

DISCIPLINE AND PUNISH?

Miloš MISTRÍK

ABSTRACT:

Regulatory authorities in the whole Europe are moving within the limits of administrative law, so they have to ask the question about the objective of their work and the functions fulfilled by the sanctions. We are analyzing the most important ones. One of the most important functions of media regulation is a prophylactic one. The second very important is if something appears in the broadcasting stream more or less only for a short period of time, but it does not mean that it cannot have devastating impact on civil, political and sexual ethics. That because they have the function to name this case. The naming function may be meaningful not only for the audience, but also for those preparing the program and it could lead to a prophylactic function. The naming function is also linked to the function to orientate the audience in the value system. The statements made by the regulatory authority may in this way reach the education. For media education it is in fact critical to get people oriented in the world of media, and to teach them to stay detached, not to damage their own and social values. Last but not least we often see people turning to the regulatory authority with their complaints that are not specified in any way, they do not show any interest in a response, they simply need to moan at the right place. Organizations, management, or political entities also use this ventilation function sometimes. So, the ventilation function acts as a safety valve. Nobody expects broadcasters to behave voluntarily and without exceptions in a way that no sanctions would need to be applied to their programs. It is expected that it would happen, but the broadcasters would select authorities from among themselves for the correction, which would supervise compliance with the jointly selected principles. It seems to be less reliable to create regulation from the "bottom". This system is really attractive, but it also has its own and not negligible risks. There would also be someone responsible for "discipline and punishment" from the "top". It is mainly for this reason that the regulation authorities are here.

KEYWORDS:

regulation of media, functions of regulation, media education, Council for Broadcasting and Retransmission

Introduction with Foucault

We chose quite a provoking title. We borrowed it from the French philosopher Michel Foucault who wrote a book with this title *Discipline and Punish*.¹ His book's subtitle is *The Birth of the Prison*, and he describes the history and running of this ancient institution of mankind. But the regulatory authorities in the area of radio and TV broadcasting (in Slovakia Council for Broadcasting and Retransmission, Rada pre vysielanie a retransmisiiu), have not this duty – although they have certain sanction tools at their disposal too – the duty to imprison the broadcasters and isolate them for some time from society. They do not move within the limits of the criminal but of administrative law. They regulate the contents of broadcasting, safeguard the limits stipulated



prof. PhDr. Miloš Mistrík, DrSc.
Fakulta masmediálnej komunikácie
Univerzita sv. Cyrila a Metoda v Trnave
Námestie J. Herdu 2
917 01 Trnava

Ústav divadelnej a filmovej vedy SAV
Dúbravská cesta 9
841 04 Bratislava
Slovenská republika
milos.mistrík@gmail.com

Media analyst, theatrologist. He studied the theatre research at the Academy of Performing Arts in Bratislava. Afterwards, he lectured at this Academy and later on at the Academy of Arts in Banská Bystrica, Comenius University in Bratislava, University of SS. Cyril and Methodius in Trnava and at the University Paris 3 – Sorbonne nouvelle in Paris. In the year 1994 he was a Director of the program of the Slovak TV, in the years 1998-2002 he was a member of the Council of the Slovak TV, from 2005 he was a member and from 2009 the President of the Council for Broadcasting and Retransmission. At the Slovak Academy of Sciences he wrote books on drama and the art of acting (*Kapitoly o hereckom umení*, 1994, *Analýzy hereckej syntézy*, 1995, *Slovenská absurdná dráma*, 2002, *Herecké techniky 20. storočia*, 2003, *Aj dráma je len človek*, 2003, *Jacques Copeau a jeho Starý holubník*, 2006, *Milka Zimková – aktorka slovácka*, 2011 etc.).

