

German: Interior Minister Schily's parting shot—a blatant attack on freedom of the press

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Just prior to terminating his term in office, Germany's interior minister Otto Schily (Social Democratic Party—SPD) launched another attack on a fundamental democratic right: this time fundamentally challenging the right to a free press. If Schily had his way, every newspaper that uncovers abuses within the state apparatus would have to reckon with police raids of their editorial offices and seizure of their documents, while any journalist who reveals a political scandal has to expect imprisonment.

The issue was sparked off by an article in the April edition of the magazine *Cicero*, which could by no means be regarded as an especially critical piece of journalism, but nevertheless dealt with a topic of considerable public interest. Under the heading “The most dangerous man in the world,” reporter Bruno Schirra wrote an article on the Abu Mussab al Zarqawi.

He based his article on information from the Jordanian and Western secret services, including a 125-page-long dossier drawn up by the German Criminal Investigation Office (BKA), which the article quotes in detail. The dossier claims that Zarqawi is being supported by Iran and is planning terrorist attacks with chemical weapons in Europe. Schirra writes that the dossier is stamped “classified material—only for official use.” This is the lowest security classification and means that the contents of the document are not of a sensitive nature.

Several weeks prior to the publication of the article, the reporter is alleged to have informed the BKA of his plans and asked for a discussion with the agency. In the event, the meeting between the two sides only eventually took place after the appearance of the article. In June, the BKA issued a writ against Schirra on the grounds of “betraying official secrets” according to section 353b of the German penal code (StGB) and began to look (unsuccessfully) for the informant in its ranks.

Finally, in the middle of September, the police carried

out a search of the editorial offices of *Cicero* in Potsdam and at the same time raided the private dwelling of Schirra in Berlin. The legal basis for the raids was a writ issued by the Potsdam district court passed at the request of the public prosecutor's office, which accuses *Cicero* and Schirra of being “accessories to the betrayal of official secrets.” The BKA dossier in question was not found; however, the entire disk of Schirra's computer in the editorial rooms was copied and 15 crates of files, portfolios and document folders—Schirra's complete private archive—was confiscated after it had been “accidentally” found in the cellar of the journalist.

According to section 353b StGB, such a criminal investigation requires the authorisation of the interior ministry headed by Otto Schily, which gave the green light.

Two weeks later, not only did Schily justify the action of his ministry at the annual congress of the German newspaper publishers association, he elevated it to a matter of state. In future, the state would pursue all journalists who quoted from secret documents and, with the help of the law, “impose discretion with regard to the state.”

Schily aggressively rejected criticism from media concerns, and even from prominent representatives of his own party and its coalition partner the Green Party. He described such critics as “just a few teasers” whose “stupid gossip” cannot “be outdone for its foolishness.” In an interview with the magazine *Der Spiegel*, he compared journalists who were in the possession of secret documents with receivers of stolen goods. The state has “a requirement to protect its own sphere,” Schily said, and went on to completely defend the searches carried out of *Cicero* and Schirra. He also remained adamant in his stance during a parliamentary hearing convened last week to discuss the issue.

A close look at the facts, however, indicates that the

searches were illegal. On the one hand, the German Constitutional Court stressed more than 40 years ago that searches on the basis of suspicion of being an accessory could not be used as a pretext to detect leaks in the state apparatus. The protection of informants is an indispensable component of press freedom. On the other hand, German criminal code also expressly states that any confiscation carried out on the basis of the suspicion of being an accessory must be in accordance with the fundamental right of press freedom. The special mention of the fundamental right in the legal text is unusual. Its inclusion is aimed at “effectively combating any danger of overemphasising the interests of the prosecution” by legislators.

In the meantime, the real meaning of “imposing discretion with regard to the state” has been revealed. The public prosecutor’s office in Berlin has instigated its own criminal procedures against Schirra, based on the “accidental find” in his cellar. Once again, the accusation is “accessory to the betrayal of official secrets.” This time, the accusation is based on documents concerning a series of scandals that have shaken the German Republic over the past decade—the Leuna affair in East Germany, deliveries of military hardware, and the donation scandal that hit the Christian Democratic Union. Schirra had formerly reported on all of these scandals when he worked as a reporter for the paper *Die Zeit*. Now, it will be a punishable offence to uncover such affairs.

The role played by Schily in this affair is still not completely clear. Was it limited to merely taking responsibility for the authorisation for prosecution? According to information in *Die Welt*, the public prosecutor who ordered the searches maintained telephone contact for several hours—probably with his superiors in Potsdam—starting from the time when officials first entered Schirra’s cellar. At the parliamentary hearing, the interior minister was reluctant to give a clear answer to the question of whether, in light of the incriminating documents found in the cellar, the public prosecutor also maintained contact with the BKA or sources in the interior ministry itself. “He neither admitted nor disclaimed anything, just threw the question back,” *Die Welt* wrote.

The media expert Johannes Ludwig assumes that Schily went so far as to exert pressure. He told the online magazine *Telepolis*: “Some years ago, the general prosecutor’s office in Germany adopted guidelines to no longer carry out such actions against media representatives. First of all, suspicion of being an

accessory could never be properly confirmed. Secondly, police actions against the press always provoke negative public reactions. And on a long-term basis, that harms the reputation and thus effectiveness of the public prosecutor’s offices.... [A]bove the public prosecutor is the senior public prosecutor, over him the general prosecutor—and then all that remains is ministry level. If a minister just thinks out loud, then [it] often leads on the lower levels to a kind of rush to obey, because nobody wants to jeopardise their career. In the case in question it is obvious that Otto Schily exerted pressure.”

The minister was evidently anxious to make some sort of breakthrough, and the action being undertaken by the public prosecutor’s office in Berlin shows that he partially succeeded. Perhaps it is “daily practice” for journalists to report from confidential documents, according to Frank Thiel, speaker for the Berlin public prosecutor’s office, speaking to the *taz* newspaper, “nevertheless it remains punishable.” He even went on to make the comparison: “In the building industry, it is also usual to pay bribes—but that is also punishable.”

The law that has been utilised by Schily, state lawyers and the police is thoroughly undemocratic. According to its text, state action is required whenever official secrets are “revealed” and thus “important public interests endangered.” This refers not to the interests of the public, but on the contrary, according to the statutes, it is necessary to prevent “any shaking of public confidence in the impartiality, incorruptibility and effectiveness of public administration.”

Not coincidentally, the section of the statutes concerned (353b) was inserted in 1936 by the Nazis. Although Germany does not confront imminent fascism, the revelation of official abuses is once again regarded by powerful sections of the state apparatus as a punishable offence.



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