

MW

THE PRIVATE AND THE PUBLIC IN THE MEDIA

Regulation and Implementation in Slovenia



JERNEJ ROVŠEK

OTHER TITLES IN THE MEDIAWATCH SERIES

MARJETA DOUPONA HORVAT,
JEF VERSCHUEREN, IGOR Ž. ŽAGAR
The Rhetoric of Refugee Policies in Slovenia

BREDA LUTHAR
The Politics of Tele-tabloids

DARREN PURCELL
The Slovenian State on the Internet

TONČI A. KUZMANIĆ
Hate-Speech in Slovenia

KARMEN ERJAVEC, SANDRA B. HRVATIN,
BARBARA KELBL
We About the Roma

MATEVŽ KRIVIC, SIMONA ZATLER
Freedom of the Press and Personal Rights

BREDA LUTHAR, TONČI A. KUZMANIĆ,
SREČO DRAGOŠ, MITJA VELIKONJA,
SANDRA B. HRVATIN, LENART J. KUČIĆ
The Victory of the Imaginary Left

SANDRA B. HRVATIN, MARKO MILOSAVLJEVIĆ
Media Policy in Slovenia in the 1990s

SANDRA B. HRVATIN
Serving the State or the Public

GOJKO BERVAR
Freedom of Non-accountability

MAJDA HRŽENJAK, KSENIJA H. VIDMAR, ZALKA DRGLIN,
VALERIJA VENDRAMIN, JERCA LEGAN, URŠA SKUMAVC
Making Her Up

DRAGAN PETROVEC
Violence in the Media

ROMAN KU HAR

Media Representations of Homosexuality

SANDRA B. HRVATIN, LENART J. KUČIĆ,
BRANKICA PETKOVIĆ

Media Ownership

PEACE INSTITUTE
METELKOVA 6
SI-1000 LJUBLJANA
E: INFO@MIROVNI-INSTITUT.SI
<HTTP://WWW.MIROVNI-INSTITUT.SI>

published by: PEACE INSTITUTE
edition: MEDIAWATCH <HTTP://MEDIAWATCH.MIROVNI-INSTITUT.SI>
editor: BRANKICA PETKOVIĆ

THE PRIVATE AND THE PUBLIC IN THE MEDIA
Regulation and implementation in Slovenia

author: JERNEJ ROVŠEK
translation: OLGA VUKOVIĆ
design: ID STUDIO
typography: GOUDY & GOUDY SANS, ITC
paper: inside pages MUNKEN PRINT 90g vol. 1,5, cover TOCATA MAT 200g
print: TISKARNA HREN

© 2005 MIROVNI INŠTITUT



The publishing of this book was made possible by the Open Society Institute

THE PRIVATE AND THE PUBLIC IN THE MEDIA

Regulation and implementation in Slovenia

JERNEJ ROVŠEK, *Deputy Human Rights Ombudsman*
e: j.rovsek@varuh-rs.si

CONTENTS

- I FOREWORD 8
 - 1.1 THE POWER OF THE MEDIA 10
 - 1.2 THE PUBLIC AS A COLLATERAL VICTIM 16
- 2 ACCESS TO PUBLIC INFORMATION 21
 - 2.1 OPENNESS AND TRANSPARENCY AS FUNDAMENTAL REQUIREMENTS 21
 - 2.2 A COMPARATIVE OVERVIEW OF THE RIGHT TO BE INFORMED AS A HUMAN RIGHT 22
 - 2.3 ACCESS TO INFORMATION IN SLOVENIA 25
 - 2.4 SITUATION BEFORE THE PASSING OF THE LAW ON ACCESS TO INFORMATION 27
 - 2.5 THE PROCESS OF ADOPTING THE LAW ON ACCESS TO INFORMATION 29
 - 2.6 FUNDAMENTAL PROVISIONS IN THE ACCESS TO INFORMATION ACT 29
 - 2.7 MECHANISMS FOR IMPLEMENTING THE ACCESS TO INFORMATION ACT 32
 - 2.8 PROPOSAL TO APPOINT AN INFORMATION OMBUDSMAN 33
 - 2.9 ACCESS TO INFORMATION ACT COMPARED TO MASS MEDIA ACT 35
 - 2.10 SHOULD MEDIA ENJOY A SPECIAL TREATMENT WHEN REQUESTING INFORMATION? 37
- 3 THE RIGHT TO PRIVACY 44
 - 3.1 AN ATTEMPT TO (LEGALLY) DEFINE THE RIGHT TO PRIVACY 44
 - 3.2 THE RIGHT TO PRIVACY AS AN INTERNATIONALLY PROTECTED HUMAN RIGHT 46
 - 3.3 RESOLUTION OF THE PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE ON THE RIGHT TO PRIVACY 48

3.4	DECISIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS REGARDING FREEDOM OF EXPRESSION AND THE RIGHT TO PRIVACY	51
3.5	THE DECISION OF THE EUROPEAN COURT OF HUMAN RIGHTS IN THE CASE OF PRINCESS CAROLINE OF MONACO	57
3.6	IMPLICATIONS OF THE ECHR DECISION IN THE CASE OF PRINCESS CAROLINE	61
3.7	LEGAL PROTECTION IN THE CASE OF AN INVASION OF PRIVACY BY THE MEDIA	63
3.8	RECOMMENDATIONS OF THE COUNCIL OF EUROPE ON REPORTING CRIMINAL PROCEEDINGS	65
3.9	PROTECTION OF PRIVACY IN CIVIL LAW	66
3.10	PROTECTION OF PRIVACY IN THE PENAL CODE	66
4	PROTECTION OF PERSONAL DATA	68
4.1	TWO APPROACHES TO PERSONAL DATA PROTECTION	69
4.2	REGULATIONS IN SLOVENIA	70
4.3	IMPORTANCE OF CONTROL MECHANISMS	72
4.4	HOW THE FLAWS OF THE EXISTING LEGISLATION HAVE BEEN MANIFESTED IN PRACTICE	73
4.4.1	A CASE OF EXCESSIVE INTRUSION INTO PRIVACY ENABLED BY THE LEGISLATION	73
4.4.2	BANK ACCOUNTS ON THE WEB	74
4.4.3	INFORMATION ABOUT CRIMINAL SUSPECTS	75
4.5	THE STANDPOINT OF THE OMBUDSMAN ON "TRIAL BY MEDIA"	77
4.6	ENDEAVORS TO IMPROVE THE SYSTEM OF PERSONAL DATA PROTECTION	78

4.7	NEW PERSONAL DATA PROTECTION ACT (ZVOP-1)	79
5	OMBUDSMEN, PRESS COUNCILS AND MEDIA OMBUDSMEN	84
5.1	OMBUDSMEN	84
5.1.1	INFORMAL AND EXTRA-JUDICIAL (OMBUDSMAN) MECHANISMS ARE INCREASINGLY POPULAR	84
5.1.2	THE HISTORY AND DEVELOPMENT OF THE OMBUDSMAN OFFICE	85
5.1.3	CATEGORIZATION OF OMBUDSMAN OFFICES	87
5.1.4	THE OMBUDSMAN AND THE MEDIA AS THE "FOURTH ESTATE"	88
5.1.5	PRESS (MEDIA) COUNCILS AND MEDIA OMBUDSMEN	89
5.2	PRESS COUNCILS	89
5.3	PRESS OMBUDSMEN AROUND THE WORLD	92
5.4	INITIATIVE TO ESTABLISH A PRESS COUNCIL IN SLOVENIA	95
6	CONCLUSIONS	102
	LITERATURE AND SOURCES	105

1 FOREWORD

After accepting the request to write a book for the Media Watch series, and after the initial collecting of relevant materials, my first feeling was one of despair. I recognized that there existed many aspects of media operation which, until then, I had not considered in detail, for example, social and political aspects, or the influence of politics and capital, to name just a few. What could I add to this subject? Previously I had written several articles on media related topics, but my perspective on the media was mainly that of a reader. For what aspect of the media could I claim to have had a deeper knowledge that I could present to readers?

I have been working in the field of human rights protection for more than 15 years. During this time I have helped people who had problems with the government, neighbors, courts, and with themselves. Complaints against the media constitute only a fraction of the total number of cases, and yet, although few, one impression that is invariably present is that any confrontation with the media inevitably leaves one feeling powerless. This experience is shared by the affected individuals and by those who are supposed to help them, the Human Rights Ombudsman included. Most of the time people complain about the media violating their rights to privacy, honor and reputation, or presumption of innocence. These real-life cases undoubtedly furnish the point of departure for my perspective on the relations between the individuals and the media, and between the public and private spheres. However, I am aware that a view from a different angle, particularly that of journalists, could be different and would probably lead to different conclusions. Despite this, I believe that a look from the outside, and from the viewpoint of media-exposed individuals, can be both interesting and instructive.