¹ FOUCAULT, M.: *Surveiller et punir*. Paris: Callimard, 1975.

by laws, and impose sanctions in the case of their violation. As stated in the Recommendation Rec 2000(23) of the Committee of Ministers of the European Council to member states on the independence and functions of regulatory authorities for the broadcasting sector: "Regulatory authorities should have the power to consider complaints, within their field of competence, concerning the broadcasters' activity. When a broadcaster fails to respect the law or the conditions specified in his licence, the regulatory authorities should have the power to impose sanctions, in accordance with the law."²

When supervising compliance with the law, the duty of regulatory authority is not to isolate a dangerous individual. The sanction must be appropriate. The only thing that could somewhat resemble isolation are the provisions of the law which enable the regulatory authorities to suspend a program and to withdraw a licence from a broadcaster, if necessary. This would really be a measure on the edge, and is very limited by law – in practice it almost cannot be exercised and is only used in extraordinary cases.

Functions of the Regulation

Regulatory authorities are thus moving within the limits of administrative law and not criminal law, so they have to ask the question about the objective of their work and the functions fulfilled by the sanctions that they potentially impose. We shall try to list and analyze the most important ones.

They can only make decisions about a regulation and potential sanctions after an act has been committed. A committed act cannot be taken back. It is not possible to **remove** a mistake which was already broadcast. Of course, there is the possibility not to remove but to make a **remedy** by additional broadcasting a correction of untrue information; however, such does not change the fact that the original had already been broadcast. And it remains in the archives, it may happen that it is published on the relevant broadcaster's web site and it is sometimes broadcast as a repeat. In addition to the sanction of a warning about a legal violation and a financial sanction, the regulatory authorities have another tool at their disposal – broadcasting a notification about the violation of a law – which is inserted into a similar program, and the sanction to suspend the program, which can – however – be used in practice only with series-type programs and is only a regressive correction of an act, but not its removal, which is impossible. The regulation by the Council does not apply to civil and legal levels, and the aggrieved party must claim its right another way if it believes that the remedy by the regulatory authority in the form of an imposed sanction is not sufficient. So it seems, as the law violation cannot be removed or corrected retroactively, the regulation activity will apply mainly to the future – to avoid repeating the same mistake. The most important **function** of media regulation is a **prophylactic one**. If we compare it with medicine, in the healing process intervention in the past is possible and necessary – treating a disease means removing it, curing the ill person, and restoring the body back to the original, healthy condition. Of course, in the third stage of its intervention, medicine also uses prophylaxis. In the media, as Hana Pravdová wrote, the public "acts under the media pressure of two antagonistic tendencies. On one hand, it lives in the frame of mass culture which offers uniformity, standardization, homogenization, 'hyper consumption', on the other hand, its pop-culture resistance leads to extreme individualism, to an effort to differentiate from the others, exhibition of narcissistic superego and flashy self-presentation."³ The **prophylactic act** is more than necessary.

However, if we take a look at the long-term overview of proceedings by a regulatory authority probably in any EU Member State, we could be overwhelmed by scepticism. Most probably we shall not be disclosing any secret if we say that in spite of the long-term activity of the Council for Broadcasting and Retransmission, in spite of the fact that it disciplines and punishes, the broadcasters are always repeating the same mistakes – it happens repeatedly that their news is not well-balanced, they violate the limits on advert volume, they broadcast programs infringing human dignity, etc. We may ask how it is possible. The broadcasters know that there is a danger of sanction, but nevertheless, they repeat the same law violation, even in the same type of program or in its next

issue. Michel Foucault proposes that if we want people not to cross certain borders repeatedly, we have to find such disadvantages, i.e. sanctions, which would make the crossing of such borders unattractive. But we cannot imagine how we could achieve that in administrative proceedings. We cannot imagine implementing an amount of financial fine which would ruin a broadcaster.

