which are mostly the result of historical stratifications: it is frankly difficult to find a rational explanation for such wide divergences.

10 Even less rational are the widespread specific criminal sanctions which are directed against many media activities – and only against them – related to the dissemination of content: criminal statutes against libel and obscenity are frightening examples of an age when media was a socially and politically dangerous activity and not a business like so many others.

11 And if the latter statement is true, it is not clear why the media should be subject to special antitrust rules which, in contrast with general *ex post* regulation, introduce protectionist principles (prohibition of cross-ownership, limitation of number of enterprises owned or quota of market share, etc). The justification that is usually given is that the special and unusual limits are needed to preserve "pluralism" in the media. But the answer avoids the substantial question: why ownership of two newspapers is legal and of three illegal, why 10 radio stations and not eleven, why a 15% market share and not a 20%? There

⁵ The opposite view is widely shared: see *ex multis* G. Robertson/A. Nicol, *Robertson & Nicol on Media Law* (2002).

⁶ R. Craufurd Smith, *Broadcasting Law and Fundamental Rights* (1997).

is no empirical data that supports *ex ante* limitations and tells us "how few is too few". Examined from a rational point of view pluralism appears to be only an ideological prejudice against media industries.⁷

- 12 To bring things back to a more realistic context where rules and regulations should be decided on the basis of facts and figures and evaluated on the basis of their performance, it is preferable to consider media corporations for what they actually are: businesses that buy informational or entertainment products – sometimes as "raw" materials, other times as half-finished or completed materials – assemble and package them under a brand (the newspaper, the periodical, the network) and sell them to the public and/or to advertisers. This is how – and why – a media business is run, and if it were not, it would be rapidly out of business. In the information society, where the main asset of world economics is knowledge and information, informational and entertainment products are just like any other tangible product and should be subject to the same rules, if and when they cause damage.⁸
- 13 One does not have to raise many arguments to point out that from a tort law theory perspective the present relaxed liability regime applied to the media is an indirect subsidy to negligent activities and its under-deterrence distorts the market by favouring inefficient organizations which externalise their costs on the public at large. There is no other activity which is guaranteed immunity or relaxed liability. Even the dogma of the "King can do no wrong" is a relic of the past and – with the exception of judicial activity – the industry, professionals, public administration and even the legislature (see the ECJ decision in the Francovich case) are liable for damages. There are two models available which are widely applied and studied: negligence and strict liability. EU law – which can be assumed as a unified model – adopts both in the field of information dissemination. Directive 95/46/EC adopts strict liability for unlawful processing of personal data, which is one of the most important raw materials of media industries. Directive 00/31/EC adopts a negligence standard for internet providers on the basis of the control principle; only if one can control the content or its destination is one liable for eventual damages. The provisions in artt. 12 to 15 of the latter Directive can be correctly interpreted as an indirect aid to the growing internet industry which is a measure quite common in the long relationship between new technologies and tort law: it is sufficient to consider the limitation to liability fixed way back in 1929 in favour of the civil aviation industry in the case of accidents. In favour of strict liability is the fact that it is the general rule for products liability and it encourages insurance policies by industry. Ultimately it is a loss spreading technique by which the actual cost would be borne by those who buy the product and/or advertise on it. Whatever the choice, it would be preferable if it were consistent with the general rules that should govern the dissemination of information. In this re-

⁷ D. Mcquail/K. Siune, *Media Policy, Convergence, Concentration and Commerce* (1988).

⁸ E. Noam, *Two Cheers for the Commodification of Information*, in: N. Elkin Koren/N.W. Netanel (eds), *The Commodification of Information* (2002), 43.

spect media are only one – and a very limited one – among the many industries involved in the same activity. In the information society "production" and "consumption" of information is extremely high and it is proper to speak of "commodification of information". The main producer of this new commodity is the state which, historically, collects enormous amounts of economic, social, personal data, processes them and then uses them in decision-making or makes them available to the public at large. But there also exist large private enterprises whose core business is tightly related to the acquisition, elaboration and sale of information, such as financial institutions. In the financial market every decision is made on the basis of the information available, and financial products (shares, bonds, futures, etc) comprise in their price the value of the information available on the company, the country, the market, etc. Great financial scandals are mostly informational scandals caused by a negligent or deceitful dissemination of financial information. This is an area of growing interest of tort law which is mainly focused on the issues of causation and damages. If information is a product, the rules that govern harmful information should be the same whether the interests involved are personal (such as reputation) or purely economic.