This book is divided into three main parts. In the first part, I speak about one important human right long neglected in Slovenia: the right to obtain information. For more than a decade, this right amounted to no more than a declaration in the 1991 Constitution of the Republic of Slovenia without any possibility of being exercised in practice, since a law that would regulate the content and the method of exercising this right did not exist. The Human Right Ombudsman's efforts over several years finally bore fruit, and the law on Access to Information of A Public Nature was passed in 2003. But this has not spelled an end to difficulties

related to the exercising of this important civil and political right. We have so far taken just the first steps towards informing the public about this right and the methods of its exercise. What still has to be improved are the mechanisms actually enabling the exercise of this right. Journalists, who ignored this law while it was in the process of being drafted, discovered the new opportunities it offered only after it came into force. Until then, they were content with the deficient provisions in the Mass Media Act, which prescribed shorter time limits but did not stipulate the administrative procedure, nor did they provide for judicial protection of the right to access information. For the media, which provide information to the public, the new law on access to information will become even more useful when the time limit for access to information is shortened and a sufficiently effective and fast complaint procedure is guaranteed.

The second part is dedicated to the right to privacy and the mechanisms of its protection when it is invaded, unjustifiably or disproportionately, by the media. Only recently has the protection of this right received more emphasis in situations in which it had to be weighed against the right to freedom of expression. Proof are some decisions of the European Court of Human Rights, particularly the judgment in the case of Princess Caroline of Monaco. A special part of the right to privacy in the wider sense of the word is the protection of personal data that has been accorded special attention in the treaty establishing a Constitution of Europe. In Slovenia, personal data protection is neglected, in terms of both legal regulation and protection mechanisms. From the principle according to which everything in this field that is not explicitly allowed (by law) is prohibited, we must move towards a more flexible legal arrangement and supervision, which will enable the balancing of this right against other legitimate rights, including the right to freedom of expression and the right to access information.

In the third part, I look into the mechanisms of self-regulation and self-control in the media. This chapter is also an attempt to resuscitate the initiative to establish a press council in Slovenia. There are many possible mechanisms for media accountability. At the Journalism Days in Ankara in 2004, Claude-Jean Bertrand of the French Press Institute listed eighty of these, stressing that the list was not complete. In this book, I present in more detail only those models of media accountability that are based on the principles close to the type of work I perform and with which I

am most familiar: informal and extra judicial (ombudsman) protection of the rights of individuals, i.e. press council and media ombudsman. The former is a collective, multipartite body which, in addition to the representatives of journalists' associations, usually includes representatives of civil society. A media ombudsman, on the other hand, is a monocratic body, meaning that it is personified by the person fulfilling that function and that it belongs in the group of so-called private sector quasi ombudsmen. It is my opinion that Slovenia needs a press council as a body for self-regulation and self-control that would also include representatives of the public. In contrast to the existing Ethics Commission of the Association of Journalists, such a press council would also deal with the conduct of the media and not only with that of individual journalists. Until now, various journalists' organizations, the association and the union of journalists have opposed the establishment of such a press council, albeit without convincing reason. Their fear has been that politics could "sneak" into their work through the representatives of civil society. I think that the prospects for the establishment of such a body in Slovenia improved after the journalists' strike in the autumn of 2004, provided that journalists realize that, despite all the tensions between them and politics and media owners, they would be much better off if they had the public as their ally.

1.1 THE POWER OF THE MEDIA

No one has any doubts that the media have enormous power in their hands, so it is not surprising that they are frequently referred to as "the fourth estate" or the "fourth branch of power," complementing the three traditional branches: legislative, executive and judicial. This time-honored tradition of a tripartite division of government, defined by Montesquieu in the 18th century, still lies at the foundation of the majority of democratic constitutions. It is based on a system of checks and balances, meaning that each branch supervises the other, preventing any one branch from gaining excessive power. This idea still governs the shaping of government systems, although many hold (justifiably) that there is practically no tension or mutual supervision between the legislative and the executive branches, since both are in the hands of the same political structure. The only line separating the two is the functional division of authorities between them. The real control over these two

branches should be performed by the judiciary, particularly the constitutional court. The media presumably constitute the fourth branch of power. Some include in this branch independent bodies of civil society and other such bodies, for example the ombudsman and the audit courts.

In order to ensure that no branch of government is left without supervision, a number of control mechanisms have been developed, among them interpellation, constitutional impeachment, annulment of legislation by the Constitutional Court, budget restrictions, and so on. To a large extent, these methods are operational in practice, ensuring democratic government and the rule of law, and thus preventing mass or systematic violations of human rights. However, no system can prevent sporadic abuses of power or violations of human rights, so national constitutions and international conventions provide for court protection of these rights. In Slovenia, the supreme body protecting human rights and fundamental freedoms is the Constitutional Court. On the international level, protection of human rights can be sought from the European Court of Human Rights in Strasbourg, the European Court of Justice in Luxembourg or the UN Commission for Human Rights. In addition to court protection, affected individuals can also opt for other, informal channels, the most important being the ombudsman.

If an individual has a dispute with government bodies, there are established, and effective, procedures to determine and sanction irregularities. I am afraid that this is not so when individual rights are invaded by the media. In reality, one who claims defamation by the media, or ungrounded allegations of legally or morally controversial conduct, has only a small chance of restoring his reputation. Court protection is an option, but proceedings are lengthy and all the while bad publicity stays with the defamed person, causing irreparable loss of reputation, friends and acquaintances even if the plaintiff eventually obtains justice, moral gratification or compensation.

Another option available is the right of reply and the right of correction, in Slovenia provided by the Mass Media Act and the Constitution. However, the exercise of this right frequently leads to many difficulties. For example, an allegation featured on the paper's front page in large typeface may leave an indelible imprint on the image of the person, and subsequent correction, particularly if it appears in a less prominent place, can never fully repair the damage already done. In Slovenia, journalists' associations opposed the pro-

posal to widen the basis for the exercise of these rights, particularly the proposal to extend the right of reply, now limited to factual assertions only, to opinions. Their argument was that political parties abused this right in order to enforce their messages and influence editorial policy. However, it has not been possible to establish any mass abuses of this right. On the contrary, individual cases point to the great difficulties experienced by those who try to exercise the right of reply or the right of correction.

The case of *v. s.*, a teacher, which I presented in the *Media Watch Journal* No. 20 (autumn 2004), illustrates the difficulties confronted by those who seek court protection in exercising this right. In this case, the medium in question first successfully avoided the identification of the “real” editor in chief, and the awkwardness of the court contributed to this. Three times the ruling was overturned and the case returned to the court of first instance. When the court finally established who could be the real editor in chief and granted to the plaintiff the right of correction, the medium filed an appeal and the supreme court decided that the proposal exceeded the scope of correction, while the right of reply was obviously overlooked. At the time of writing, court proceedings are still underway. Although the Mass Media Act prescribes very short time limits for court decisions, the final decision in this case has not been reached after more than a year. The question that arises is what the impact could be of any correction or reply after such a long time.

Groups that are particularly vulnerable to invasions of privacy and violation of the right to honor and reputation, are socially weak, marginalized or minority groups (e.g. the Roma community). Most of them lack adequate knowledge about the mechanisms of court protection, not to mention the resources needed to afford long proceedings. They do not have the money needed to pay lawyers, and definitely not as much as Princess Caroline of Monaco, who, as we shall see later in the text, managed to prove before the European Court of Human Rights (after 11 years) that the media had violated her right to the peaceful enjoyment of her private and family life. Journalists working for the tabloid press seem to have a “nose” for pinpointing those whose privacy, honor or good name can be infringed upon without a serious risk that the case will be taken to court. They know that court protection involves considerable financial resources, that the outcome is uncertain, and that the person runs a risk of provoking new bouts of bad publicity.

In addition, solidarity among journalists in such cases also seems to be at work.

