

**UN Human Rights Council
Universal Periodic Review
30th session – April-May 2018**

September 2017

**Contribution by Reporters Without Borders (RSF),
a non-governmental organization with special consultative status,
on freedom of the media and information in Germany**

An international NGO that has promoted media freedom worldwide since 1985, Reporters Without Borders (RSF) has consultative status with the United Nations. Its national sections, its bureaus in ten cities and its network of correspondents in 130 countries enable it to closely monitor freedom of information and expression all over the world. In 1994, RSF Germany was founded as the German section of the organization, based in Berlin.

Germany ranks 16th out of 180 countries in RSF's 2017 World Press Freedom Index.

Prepared for the third cycle of Germany's Universal Periodic Review, this contribution offers recommendations on press freedom and freedom of information.

1. Working conditions for Journalists: Violence, threats and hostilities towards journalists

Strong constitutional guarantees and an independent judiciary system ensure a generally sound work environment for journalists in Germany. The constitutional court has repeatedly ruled in favor of press freedom and related basic rights. However, journalists continue to be threatened and harassed by right-wing groups and demonstrators, sometimes without an adequate police response. In 2016, RSF Germany registered 18 violent attacks on journalists. Apart from two exceptions, they all occurred during demonstrations of the right-wing populist party Alternative for Germany (AfD) or the anti-Islam movement Pegida. Police and judiciary in the German state of Saxony, where about two thirds of the cases documented by RSF in 2016 occurred, repeatedly faced criticism for not acting decisively against such acts. A parliamentary request in Saxony's state parliament revealed last August that a significant number of the cases documented by press freedom activists was not even known to prosecutors. Many journalists thus feel intimidated and think twice about whether or not to research and write about certain topics.

During the G20 summit in Hamburg in July 2017, 32 journalists had their accreditations revoked, with authorities citing security concerns as a reason. A list with names of reporters and photographers whose accreditation had been withdrawn was widely distributed among policemen securing the summit. People and media passing by were able to take a look at the lists and thus at the names. Stigmatizing journalists as a security threat with lists of names copied multiple times is clearly a data protection scandal.

At least ten of the 32 accreditation withdrawals have by now been shown to be based at least partly on either false assumptions or on information illegally stored in police databases, such as accusations of criminal acts that have long been cleared in court. After the German public broadcaster ARD TV published its findings on these cases end of August 2017, the German interior ministry admitted that in at least four cases the decision to withdraw the accreditation was wrong. German security authorities clearly restricted some journalists' ability to work and stigmatized them as supposed perpetrators of violence based on faulty and in parts illegally stored information. The Federal Office of Criminal Investigation obviously stores information of questionable security relevance on a large scale as it thinks best.

Another worrying incident was the constitutionally questionable ban of linksunten.indymedia.org, an online portal deemed left-wing extremist by security authorities. German interior minister Thomas de Maizière announced the website's ban in August 2017, invoking the law of associations by classifying its group of operators as an association which he declared dissolved. De Maizière called the portal "the most influential online platform of violent left-wing extremists in Germany", saying the latter had used the website for years for "spreading posts with criminal and anti-constitutional contents".

While incitement to hatred and violence are clearly unacceptable, press freedom also applies to publications that are uncomfortable and difficult to bear. In order to proceed against criminal content on linksunten.indymedia.org, there would have been less radical means available. However, the German government took the highly unusual step of banning a – despite everything journalistic – online portal through the legal backdoor of the law of associations, avoiding thorough consideration of any negative repercussions on media freedom and providing repressive regimes with a pretext to follow the German example. Some critics even linked the decision to the national election campaign, speculating the interior minister wanted to demonstrate a hard line against supposed leftist extremists in order to rally support from his conservative party basis.

2. Whistleblowers and Informants are not adequately protected

The protection of whistleblowers in Germany is still insufficient by global comparison. No law exists to explicitly protect them. Those who reveal political, social or economic abuses face discrimination at work. At least in the finance sector new regulation prohibits the prosecution of employees who reveal violations of law.

In December 2015 an anti-whistleblower penal provision came into force without substantial political debate and well-hidden in a legislative package re-introducing bulk data retention powers for telecommunications metadata: The new statutory offence of "data fencing" ("Datenhehlerei"; section 202d of the Penal Code) penalizes the handling of leaked data without ensuring adequate protection for the media. The law thereby criminalizes an important part of the work of investigative journalists and bloggers, as well as of their sources and of experts assisting in their investigations. An alliance of German civil rights organizations, journalists and bloggers, among them RSF, has lodged a constitutional appeal against the provision in January 2017.

3. Surveillance of journalists: "on the radar" of the intelligence service

Journalists face the risk of surveillance by the German foreign intelligence agency (Bundesnachrichtendienst or BND). According to a report by Der Spiegel magazine, starting from 1999 the BND spied on at least 50 telephone and fax numbers or email addresses of journalists or

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newsrooms worldwide. Reporters Without Borders had long feared that the BND monitored journalists as part of its mass filtering of communication data, at least as a collateral effect. The targeted surveillance revealed by the Spiegel investigation is a massive violation of press freedom. According to documents seen by Der Spiegel, among the targets were the British BBC in Afghanistan and London, the New York Times in Afghanistan, as well as mobile and satellite telephones of the news agency Reuters in Afghanistan, Pakistan and Nigeria.