However, decisions made by the regulatory authority have other functions as well. One of the most important is the **function to name** the case. If something appears in the broadcasting stream more or less only for a short period of time, it does not mean that it cannot have devastating impact on civil, political and sexual ethics. But if we do not stop at it and do not name it, even with the subsequent consequences, the conscious, rational attention of the audience may miss it, it gets to the consciousness of the audience, they do not think about it, they make no standpoint on it, and they do not build any defence reflex against it. Every day we are confronted with a multitude of broadcasting streams by means of the large number of radio and TV stations, and the majority of percipients is really not able to and cannot make a standpoint or even keep a critical distance. But only when the regulatory authority based on a complaint selects a seemingly small fish from the stream, analyses it in detail, and names the things bearing the negative information does the required effect emerge. Let's have a look for instance at the reality shows or docusoaps currently riding high on the TV schedules not only in Slovakia, and achieving high viewing figures, which is not proof of excessive resistance against them. The **naming function** may be meaningful not only for the audience. We can hope that it is meaningful also for those preparing the program, and it could lead to a **prophylactic function** – a broadcaster would get precise information issued by the regulatory authority about things that could hit the limits also in the future.

The naming function is linked to the **function to orientate** the audience in the value system. This function is related to "the establishment of new information needs, the needs that were brought about by cultural expansion and led to the mass communication fragmentation."⁴ We cannot think of any immediate or straightforward effect. Becoming oriented in the issue reaches the whole media education area – its formalized sphere, i.e. existing within the school curriculum at all levels of schooling, and in various volunteer but also commercial educational institutions. But statements made by the regulatory authority may also reach education at the individual, informal, and not organized level. We definitely cannot expect the public to watch the work and statements made by the regulatory authorities. But on the other side, some of their decisions sometimes get extraordinary attention, and information about them fills the front pages of newspapers.

For **media education** it is in fact critical to get people oriented in the world of media, and to teach them to stay detached, not to damage their own and social values (let's say sceptically: if they have any at all...). We live in a "context without reality" that means that new media have begun to build relationships through the screen.⁵ Dana Petranová says, "Media education is defined as a lifelong, systematic and goal-oriented process of acquiring media competency and raising the level of media literacy. Today's information society is based on knowledge and findings. Falling behind or a low level of media literacy, if caused by the lack of education or various economic and social barriers, can result in seniors' exclusion from community life or their severe frustration".⁶ And we can add, not only seniors'. Many opinions have been voiced saying that no education, mainly formal and often too formal, has ever succeeded at significantly changing the daily habits and bad manners of the audience, and we have to agree. However, from the long-term view, we can also see the trend of enhanced media literacy and orientation slowly starting to improve the audience's **resistance** to their manipulation. We know from film history that in the beginning people used to run from their seats in cinemas if there was a train rushing towards them from the screen. And remember Wells' War of the Worlds, the 1938 CBS radio broadcast which started panic among American citizens. From the long-term perspective, we can see moments of the gradual maturing of the electronic media audience. However, on the other hand we have to acknowledge that the other side – the broadcasters are also getting mature and their means are increasingly sophisticated and crafty.

2 Recommendation Rec (2000) 23 of the Committee of Ministers to member states on the independence and functions of regulatory authorities for the broadcasting sector. [online]. [2014-01-04]. Available at: <<https://wed.coe.int/ViewDoc.jsp?id=393649&>>.

3 PRAVDOVÁ, H.: *Fenomén zábavy a úloha stereotypov v produkcii a recepcii mediálnej kultúry*. In Communication Today, 2011, Vol. 2, No. 1, p. 8.

4 TINKA, J., MAGÁL, S.: *The Regionality of Church Media as a Manifestation of their Domestication*. In European Journal of Science and Theology, 2013, Vol. 9, No. 5, p. 208.

5 SOLÍK, M., VIŠŇOVSKÝ, J., LALUHOVÁ, J.: *Media as a Tool for Fostering Values in the Contemporary Society*. In European Journal of Science and Theology, 2013, Vol. 9, No. 6, p. 72.

6 PETRANOVÁ, D.: *Media Education in the Life of Senior Population*. In European Journal of Science and Theology, 2013, Vol. 9, No. 2, p. 24.