The history of the media is a history of the struggle for freedom of expression. Powerful figures, particularly from the ranks of political elites, have never ceased attempting to restrict it. Politicians in all systems, including democratic ones, strive to use the media to their own advantage, or to subject them, because a favorable media image improves their electoral prospects, and conversely, the negative coverage or disclosure of anomalies dramatically reduces their chance of winning the election. Regrettably, elections are increasingly becoming a media event, while the contents of political programs and developmental issues are sidelined. When a few years ago, during a seminar on the role of the ombudsman, I asked a Russian colleague how it was possible that the most corrupt politicians from the previous political system had now been elected as governors of Russian provinces, he replied: "You buy the local media, and the election victory is yours!"

Today, the success and reputation of public figures largely hinges on their media image. It is disconcerting that actual achievements or abilities play only a minor role in the public image and popularity of public figures. So we have a situation in which the accomplishments of many hard-working and successful people who keep a low profile, among them politicians, are hardly ever mentioned in the media, while many under achievers, aided by good PR services and friends in the right places, have the public image of successful persons. Unfortunately, media attention may have a negative effect as well. For example, a minister who works hard towards an improvement but encounters the resistance of powerful lobbies, frequently ends up with a less favorable media image than one who does nothing. To put it differently, those who do not meddle with anything and live through their term in office sitting at a more or less empty desk, have more chances of concluding the term peacefully and without being quizzed over their moves.

The media not only report events, they also create them. But does media attention affect the course of events? This was a question I asked myself when reading an article about the unsuitability and the alleged lack of professionalism displayed by a Ljubljana prosecutor, featured on the front page of *Delo*.¹ Although the expressions such as "it is

¹ Dva tožilca pred razrešitvijo? Zdenka Cerar čisti tožilstvo. (Two Prosecutors About to Go? Zdenka Cerar's Purge Within the Prosecution), *Delo*, 1.04.2004.

said,” “reportedly,” “presumably” and so on used in this article hinted at his poor performance, no official proceedings were taken against this prosecutor, at the time of publication or later. However, just one day after the article appeared in the newspaper, the prosecutor resigned. It is not my intention to either defend or accuse this prosecutor, nor to judge his performance. I mention this example because it raises an interesting question, that is, whether the prosecutor would have resigned had this article not appeared. Perhaps he would have persisted and would still be there performing the same job. However, the opposite hypothesis is also possible, one saying that only those public persons who have thick skin and take no account of media coverage survive. They hope that media attention will die away eventually, and, indeed, that is what actually happens, sooner or later. This is very likely one of the reasons why only those politicians with thick skin and few ethical concerns remain on the scene.

Today, information is a market product just like any other. By selling information, it is possible to make good money, so media owners reap profit. In their effort to increase it, they do not pay much attention to ethics or individual rights; the only thought on their minds is the greatest possible return on investment within the shortest possible time. These processes lead to media ownership concentration, itself a threat to media pluralism and, consequently, democracy. This subject, and especially the impact of ownership concentration on the autonomy and pluralism of the media in Slovenia and other post-socialist countries, is extensively treated in the book “Media Ownership”² that appeared in the Media Watch series.

The commercialization of media content increasingly obfuscates the dividing line between information and advertisement. Advertisements blend with serious information, so it is difficult to determine whether or not the (market) interest of the media owner stands behind specific information. The most banal example of this involves texts about “healthy food.” If one article states that coffee is detrimental to, and another that it is highly beneficial for health, the reader cannot know whether it is the coffee producer with whom the media owner has connections or the producer of drugs against high blood pressure. Some studies suggest that Slovenian journalists are no more immune than their foreign colleagues to the more or less subtle pressure from

² Sandra B.Hrvatín, Lenart J. Kučič and Brankica Petković: *Media Ownership*, Media Watch book series, Peace Institute, 2004.

various commercial owners.³ The results of one such survey showed that journalists increasingly felt pressure exerted by marketing departments within the media. This pressure is not necessarily direct. Self-censorship, arising from an awareness of the importance of the main advertisers for the medium, is also present. Smaller or local media are particularly exposed to such pressure. Covert advertising, corruption and morally controversial conduct are obviously present in Slovenia as anywhere else. In one survey,⁴ only three of the 39 journalists who report economic issues asserted that they did not accept gifts.

The media shape public opinion which is then actualized through elections. However, they dedicate increasingly less space to serious social issues important for the country's governance, and once commercial and entertainment content prevails, citizens no longer receive information that could serve as a guideline in choosing political leaders. This is one reason why in Europe many extremist parties encouraging ethnic or racial intolerance have been scoring well in elections. Definitely, the media cannot be absolved of the responsibility for these developments. For example, by attaching ethnic or racial designations to the names of criminal suspects, the media encourage stereotypes that can lead to racial or ethnic intolerance. The *Media Watch Journal* has regularly published articles about such cases in Slovenia.

When assessing the global situation fifteen years after the fall of communism, Vaclav Havel⁵ disappointedly established that "global corporations, media cartels and powerful bureaucracies transform political parties into organizations whose main role is no longer to serve the public but to protect a particular clientele and interests. Politics has become the battlefield of lobbyists; the media trivialize serious problems and democracy frequently looks like a mass-market virtual game rather than a serious task for serious citizens." He sees the solution in civil society as a counterweight to political parties and government institutions, stressing that it is important not to lose trust in the significance of alternative centers of thought and civil action. In Slovenia, this role has been successfully fulfilled by the media section of the Peace Institute.

3 Andreja Rednak: Na novinarje pritiskate, mar ne? (They Pressure Journalists, Don't They?), *Gospodarski vestnik*, August 2, 2004

4 See diploma work by Andreja Rednak: *Gospodarsko novinarstvo v sodobnem slovenskem tisku*, FDV, 2004

5 Vaclav Havel, Česa nas komunizem še vedno uči (Lessons Still To be Learned From Communism), *Delo*, 18.11.2004.

1.2 THE PUBLIC AS A COLLATERAL VICTIM

During the many years of the struggle to protect journalistic freedom from the intrusion of politics, journalists and their associations developed a powerful defensive instinct against external influences, particularly political ones. In Slovenia, even before the official inauguration of democracy and the new government, journalists, displaying great courage, managed to achieve a large degree of autonomy for their profession. The political influence on the media largely dissolved in the 1980s. In my opinion, the second half of the 1980s was a golden age for the Slovenian media. During this time, when the previous political elite was dissenting from power, and the levers of influence were slipping from their hands, journalists and editors were virtually autonomous, and free to “test” the limits of this newly gained freedom. In so doing they were generously helped by some liberal prosecutors and judges. Since at that time there were no media owners as we know them today, pressures towards larger profits were incomparably smaller, and so was covert advertising. The media had enormous power in their hands and were virtually free from external control. I should stress here that, as far as I remember, most of the time journalists did not abuse this power through unethical conduct or excessive invasion of privacy. This golden age ended in the 1990s, when the new government (and, once the privatization process was completed, new media owners as well) attempted to re-introduce the mechanisms of political influence that had been in place under the previous system. The current resistance of journalists’ associations and trade unions to the supervision models including external members could be interpreted as a nostalgic effort to adhere to those positions and freedoms once enjoyed which, unfortunately, are difficult to recreate.

In Europe, media freedom is strongly protected by the courts. This is the result of an awareness of the importance of freedom of expression for democracy and for the exercise of other human rights. Since freedom of expression is an internationally recognized right, supra-national courts are also actively involved in its protection. Whenever an invasion of privacy of a politician contributed to the disclosure of anomalies within government structures, the European Court of Human Rights refused to sanction it. This approach has been, and still is, a powerful exemplary model for a large number of countries that underwent the transition from to-

talitarian regime to democracy. But in their struggle to preserve freedom and independence from the government, the media, in my opinion, have intruded too deeply into the rights of civilians. In the “heat of battle” between them and politics, journalists hastily label every measure that may be understood as an attempt to introduce any kind of external control or protection of individual rights as a “hostile attack.” This is one possible explanation of the media’s opposition to the attempts to regulate media freedom, even when it is obvious that excessive intrusions into privacy and violations of human rights do occur. I hold that this is also one of the reasons that Slovenia still does not have a model of media accountability that would include representatives of the public. But one thing that the media overlook is that the real victims in this battle are individuals who are representatives of the public which they are supposed to serve. In other words, in the battle between media and politics, ordinary citizens have become collateral victims.