In October 2016, Germany's national parliament passed a reform bill on the BND, giving the intelligence agency the explicit right to spy without restrictions on non-EU journalists, as long as this is deemed to serve Germany's political interests. By passing the law, the ruling coalition not only defied the unanimous criticism of media associations and human rights organizations, three UN Special Rapporteurs, the OSCE Representative on Freedom of the Media and the legal committee of the German Bundesrat, but also technical objections. Germany's permanent mission to the UN in Geneva even provided misleading information on the law, claiming in its answer to the three Special Rapporteurs that the BND was obliged to observe the principle of proportionality as enshrined in Germany's constitution "regardless of the nationality of the person in question", even while the new BND Law expressly specifies otherwise.

The bill does not permit spying on German citizens and permits only limited spying on the citizens of other EU countries. But it permits unrestricted spying on the citizens of non-EU countries if it was decided that the result would help to protect Germany. Exemptions protecting journalists, such as those in paragraph 3 of Germany's so-called G10 law – a law specifying the restrictions that can be placed on the constitutional right to the confidentiality of email and telecommunications – are completely absent from the law. The bill allows, for example, the BND to place the New York Times under surveillance if the newspaper received confidential information that the German authorities regarded as sensitive.

The BND also collects and analyses metadata of German citizens' foreign telephone conversations to a larger extent than previously thought and without any legal basis. Employing a long-secret "traffic analysis system" called VerAS ("Verkehrsanalysesystem"), the intelligence agency is able to collect location data and connect suspicious contents with recordings of conversations. This is according to an internal legal report of the BND that was published by Wikileaks.

4. Law on online hate content: Risk of over-blocking

A hastily-drafted new law on online hate-content was passed in June 2017 and came into force on October 1st, 2017. Even though during parliamentary deliberations the governing coalition took up some of the criticism against the bill and changed a number of problematic provisions at the last minute, the core problem of the bill against hate-speech in social media – or Network Enforcement Act, as it is officially named – remains unresolved: Backed by a threat of heavy monetary fines, the law obliges providers of social media platforms such as Facebook, Instagram, YouTube or Twitter to remove "clearly unlawful" content within 24 hours of notification. However, the law fails to provide guidelines how to define such content, which in practice may easily become the subject of lengthy legal disputes. The short deadline for removal, coupled with the threat of heavy fines, will very likely drive social networks to remove more content than is legally justified. Even journalistic publications will face a real danger of being affected by this kind over-blocking without due process.

Another questionable aspect of the law is the careless use of the term "punishable false news" in its explanatory statement, echoing the highly questionable concept of "fake news". This lends

legitimacy to the defamatory language often used by repressive governments such as those of Iran or Russia in order to persecute their critics.

Among its few positive aspects, the German law now obliges social networks to name representatives who will have to respond to prosecutors' requests within 48 hours, aiming to speed up judicial investigations and to strengthen legal recourse.

Given social networks' essential role not only as a tool of journalistic investigation and for news distribution, but also for bypassing censorship in repressive countries such as China, Turkey or Vietnam, the new law has set a dangerous precedent that may easily be used as an excuse for new censorship by authoritarian governments eager to repress independent voices. Russian lawmakers have already introduced a similar bill feared to further restrict already heavily-curtailed online freedoms in a country lacking the counterbalance of an independent judiciary. They explicitly referred to the German law as their source of inspiration and even copied many its provisions.

5. Access to information: Weak guarantees and many exemptions

Journalists in Germany also face difficulties in their daily work due to weak Access to Information legislation, defined as a key indicator for press freedom in the United Nations' Sustainable Development Goals (SDG 16.10). Even though a national Freedom of Information Law has existed since 2006, its guarantees are weak in international comparison. Federal agencies can therefore easily reject requests, citing wide-ranging exemptions. Answers are also subject to fees and sometimes long delays, creating further obstacles to the law's wide application.

At the regional level, four of Germany's states – Bavaria, Hesse, Lower Saxony and Saxony – still do not have freedom of information laws at all. In practice extensive exceptions and long time lags for reply impede the usage of the existing laws.

6. Safety of journalists: First step in the fight against impunity

RSF salutes the German parliament's recent decision to put its weight behind Reports Without Borders' initiative for the creation of a United Nations Special Representative for the Safety of Journalists, the first parliament worldwide to do so. In a resolution passed in June 2017, the Bundestag deputies called on the German government to "support a UN initiative on the safety of journalists and against impunity, and to promote the establishment of Special Representative to oversee compliance by UN members states with their international legal obligations to provide security for journalists and who would report directly to the Secretary General".

Recommendations

In the light of these observations, RSF urges the German government to:

- Abide by its international obligations for the safety of journalists and media workers covering peaceful protests, ensure that police protect journalists against acts of violence during demonstrations and that such acts are brought to justice swiftly and systematically.

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- Introduce a comprehensive whistleblower protection bill.
- Revise the BND law to include in it adequate safeguards against the surveillance of journalists, regardless of their nationality or country of residence.
- Commit to revising the German law against hate-speech in social media (Network Enforcement Act) after thorough consultation with civil society, providing for adequate safeguards against over-blocking and ensuring legal oversight through independent judicial institutions.
- Ensure that any obligations for the removal of content aiming at addressing hate-speech are bound to the rule of law principles and include adequate safeguards for the protection of fundamental rights such as freedom of speech and opinion
- Repeal or thoroughly revise the “data fencing” provision (section 202d) of the Penal Code, making sure to protect journalists and bloggers as well as their sources and assistants from criminal prosecution for handling leaked data, and from office searches and the confiscation of investigation material.
- Amend the national law on Access to Information, removing from it overly broad exemptions, stipulating reasonably short deadlines for answers and abolishing fees for freedom of information requests.

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