Even if “the dual system of electronic media supports a pluralistic democratic society”,⁷ in the current world full of conflict, electronic media is also in conflict. They are fighting amongst themselves for market share, they are attacking the percipient in both the good and bad sense of the word, their content is conflicting in political discussions, in movies, TV competitions, and reality shows. If during their broadcasting the media violate limits, become ambiguous, or the tool of some political or business group, violate implemented value scales, disturb ethical principles, or picture all these things, they bring more tension. And also their positive work, mainly innovation (new programs, new topics, new tools of commercial communication, etc.) results in conflict. All these things irritate the audience and one – may be an unwanted function of the regulatory authority for this reason – the **ventilation function** acts as a safety valve. We often see people turning to the regulatory authority with their complaints that are not specified in any way, they do not show any interest in a response, they simply need to moan at the right place, they need to ventilate their frustrations presented to them or mediated by the media. Organizations, management, or political entities also make use of this ventilation function sometimes. If officials cannot respond to a complaint, or if a complaint relates to the regulatory authority, they keenly submit it to this regulatory authority and sometimes they even do not care in what way the relevant problem is solved. Sometimes it is enough for someone to make a statement – a journalist in a newspaper or a politician in Parliament – and the regulatory authority needs to be asked about its opinion, why it acts or does not act. This ventilation function in fact has no support in the law, but it operates as an additional function and society needs it for its life.

Conclusion: Apollo and/or Dionysus

As we said, in spite of the sanctions imposed, broadcasters repeatedly make the same mistakes. This could be explained by the confrontation of the two principles derived from the ancient Greek gods Apollo and Dionysus. The Apollo principle is sober, considerate, intellectual, balanced and harmonic. The Dionysus principle is passionate, excitable, emotional, unbound and conflicting. Both these principles coexist in each of us, but they are rarely balanced. And so while Apollo advises to us and broadcasters and their program to respect legal limits, not to be led astray from the objective, complex approach to the world, Dionysus leads us along dangerous paths on which we also try things which are not right, should not be done, but are still done with pleasure and delight. Some people say that people are like that in general, and if we see the rating figures we can find that the audience is often attracted to programs that appeal to lower instincts, and that programs which could be called “Apollonian” usually attract less viewers, often being watched by intellectuals. This could be why mainly commercial channels, striving for profit, broadcast similar programs with similar content at prime time. We do not want to glorify the regulatory authorities, they are just ordinary authorities in the network of other state and administrative authorities, but we must admit that their activity could be governed by the “Apollo” principle. (But we need to admit, *cum grano salis*, that the Dionysus principle may sometimes interfere with their decisions...)

A question has emerged as to whether it would not be more appropriate for the media to entrust their regulation to self-regulatory authorities, and to narrow or leave regulation to means of legal regulation. As stated in the Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive): “Measures aimed at achieving public interest objectives in the emerging audiovisual media services sector are more effective if they are taken with the active support of the service providers themselves.”⁸ However, from the viewpoint of our topic we need to warn that self-regulation also has its own self-regulatory authorities. There is nothing like “automated” self-regulation at the level of program broadcasting. Nobody expects broadcasters to behave voluntarily and without exceptions in a way that no sanctions would need to be applied to their programs. It is expected that it would

⁷ MISTRÍK, M.: *Duálny systém televízneho vysielania na Slovensku*. In Slovenské divadlo, 1995, Vol. 43, No. 4, p. 388.

⁸ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive). [online]. [2014-01-04]. Available at: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:095:001:0024:EN:PDF>>.

happen, but that they would select authorities from among themselves for the correction, which would supervise compliance with the jointly selected principles. So there would also be someone responsible for “discipline and punishment”, but in this instance it would be self-discipline and self-punishment. This system is really attractive, but it also has its own and not negligible risks. The major issues result from the fact that it is disputable to what extent the authorities created from broadcasters could stay detached, as we know that in the conflict of Apollo and Dionysus principles, a balance cannot in fact be established. How can we expect a broadcaster offering Bacchanalia on the screen to be Apollonian at the same time? Following the logic of that said here, it seems to be less reliable to create regulation from the “bottom”. Regulation from the “top” is the outcome of a consensus also considering the Apollonian principle, i.e. also rational thinking about where a man should progress, and how the legal limits and criteria of media functioning should be set. We think that it is mainly for this reason that the regulation authorities are here.

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