The short-term interests of the journalistic profession in Slovenia partly came to light during the journalists’ strike on the day of parliamentary elections, at the beginning of October 2004. Journalists undoubtedly had many reasons for this strike. The unsettled legal and social statuses of many journalists have called for a resolution. Yet, it is disputable whether the journalists chose the right moment to go on strike and whether all other channels that could have led to the settlement of controversial issues were exhausted. It was obvious that the journalist’s union did not use suitable legal paths to achieve the signing of the collective agreement. It placed all its hopes on the strike, which eventually took the most radical form, given that it was held on election day and the few days following. The strike undoubtedly caused harm to the media, especially those that did not have good reason to go on strike (e.g. RTVS). But the brunt of the event was borne by the citizens and other residents of Slovenia whose right to be informed was curtailed during a period highly important for the democratic life of the country. That the public suffered damage could be inferred from many letters by dissatisfied readers following the strike. They frequently stated that they did not fully understand the reasons for this strike. Obviously, the journalistic profession made a serious mistake by failing to explain to the public, in a sufficiently clear manner, the reasons for the strike. Their failure is even more frustrating when one remembers how radical this strike was. In my opinion the circumstances surrounding this

strike point to the fact that, during this muscle-flexing and otherwise legitimate pressuring towards fulfillment of their requirements, journalistic associations did not care much about the public, nor did they find it important to attract the public as their ally. Had it not been so, they would have invested more effort in informing the public about their reasons before they went on strike.

Despite this, the outcome of the strike was favorable, although at the moment the final gains are not yet quite clear. The strike showed that there existed strong solidarity among journalists, but it also brought to light some difficulties with which journalists have to cope that were until now little known to the public. In their race for ever higher profits, media owners have been reducing the value of journalistic work. Apart from creating a state of disarray as regards labor relations and the social status of journalists, this is also manifested as the lowering of professional standards. People without adequate education or experience are hired for journalistic jobs, because they are a cheaper labor force. The number of journalists who work under an open term contract has been decreasing. An open-term contract, however, enables long-term professional development, education, relative independence from media owners and editors and thus easier adherence to the ethical standards of the code of journalists. It is understandable that media owners with no long-term interests in the media market are not interested in signing such contracts. For them, journalists who are easily replaced and who do not raise embarrassing ethical issues are a more suitable choice.

I do not have deeper knowledge of the state of (non)professionalism in journalism, but I can back my statement about the lowering of professional standards by giving an example from my own experience. Some years ago, just before Human Rights Day, a journalist with the local radio network asked the Human Rights Ombudsman for a statement on this topic. However, she did not make an effort to learn anything about this field or about the problems associated with it. Moreover, she did not so much as try to establish why this day was celebrated on December 10. Her request for the statement was accompanied with the explanation "you yourself know best what to say."

From time to time, the question of a professional organization of journalists finds its way on to the agenda. The idea is to establish a Chamber of Journalists, modeled on similar organizations such as those of doctors, lawyers,

notaries, engineers or detectives. What should be done in order to stimulate employers to hire journalists who would be members of this organization, which could lead to a raising of professional standards? It is clear that this cannot be prescribed by an administrative measure or a law, because of the significance of freedom of expression. Despite this, I think that there is a way. A possible solution, a “carrot and stick” method indeed, lies in the tax legislation. A tax relief approach could stimulate the employment of journalists who are members of the professional association, and discourage the engagement of non-members.

There are no reasons not to believe that the majority of journalists want to act ethically and want to respect the rights of others in accordance with the ethical code of their profession. However, commercialization and various forms of pressure, recently primarily pressure from media owners, compel them to confront serious moral and existential dilemmas. Professional codes could be of great help here (and just in passing, it is my opinion that the current code of the Slovenian journalists is very good), but the code alone is not sufficient for the standards to be implemented in practice. A supervisory body could contribute much towards the realization of this goal. It should be authorized to decide not only on individual instances of the violation of journalistic standards, but also on the wider issues pertaining to the journalistic profession. Such a supervisory body, or a press council, could also protect journalists from the demands of editors or owners when they violate the principles of the code. The inclusion of representatives of the public in such a body of media accountability would only increase its reputation and legitimacy.

The paradox of the media world, and not only in Slovenia, is that it cannot resolve the essential problems, neither without the government nor in cooperation with it. Obviously, journalists and media owners are not capable of shaping an effective system of self-regulation on their own, nor can they ensure higher standards of journalism through a chamber of journalists. The state, on the other hand, could compel them to fulfill these two obligations by way of regulation. However, statutory regulation brings with it hazards that could affect the independence of the media and freedom of expression. There is a permanent threat that politicians would try to secure influence using the mechanisms of statutory regulation. Distrust on both sides is obvious, and it forestalls a reasonable solution. The reactions to the initiative

to establish a press council in Slovenia clearly showed that every such attempt, even when made with the best purpose in mind, meets with resistance and non-understanding. Do we need to wait for some tragic event, such as the death of Princess Diana, to see changes in this field? In Great Britain, journalists and media owners managed to agree upon an effective self-regulation system only after parliament announced stricter legislation in the media field. Another kind of pressure is created by lawsuits that end in high compensation for invasions of privacy, which in the long run prove to be much more costly for media owners than the funding of self-regulatory bodies. In Great Britain, the number of lawsuits involving the media decreased since the introduction of the Press Complaint Commission. Whether changes will be introduced in Slovenia, remains to be seen.

2 ACCESS TO PUBLIC INFORMATION

2.1 OPENNESS AND TRANSPARENCY AS FUNDAMENTAL REQUIREMENTS

Openness and transparency of state bodies with respect to access to data and information of a public nature are characteristics of contemporary democratic states governed by the rule of law. Relevant information, openness and the possibility of control strengthen citizens' trust in state bodies and public administration in the wider sense of the word. If the work of public administration is hidden from the public eye, there are many more opportunities for irregularities, abuse of power and various forms of corruption.

Inaccessibility of information, communication of incomplete or only "official" information, and appointment of intermediaries who stand between information sources and the public, are the traits typical of closed, non-democratic and authoritarian systems. As a rule, most irregularities and violations of individual rights occur precisely in such environments. My own experience in the office of human rights ombudsman confirms that unlawful acts, irregularities and poor attitude towards individuals are mostly the features of those state bodies that are inaccessible, non-transparent and unresponsive to external initiatives and demands.

Information about government's intentions and new regulations importantly contributes to an effective implementation of regulations and measures, among other things. The state should make every effort to inform citizens about new regulations and ensure free-of-charge access to this information. Accurate and correct information is a prerequisite for correct political and economic decisions as well as control over their implementation, leading to a greater probability that such decisions will be based on realistic assessments. Openness also enables individual branches of government, particularly the legislative and the executive branches, to carry out their supervisory functions. Openness and the possibility of public control are important elements that contribute to a greater responsibility of state authorities, and are also a prerequisite for the establishment of the mechanism of checks and balances.

The right to access information held by the state is an important civil and democratic achievement, because in reality it enables civil society to have direct control over the work of the state. Similarly important is the control exercised by

the media, but from the perspective of citizens it is indirect and, when the media are not fully independent from state authorities, also insufficient. A law that regulates access to information thus provides individuals and civil society groups with a mechanism of direct control over state bodies.

2.2 A COMPARATIVE OVERVIEW OF THE RIGHT TO BE INFORMED AS A HUMAN RIGHT

In international documents pertaining to the protection of human rights, the right to be informed is defined as a basic human right. Article 19 of the UN Covenant on Civil and Political Rights speaks of the freedom to seek, receive and impart information and ideas of all kinds, either orally, or in writing, or in print, or in some other form. Legitimate restrictions of this right, based in law, are necessary in order to ensure respect for the rights or reputation of others and to protect national security, public order, public health or morals. In the Convention for the Protection of Human Rights and Fundamental Freedoms, the right to be informed is linked to the freedom to hold opinions and to receive and impart information and ideas without the interference of a public authority and regardless of frontiers. Article 10 of this Convention can be interpreted in such a way that, when the right to be informed is stipulated by legislation or the constitution, it can be limited only for reasons stated in paragraph two of this article. Restrictions must be stipulated by law and must follow the legitimate goals that are indispensable in democratic societies. This interpretation is supported by the comprehensive body of case law of the European Court of Human Rights.

On November 25, 1981, the Committee of Ministers of the Council of Europe adopted a recommendation to member states that national laws and practice pertaining to the exercise of the right of access to information, should be harmonized with the principles that were appended to this recommendation.⁶ According to these principles, everyone (every natural or legal person) has the right to request and obtain information held by public authorities. In order to exercise this right, appropriate means and channels should be ensured, and information should be accessible to everyone under equal terms. A specific interest may not be required as a condition for submitting a request. The request should

⁶ Recommendation No. R (81) 19 of the Committee of Ministers to Member States on the Access to Information held by Public Authorities.

be processed in a reasonable time, and reasons for refusal should be explained. The right of appeal and judicial protection should also be ensured. Many other documents by the Council of Europe also testify to the importance of the openness and transparency of public authorities.