Once one has brought the liability of the media back to its natural environment, away from ideological prejudices, and rooted it in the economic process, it is obvious that there is an important aspect that must be considered and that, at present, is generally disregarded: risk avoidance. If it is clear that media industries are in the business with the legitimate goal of making a profit and therefore do not deserve privileges nor penalties, it should also be clear that the dissemination of news (and also of entertainment) is part of an industrial process. It is important – also from a point of view of business ethics – that such activity should not be harmful to third parties. There are obvious benefits in introducing risk-avoiding procedures: less damages means far lower insurance premiums, a reputation for accuracy, competitive advantages, and improved social standing of publishers, editors and journalists. From this perspective, instead of expanding media privileges, one should focus on news-gathering techniques, access to primary and secondary sources and verification procedures in the same way as one would do in any other "factory".⁹

Equal importance should be given to the ways by which news is presented through titles, subtitles, captions, summaries and so on, which is the "packaging" process in news dissemination. Finally it would appear obvious to introduce internal and external audits in respect of what is considered "best practice". Like in every other business it is natural that decisions – such as that to publish or how to publish – will be taken on a risk-benefit analysis, but such a decision is much more rational and transparent if based on economic elements rather than on the narcissistic tendency of journalists to thrust themselves – and not the news – in the limelight.¹⁰

⁹ P. Manning, *News and News Sources. A Critical Introduction* (2001).

¹⁰ R.H. Coase, *The Economics of the First Amendment. The Market for Goods and the Market for Ideas*, [1974] *American Economic Review, Proceedings* (Am. Econ. Rev. Proc.), 384.

- 16 This brings us to the final issue: media mistakes – to use a benevolent expression – are the result of individual decisions, sometimes taken on the spur of the moment, sometimes calculated. In the media industry the human factor is extremely relevant. This does not mean that journalists should be super-heroes (although Clark Kent is depicted as a reporter), or have super-specialized skills. It means instead that in the media industry the criteria used for the selection of journalists should be regarded as extremely important, while, instead, they are mostly neglected. Recruitment policies should, obviously, include not only training at the beginning of the career, but also on-going training, an issue which is completely ignored by most publishers and journalists' associations. Another aspect that is neglected is the clarification of the contractual obligations of journalists towards their publisher. Once it is clear that they are not vested with special rights but are intellectual professionals like many others (lawyers, accountants, consultants, etc.) it would be preferable that they should have clear guidelines on how they should fulfil their duties. Formalizing rules presents a number of important advantages: it renders the players more aware of their role, it helps balance competing interests, it clarifies responsibilities, it allows the parties to challenge the rule or its enforcement. In this context – and not in the ambiguous limbo in which the press is now placed – press codes can represent an important aspect by fixing the mission of the profession and its commitment to public interests; and at the same time protect the category from undue pressures from the publisher or third parties.¹¹
- 17 Tort law is not the miraculous remedy for social wrongs, but if one wishes to evaluate its potential, it is sufficient to compare the areas where it normally operates and the media industry. It is quite clear that inadequate and inefficient tort law (such as that which we find in the media sector) can be strongly related to markets with low professional and industrial standards.

¹¹ C.J. Bertrand, *La déontologie des médias* (1997).

Persönlichkeitsschutz und Strafrecht – an der Grenze zweier Rechtsgebiete*

Frank Höpfel

I. Vorbemerkungen

Das Thema „Persönlichkeitsschutz und Strafrecht“ führt uns an die Grenze zweier Rechtsgebiete. Es lässt mich daher mit einer allgemeinen *Vorbemerkung* beginnen. Strafrecht schützt die Persönlichkeit im Sinne der Würde und Integrität des Einzelnen in sprichwörtlich fragmentarischer Form, indem es die physische und psychische Gesundheit, die Freiheit, Ehre, Privatsphäre, die sexuelle Integrität, um die wichtigsten dieser Ausprägungen zu nennen, zu Rechtsgütern erhebt und mit Strafdrohungen bewehrt.

Die Verteidigung dieser personalen Individualrechtsgüter ist – bis auf jene der Ehre und der Privatsphäre – durch das Notwehrrecht abgesichert, das in Österreich, in näherer Ausführung des § 19 *Allgemeines Bürgerliches Gesetzbuch* (ABGB), durch § 3 *Strafgesetzbuch* (StGB) geregelt ist;¹ darüber hinaus berechtigt die Klassifikation einer Handlung als Kriminaldelikt jedermann, einen dringend Verdächtigen während oder unmittelbar nach der Tat auf angemessene Weise festzuhalten, um ihn der Strafverfolgungsbehörde zu übergeben (§ 86 Abs 2 *Strafprozessordnung*, StPO). Das ist durchaus ein legistisch bedeutsamer Aspekt, wenn es darum geht, wie auf ein als Belästigung erscheinendes sozial unerwünschtes Verhalten adäquat reagiert werden kann.

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¹ Dazu ist festzuhalten, dass es für die Notwehreberechtigung auf eine Strafbarkeit (Tatbestandsmäßigkeit) der rechtswidrigen Angriffshandlung nicht ankommt. So könnte zB erwogen werden, ein unerwünschtes Verhalten zu Verwaltungsunrecht zu erklären oder etwa als Angriff bloß auf die Ehre – somit vordergründig ohne notwehrfähiges Gut – in das Strafgesetz einzureihen, während ebenfalls beteiligte Komponenten, die gegen das Rechtsgut Gesundheit oder Freiheit gerichtet wären, als solche die Schwelle des Tatbestandsmäßigen nicht zu erreichen brauchen. Eine teleologische Analyse würde dennoch zur Notwehreberechtigung nach § 3 Abs 1 (erster oder zweiter Satz) führen. Vgl dazu im folgenden Text die Thematik des „stalking“.