In the earlier documents relating to access to information, the EU placed stress on equal treatment and prevention of unfair competitive advantages that may result from discriminatory or selective informing. This points to the awareness that differences in information may lead to irregularities and corruption within the sources of information, particularly in the public sector. In recent years, and particularly in the text of a new European Constitution, openness and transparency of work have become leading principles within both the EU and its member states.

In the past decades, the majority of EU member states adopted relevant legislations regulating the right of access to information. Of all European countries, Sweden has the most extensive experience and the richest tradition in this field. The first Swedish law regulating access to information held by public authorities dates from as early as 1766. As regards other developed countries across the world, let us mention the US, Canada and Australia, i.e. the countries with most detailed regulations on this issue.

In contrast to EU member states, all of which can boast a long tradition and practice of guaranteeing freedom of information, the EU bodies themselves adhered for a long time to the principle of closeness and confidentiality of documents. However, individuals, organized groups and individual countries, in particular the Scandinavian states with the most developed policies relating to this field, persistently strived to promote the policy of openness, and their effort was largely successful.

The commitment of all EU bodies to strive for more openness and transparency in the process of decision taking was first formulated in the Maastricht Declaration of 1992. The aim was to strengthen the democratic character of EU institutions and the public's confidence in the EU administration. Article 254 of the Amsterdam Treaty (formerly Article 191a) states that every EU citizen and every natural or legal person residing or having a registered office in any EU member state has the right to access the documents issued by the European Parliament, the Council or the Commission, subject to the principles and conditions adopted by these institutions.

This was the basis for Regulation 1049/2001 regarding public access to the documents of the European Parliament, Council and Commission, adopted by the European Parliament and the Council on May 30, 2001 and effective as of December 3, 2001. This Regulation defines the principles, conditions and limitations of access to documents and sets obligation for the said institutions to adapt their rules of procedure to the provisions of this regulation. Each institution and all of the bodies and agencies it establishes, shall observe the rules of this regulation as regards documents concerning the activities covered by the Treaties establishing the EU. All EU citizens, including all natural and legal persons residing or having a registered office in one of the EU member states, have the right to access documents received or held by these institutions.

An important role in the process of implementation of the openness principle is played by the case law based on the decisions of the European Court and European Human Rights Ombudsman. On many occasions, the Court has brought decisions in which the right to receive information has been recognized as a norm binding on all EU institutions (e.g. the Netherlands v. the Council, ECR-1-2169).

These standpoints were put to maximum use by the European Human Rights Ombudsman. The first ombudsman, Jacob Söderman, a Finn, dedicated considerable time to the issues of openness and transparency of EU bodies. In June 1996, he launched an inquiry on his own initiative to establish how the EU institutions ensured access to documents and how they handled such requests. On concluding the investigation, in December 1997, he wrote a special report addressed to the President of the European Parliament, in which he proposed that all institutions should adopt their rules on the implementation of accessibility (the Council and the Commission excluded because at that time they had already done so). The European Ombudsman's part in the process of ensuring more openness and greater transparency was not limited to the general level only, but also extended to practice. For example, on the basis of appeals he received, he formulated a proposal that the European Commission should set up public registers of its documents (enabling access to all materials when recruiting employees for work in EU institutions) and enable access to the list of all measures adopted by the EU and pertaining to the fields of judicature and internal affairs. His activities in this field are clearly laid out in his press releases.⁷

I have already mentioned that the text of the new European Constitution places stress on the principles of openness and free access to public documents. In Title VI on the democratic life of the Union, when referring to the principle of representative democracy, it says that “[e]very citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly as possible and as closely as possible to the citizen” (Article 45). In Article 46(2) it is said that “[t]he Union Institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.” A special provision refers to the transparency of EU institutions (Article 49). In addition to setting the general principles concerning the openness of all Union institutions, bodies and agencies and of the European Parliament, which “shall meet in public, as shall the Council of Ministers when examining and adopting a legislative proposal[,]” in paragraph 3 it is stated that “[a]ny citizen of the Union, and any natural or legal person residing or having its registered office in a Member State shall have a right of access to documents of the Union Institutions, bodies and agencies in whatever form they are produced[,]” and in paragraph 4 that “[a] European law shall lay down the general principles and limits which, on grounds of public or private interest, govern the right of access to such documents.”

Article 11-42 found in the second part of the Constitution (the Charter Of Fundamental Rights Of The Union) defines the right of access to documents in a similar manner as defined under Title VI.

In the EU, the trends towards the unification of rules regarding access to information have been increasingly stronger, inside the member states as well as EU institutions. While it is true that the priority status given to this area by the EU could be primarily attributed to its goal of ensuring equal conditions for businesses and equal opportunities on the common market, it is also one of the political conditions required in the enlargement process.

2.3 ACCESS TO INFORMATION IN SLOVENIA

Although Article 39 of the Constitution of the Republic of Slovenia adopted in 1991 defines the right of access to information of a public nature, this constitutional provision, which is part of the chapter on human rights and

7 <<http://www.euro-ombudsman.eu.int/Release/En/default.htm>>

fundamental freedoms, could not be exercised until 2003 when the law regulating access to information of a public nature came into force. To put it differently, without relevant legislation, this right could not be exercised in practice, as is obvious from the definition found in Article 39 of the Constitution: "Except in such cases as are provided by law, everyone has the right to obtain information of a public nature in which he has a well founded legal interest under law." This means that the law must define the "well founded legal interest," and also exceptional cases in which it is possible to deny information. This practical incapacity to exercise this constitutional right, which lasted until March 2003 when the Access to Information Act (ZDIJZ)⁸ came into force, was actually a violation of the first paragraph of Article 15 of the Constitution that stipulates that human rights and fundamental freedoms shall be exercised directly on the basis of the Constitution.

Obviously, for quite a long time no one was excessively worried over this state of affairs. Neither the deputies to the National Assembly, nor political parties, nor the media found it necessary to alert the public to this constitutional, legal and democratic deficit (naturally, state bodies had no interest in so doing). This failure to take action could be attributed to the fact that the law on the media (both the current law and its predecessors) does include a provision stipulating the obligation of the public sector to supply information requested by journalists. Although this provision is deficient and does not include legal protection, to my knowledge the journalists never demanded a new law by which this right would be extended to all citizens. Therefore, the regulation that was in use before the introduction of the ZDIJZ was discriminatory in that it granted access to only one group of citizens, i.e. journalists.

Non-governmental organization (e.g. the PIC and the Peace Institute) and the Human Rights Ombudsman were drawing attention to this problem throughout the second half of the 1990s. The 1998 report by the Human Rights Ombudsman contains a separate chapter dedicated to this issue (item 2.1). Several solutions to be implemented by the government and the National Assembly were put forward, the most important being one proposing a new law that would regulate the exercise of this right as stipulated in paragraph 2 of Article 39 of the Constitution. The National Assembly and the National Council gave their sup-

⁸ *Uradni list*, No. 24/7.3.2003.

port to these proposals on several occasions when discussing the ombudsman's annual reports.

2.4 SITUATION BEFORE THE PASSING OF THE LAW ON ACCESS TO INFORMATION

In a democratic environment, the work of state bodies, local administrative bodies and other bodies invested with public powers must be open and transparent. This particularly applies to their functions related to citizens' rights and obligations. It is in the interest of every government body that wants to see its provisions or measures implemented in practice that all citizens with whom it has direct or indirect contact are informed, in a timely and appropriate manner, about its decisions, reasons for introducing particular measures, and the purpose of such measures. In order for these decisions to be respected and heeded voluntarily by the majority, thus eliminating the need to engage the repressive apparatus, citizens must be well informed. The traditional approaches to informing the public, e.g. through press conferences, printed matter about institutions' activities, goals, rules and customer handling processes, have been upgraded thanks to the development of new electronic communication channels, the Internet in particular. A number of state bodies in Slovenia have recognized the importance of these new options and posted information about their activities on their web pages. Some of these presentations include, in addition to basic information about the work and responsibilities of the institution, also information on regulations pertaining to their area of activity, the rights of individuals and the exercise of these rights.

However, certain difficulties were connected with access to regulations. While the full texts of national laws were offered by a commercial provider, and partly by the National Assembly, the regulations adopted by local communities were not accessible, and the situation in this area is still far from being satisfactory. The Human Rights Ombudsman office identified this problem and proposed that the state should enable free of charge online access to the entire legislation. Our endeavors led to important improvements. Following our proposal in the 1998 Annual Report, the Uradni list, the official gazette of Slovenia, has become available online, free of charge; individual ministries have by now firmly established the practice of ensuring web access to the legislation pertaining to their area of work; and,

based on the changes in the rules of procedure, the National Assembly is now required to publish a full and consolidated text following each legislative amendment. The legal obligation binding on all public administration bodies, to post on the Internet all important information including the consolidated versions of laws pertaining to their area of activity, was introduced only by the ZDIJZ (Article 10). Obviously, a large step forward has been made in providing web access to national laws, so electronic registers of the current legislation are available from several sites.

The ombudsman's proposal that local communities, i.e. administrative units, should also ensure online access to the consolidated versions of their legislation did not lead to equally good results. The situation varies from community to community, but it seems that there is no national or self-managing body capable of compelling the local communities to fulfill their obligation stipulated by the ZDIJZ.

The government portal, E-uprava (E-administration)⁹, represents a noticeable improvement in the field of information provision and electronic services for citizens. Many administrative units (municipalities) now provide not only basic information, but also access to the most frequently used application forms that may be submitted online. The web pages of various ministries are constantly being improved and their content enriched. The report by the Government Center for Informatics on the implementation of the e-administration project, covering the period up to 2004, clearly shows that Slovenia is already above the EU average as regards electronic administrative services. To be more precise, in the area of e-services for citizens, it exceeds the average by 6.6 percentage points, while in the area of e-services for economic entities it lags behind the EU average by 3 percentage points.¹⁰

Especially worrying was the state of affairs in the area of environmental protection. Ratification of the Aarhus Convention was delayed for several years for no convincing reason, as was its implementation. Furthermore, provisions in the Environmental Protection Act (Article 14), indeed deficient, were not implemented in practice. Governmental representatives argued that the procedure applied in the case of requests for environmental information was one stipulated by the General Administrative Procedure

⁹ <<http://e-uprava.gov.si/e-uprava>>

¹⁰ Summary of the execution of Action Plan for the period up to 14.09.2004, available at <<http://e-uprava.gov.si/e-uprava/portalStran.euprava?pageid=48>>.

Act, but in practice the Ministry of Environment refused to apply the administrative procedure. According to them, the only possible channel was an administrative dispute. However, it is well known that an administrative dispute is a largely inconvenient method in resolving such matters. Particularly information on environmental pollution loses its value after a certain period of time, usually a brief one, so in this area, the right to be informed may be equated with the right to live.

2.5 THE PROCESS OF ADOPTING THE LAW ON ACCESS TO INFORMATION

In most democratic countries, it is precisely the drafting of the law on access to information that requires participation of the public and stimulates NGOs to take action. It is not possible to expect that state bodies will strive for openness of administration of their own accord, or that they will encourage the inclusion of the public in the process, but rather that their behavior will be just the opposite. Owing to the notorious rigidity of state apparatuses everywhere in the world, progress towards greater transparency is a slow and painstaking process taken in small steps.

In Slovenia, the coalition of NGOs and several individuals participated actively and constructively in the drafting of a law on access to information. The first draft was prepared by an NGO, i.e. the Legal and Information Centre for Non-Governmental Organisations (PIC).

The influence of civil society would have been even greater had not the legislative procedure been so fast, partly owing to the new Rules of Procedure in the National Assembly. As a result, the proposed changes to the draft bill were discussed on only two occasions: at a plenary session of the National Assembly and at a meeting of the parent committee. On top of that, at the committee meeting the proposal underwent conceptual changes, and the responsibility lay partly with the drafter. Obviously, the drafters ran out of time, so extensive debates or considerations of individual solutions were omitted.

2.6 FUNDAMENTAL PROVISIONS IN THE ACCESS TO INFORMATION ACT

Taken as a whole, the Slovenian law regulating access to public information (ZDIJZ) is a modern law, and exemp-

tions are comparable to those used in the EU. Article 6 of this law stipulates that an applicant may be denied access to information if the request pertains to:

1. information classified, on the basis of a law regulating confidential information, as secret for reasons of public security, national defense, confidentiality of international relations or confidentiality of intelligence and security operations of state bodies;
2. data classified as a business secret in accordance with the law regulating economic entities;
3. personal data whose disclosure would represent the violation of personal data protection;
4. information whose disclosure would represent a violation of confidentiality of individual data about reporting units, in accordance with the law regulating the activity of national statistical offices;
5. information stored in the public archives which is, in accordance with the law regulating archive materials, classified as confidential;
6. information whose disclosure would represent a violation of the confidentiality of tax procedure, in accordance with the law regulating tax procedure;
7. information obtained or compiled for the purpose of criminal prosecution or in relation to a criminal prosecution, or misdemeanor procedure, the disclosure of which would prejudice the implementation of such a procedure;
8. information obtained or compiled for the purposes of administrative procedure, the disclosure of which would prejudice such a procedure;
9. information obtained or compiled for the purposes of a litigation, non-litigation procedure or other judicial procedure, the disclosure of which would prejudice such procedures;
10. information from a document that is in the process of being drawn up and is still subject of consultations within a body, the disclosure of which would lead to the misinterpretation of its content;
11. information about natural assets which, in accordance with the law governing the conservation of nature, is not accessible to the public for the purpose of protecting natural assets;
12. information from the document drawn up in connection with internal operations or activities of bodies, the disclosure of which would lead to the disturbances in the operation or activities of a body.

Obviously, items 1-6 stipulate traditional exemptions related to public security, defense, foreign affairs, operation of security services, trade secrets, personal information (in accordance with the law that regulates this area), and confidentiality of tax procedures. These reasons are of an absolute nature. As regards criminal, judicial or other legal procedures, information is inaccessible only when the body in question assesses that its disclosure would harm the interest protected by the exemption. Access to information is also denied if requested information is part of a document that is still in the process of being drawn up, or if the document pertains to the internal operation of a body, and information disclosure could result in a wrong interpretation of document content, or could disturb the operation of that body. Since this actually means that it is necessary to weigh the arguments, i.e. whether the disclosure would lead to “a wrong interpretation of a document” or would “cause disturbance in the operation of that body,” these exemptions are of a relative nature.

In addition to regulating the passive aspect of the exercise of this constitutional right, i.e. procedure on request, the law also includes provisions relating to its active aspect, i.e. the obligation of all public administration bodies to publish all information important for the public. All bodies are required to make available online and free of charge the consolidated texts of regulations pertaining to their area of activity, studies and programs, proposals for regulations, documents pertaining to public tenders, information on administrative services and other information of a public nature. Another important provision in this law is the one prescribing an obligation for all public administration bodies to set up, maintain and publish the registers of information of a public nature pertaining to their field.

Furthermore, every public body must appoint at least one official who will be responsible for supplying information and for handling request procedures. A request to access information can be submitted orally or in writing. Written requests are subject to the administrative procedure as stipulated by the legislation governing access to information and general administrative procedure. If access to information is granted, the body only makes an official record; if a written request is denied in whole or in part, the body issues a written notice. Access to information is free of charge, but if requested material is forwarded to the applicant, the applicant may be asked to cover material costs. The state

bodies are required to process the request for information immediately, and within 20 working days at the most. This deadline may be extended to 30 days at the most. Appeals are decided by the commissioner for information established by this law, who takes decisions about all refusals by all public administration bodies of all the three branches of government, including the judiciary.

2.7 MECHANISMS FOR IMPLEMENTING THE ACCESS TO INFORMATION ACT

It is well known that legal norms alone do not have much effect unless they are supplemented with effective supervisory and encouraging mechanisms, and this especially applies to the area of human rights. A breakthrough towards greater transparency may cause a small earthquake in the operation of public administration. Before the ZDIJZ was passed, the rule that prevailed was that information that was not explicitly declared as accessible was inaccessible, rather than the other way round. The ZDIJZ inverted both this rule and practice by stipulating that the public has the right of access to all documents except those that are classified as confidential, i.e. inaccessible. This is another reason why provisions pertaining to the mechanisms that may influence, formally and informally, public bodies to move towards greater openness and accessibility are so important.

The drafters of the ZDIJZ modified the part referring to these mechanisms several times during the drafting process. The initial proposal was to form a special government commission that would handle administrative appeal procedures and, in addition, carry out stimulating, advisory and development activities. Since these tasks were not compatible, this proposal was replaced with another one according to which appeals would be decided by the government, while other tasks would be fulfilled by a lay body – a special council for access to information of a public nature. The final proposal, which was adopted, was to establish a special commissioner. This proposal was put forward practically at the last moment, at the session of a committee during the second examination of the bill. It was also proposed that the encouragement and development activities should be undertaken by the ministry responsible for an information society.

In the opinion of NGOs and some individuals who were included in the drafting process, these solutions are not good,

because they do not ensure sufficiently effective and independent protection of this right, nor the implementation of the legally prescribed tasks related to the openness and transparency of public administration. The commissioner for access to public information has only one responsibility and that is to decide about administrative appeals. This means that he/she decides only on the legality of individual actions of the body in question, but has no supervisory or investigative powers nor any wider responsibility aimed at encouraging the openness of public administration bodies.

Practice confirmed that these apprehensions were justified, although, given the inadequate solution, the commissioner's accomplishments exceeded expectations. Our prediction that in the majority of cases the information commissioner would be asked to clarify issues and give advice, while requests to take decisions in administrative appeals would be few, proved true. Undoubtedly, the provisions in the ZIDJZ will have to be reassessed on the basis of practical experience.

The implementation of the law furthermore exacts activities that would encourage state bodies to introduce order into their operations, publish information registers, appoint officials responsible for specific tasks, and make information accessible online and free of charge. At the moment, the responsibility for these tasks lies with the Ministry of Information Society, but as already pointed out, state bodies have never been keen to fulfill these tasks, at least not until exposed to an external pressure.

2.8 PROPOSAL TO APPOINT AN INFORMATION OMBUDSMAN

Several NGOs and the Human Rights Ombudsman proposed that the law should establish a special information ombudsman who would be part of the existing office of the Human Rights Ombudsman. His/her responsibility would include an informal intervention as well as giving of advice, encouragement and implementation of development tasks. The information ombudsman would be able to intervene more rapidly and cheaply and in a less formal manner than the bodies involved in an administrative procedure. As regards advisory activities and stimulation, an information ombudsman would be more suitable because he/she would be more independent than the ministry. According to this proposal, the appeal procedure would follow the rules of the general

administrative procedure. Also proposed were two new forms of ombudsman's participation in an administrative dispute. He/she could participate as an independent party or could file appeals himself/herself if the body in question turned down his/her proposal. This could contribute to the establishment of a body of case law which in this area is quite modest at the moment, since the "value" of the dispute in most cases is proportionally lower than that of the resources, knowledge and time needed to pursue judicial protection.

The status of information commissioner as proposed by the ZDIJZ is constitutionally disputable. By virtue of the method of appointment, the commissioner is independent and his position legally equal to that of the human rights ombudsman, constitutional judges and members of the Audit Court. Such a solution is by all means extraordinary and at variance with the established system. In contrast to the commissioner's post, all other posts mentioned above are constitutional offices or supreme bodies in their areas of activity, and are thus superior to the commissioner in certain respects. The commissioner's decisions may also be cancelled or modified by administrative courts. In addition, the law also stipulates that administrative and technical conditions applying to the commissioner are provided by the Ministry of Information Society, which is a provision that potentially threatens the commissioner's independence. This, in other words, means that, although the commissioner is independent, the technical conditions of operation are set by the minister, who is by virtue of the method of appointment, inferior to the commissioner. This scheme lacks consistency. The prescribed legal duty – taking decisions in administrative procedures – by no means justifies such a high formal position for the commissioner.

On the basis of available data, predominantly those found on the Internet, we can conclude that in the majority of countries the implementation of the law on freedom of information is supervised by a special, independent body. In many cases this is a special ombudsman or other body comparable to the ombudsman by its manner of operation. Obviously, practice has proved that this approach ensures more openness in the operation of state bodies. Hungary, for example, has a special ombudsman responsible for the protection of personal data and access to information. In Ireland, the information ombudsman was established by the Freedom of Information Act (1997), while its role is carried out by a national ombudsman.

I have never been in favor of special ombudsmen, but in this case my view is that an information ombudsman, working in connection with the human rights ombudsman, would be a suitable solution. Other proposals that I encountered for special ombudsmen invariably involved the protection of specific categories of people, but in this case the point at issue is a constitutional and democratic right. Some may remark that the existing human rights ombudsman could also handle violations of the right of access to information; the law itself stipulates that the responsibility for the protection of this right lies with the “citizens’ rights ombudsmen” (which should probably be understood as a human rights ombudsman). While this is true in certain respects, experience shows that the assignment of new responsibilities to a human rights ombudsman has had undesired consequences. In 2001, the law regulating the protection of personal data was amended to include a new provision based on an EU directive, by which the human rights ombudsman became responsible for supervising this area. This solution proved ineffective in practice, because the lack of personnel and a multitude of responsibilities in other fields left the ombudsman without the time needed to dedicate due attention to this area, not to mention time for preventive tasks or guidance. This solution was subsequently removed by a new law on the protection of personal data (ZVOP-1) in 2004.

Slovenia is a small country and, therefore, unlike some other, larger countries, it cannot afford many or large institutions. Therefore, it seems sensible to take into consideration the idea of one institution that would cover several areas, provided that it is independent, as stipulated by the EU legislation. Its area of activity could include the protection of personal data and access to information, as in Hungary, Ireland and Great Britain, and possibly some other segments, for example, control over the implementation of the legislation regulating the electronic signature. According to EU directives, all these areas are subject to independent mechanisms of control.

2.9 ACCESS TO INFORMATION ACT COMPARED TO MASS MEDIA ACT

Article 45 of the Mass Media Act (ZMed) stipulates that a public body has an obligation to provide journalists and other authors of journalistic texts with all information relating to its area of work, except information exempted

under this same article. A failure to do so leads to a request by the editor in chief of the media, to which a public body must respond by the end of the following working day.

What does a comparison of the ZMed and ZDIJZ provisions on access to information show? First of all, the exemptions that lead to refusals to grant information are defined differently; definitions in the ZMed are general and abstract, while the ZDIJZ is more specific and perhaps more restrictive. So, what happens if a state body decides to refuse access requested by an editor in chief on the basis of the ZDIJZ? Before I proceed to answer this question, let me stress again that it is unconstitutional to make differences between journalists and other citizens with respect to access to information.

According to the ZMed, the deadline for response is one working day; according to the ZDIJZ it is twenty days. Since both laws refer to the same issue, this difference is difficult to defend from the perspective of the public sector.

Control mechanisms and legal protection are also differently treated. The ZMed does not include provisions referring to the appeal procedure. If an administrative body fails to respond, or refuses to grant access to information requested by the editor in chief, the latter can file an appeal with the media inspector operating under the auspices of the Ministry of Culture. Appeals of this kind have so far been few, but they have still involved complications. For example, the request for information addressed to the Government Office for Nationalities concerning the purchase of books (*Mladina*, 17.02.03) and the request for information about the salaries of the Ljubljanski Holding employees (*Delo*, 1.03.2003), raised dilemmas as to whether these issues belonged in the area of activity of those public bodies. In the first case, the inspector found it sufficient that the public body in question responded within the prescribed time, and in the second, he was of the opinion that the body met the legal requirements because it attempted to provide an answer by phone, although unsuccessfully. This leads us to conclude that the media inspector's interventions were not sufficiently effective and particularly not sufficiently fast.

The ZDIJZ prescribes the obligations of the public sector bodies in more detail and specifies time limits. The decisions taken by appellate bodies (the commissioner and the administrative court) are formally binding on public bodies. Therefore, if information requested by a journalist is related to a journalistic investigation of some length, the procedure as defined by the ZDIJZ may be more effective despite longer

time limits. Among other things, the law stipulates a high fine (minimum 250,000.00 tolar, roughly 1,000 euros) for an official who fails to supply the requested information within the legally prescribed time.

2.10 SHOULD MEDIA ENJOY A SPECIAL TREATMENT WHEN REQUESTING INFORMATION?

As has been already established, the media representatives, including the Association of Journalists, did not show sufficient interest in the solutions proposed by the ZDIJZ drafters. They thought that the time limits were (too) long, but the drafter did not express a willingness to shorten these deadlines essentially or bring them in line with those prescribed by the media law. Obviously, at that time the media people did not worry excessively over the fact that the media law did not include effective legal instruments to resolve the situation when the public body failed to supply the requested information “by the end of the next working day at the latest,” as stipulated by Article 45 of the ZMed, or when the public body failed to produce a written explanation for the refusal to provide information requested by the chief editor.

Moreover, the executives of the Association of Journalists of Slovenia were obviously satisfied that they were excluded from the ZDIJZ drafting. This is evident from the commentary on an article by Paul McMasters dealing with the Freedom of Information Act (FOIA) in the US, featured in the third issue of the Association’s online paper on April 29, 2003. In this commentary it is said that the featured article was meant to accompany the “debate about our law on access to public information, from which, *luckily*, the journalists were excluded” (emphasis mine).¹¹ I read the article by McMasters, the former president of the American Society of Professional Journalists, but could not find any good reason there for the satisfaction of the Slovenian journalists. McMasters describes the American experience of the introduction of the Freedom of Information Act signed into law in 1966. The difficulties he mentions are expected and common. However, it should be stressed that the FOIA applies to all citizens. In the US, access to information for journalists is not regulated by a separate law as it is in Slovenia. According to the author, access to information in the US

11 <<http://www.novinar.com/enovinar>>; Quotes from <http://www.spj.org/foia_history.asp>.

is complicated; state agencies are not inclined to information accessibility; courts tend to side with agencies although they assert their commitment to transparency, and delays in responding are considerable. As for the journalists, whose requests for information account for only 1% of FOIA requests, only few among them have enough patience, money and determination to work through “what seems an inevitable series of appeals, requests and other roadblocks.” In the words of Harry Hammitt, the editor of *Access Reports*, “[r]eporters are more than willing to go to court, but editors and publishers have decided they don’t really want to spend the money.” Despite these difficulties, the law works, even if slowly. The author quotes Jane Kirtley of the Reporters Committee for Freedom of the Press: “This law creates a legal presumption of openness and accountability. Given how much of a struggle it is to get access with the law in place, I can’t imagine what it would be like if we didn’t have that kind of legislative mandate.”

Given the American experience, I really did not see any reason for the satisfaction of Slovenian journalists at being excluded from the ZDIJZ drafting. And indeed, their attitude changed radically in early 2004, when the ZDIJZ took effect and when the information commissioner began his term in office. There were probably several reasons for this change of heart. Shortly after the ZDIJZ came into force, I published an article comparing the ZDIJZ and the ZMed in which I presented grounds for the argument that mechanisms legislated by the ZDIJZ were more efficient than those in the ZMed. The article was published in the *Večer* daily and the *Media Watch* quarterly.¹² *Delo*’s Saturday supplement, *Sobotna priloga*, refused, without explanation, to carry this article. One reason for journalists’ changed perspective on this issue could have been the courageous and determined approach taken by the information commissioner. Of course, journalists can use the ZDIJZ mechanisms as well, yet in such a case, the relatively long deadlines stipulated by the ZDIJZ apply to them as well, although they at least have (effective?) legal instruments if the public body refuses to provide information.

Virtually coinciding with the law drafting process was the media’s disclosure of anomalies in the public sector salary system. Understandably, those who received anomalous salaries were careful to keep silent about the issue. The jour-

¹² *Media Watch Journal*, No. 16, March 2003.

nalists employed all kinds of official and unofficial channels to obtain information about salaries in the public sector. Their targets were particularly public institutions and some other institutions financed from public sources and earning part of their revenue on the market, among these *Radio Television Slovenia (RTVS)*, whose management long endeavored to keep this information away from the public. Unofficial data, which later proved to be correct, indicated that employees of *RTVS* received extremely high salaries that substantially exceeded those in other segments of the public sector. Since *RTVS* for quite some time dodged the question posed by *Delo's* journalist Rok Kajzer, who inquired about the salaries of the *RTVS* general manager, his assistants and radio and television directors, on January 8, 2004 Kajzer sent an official request for information to the *RTVS* management citing the *ZDIJZ* and the law regulating salaries in the public sector as grounds for his request.¹³ After waiting in vain for a response, he wrote another article 14 days later,¹⁴ pointing out that the *RTVS* management had 14 days to respond, after which deadline he could file a complaint with the commissioner. Kajzer's case clearly shows that the media cannot be pleased with the long time limits stipulated by the *ZDIJZ*, since hot news should be "reheated" at much smaller intervals than enabled by the *ZDIJZ*, otherwise the hot subject cools down and loses its flavor of "scandal."

Another move that contributed to this series of events was the decision taken by the Slovenian police to stop communicating to journalists the initials of criminal offenders and suspects. The Association of Journalists of Slovenia responded to both issues in their press release of January 22, 2004. It drew attention to the danger of keeping information away from the public by which citizens' right to be informed is affected. The Association announced the establishment of a special expert team to discuss this issue and stressed that the media law should regulate access to information for journalists in a more appropriate manner. They also pointed out that the current regulation as provided by the *ZMed* was inappropriate and that this was reportedly the opinion not only of journalists but also of information suppliers.

13 "Plače šefov rrtvs: Strogo zaupno" (Salaries of rrtvs Managers: Strictly Confidential), *Delo*, 9.1.2004.

14 "Plače šefov na rrtvs še vedno tajne, tudi inšpektorja zanimajo plače" (Salaries of rrtvs Managers Still A Secret, Inspectors Also Interested in This Information), *Delo*, 22.1.2004.

At the same time, the Ministry of Culture began work on amendments to the media law (ZMed-B). The amended law is expected to settle primarily the issues pertaining to media pluralism, ownership structure and harmonization with EU legislation. The Association of Journalists hastily proposed a new formulation of Article 45 referring to the provision of information to the media. However, there was no time for a comprehensive expert debate on this issue, and it was obvious that until that time neither the Ministry of Culture nor the Association of Journalists had given serious thought to this subject. This was evident from what was said during the meeting at the Ministry of Culture in February 2004, in which I participated. It was said that the new wording of Article 45 had to be supplied within a few days in order to meet the deadline for the submission of amendments to the government. This haste was correspondingly reflected in the quality of the proposed formulation of Article 45, adopted by the Government at its meeting on March 4, 2003 and published in the Poročevalec DZ (The National Assembly Reporter) No. 32 on March 20, 2004.

The primary goal of the Association of Journalists was to secure legal protection by proposing a provision stipulating the inclusion of the information commissioner in the appeal procedure. The commissioner was in favor of such a solution. Its second goal was to remove the obstacle posed by the law regulating the protection of personal information. The debates on whether or not it was acceptable to disclose the initials of suspects and salaries in the public sector, clearly showed that the main argument in refusing access to information was the legislation regulating personal data protection, i.e. Protection of Personal Information Act (zvop).

This would not be controversial in itself had it not raised a number of constitutional issues. In addition to the difference in procedure, the main problem involves exemptions that enable public bodies to refuse access to information. In the ZDIJZ these exemptions are defined in detail under Article 6, while ZMed dedicates only three paragraphs of Article 45 to the exemptions.

During the meeting at the Ministry of Culture mentioned above, I argued that the constitutional principle of equality and non-discrimination rules out the difference in the legal regulation of access to information for ordinary citizens and journalists. In other countries, this right is regulated by one law. Regardless of their mediator role, journal-

ists cannot have wider access to information than ordinary citizens, because in such a case it would be possible to speak of “privileged” citizens as opposed to others. This could be dangerous for democracy, since this enables the media to publish information inaccessible to “ordinary” citizens and civil society, meaning that it would not be possible to check whether or not journalists had provided correct information. Journalists’ view is different. In their opinion, the issue of access to information held by the authorities involves a clash between the media and the government. By disclosing “disconcerting” information held by the authorities, the journalists seek to disclose anomalies in the public sector which the authorities wish to keep away from journalists and the public in general. In such a presentation of this “clash,” citizens are treated as passive consumers of information. Neither the media nor the government sees them as a serious subject. In so doing they forget that they both serve citizens who should have the possibility of controlling all branches of power; that is to say, the three traditional branches of power as well as the “fourth estate.” However, we should add that it is also true that neither citizens nor civil society organizations have many chances to contribute significantly to this clash without the help of the media.

My reservations concerning the constitutionality of the offered solution were more or less solitary. It is interesting to note that at the mentioned meeting at the Ministry of Culture I had the impression that the ministry representatives felt inferior to journalists and held them in high respect. They did not dare to directly oppose the journalists’ proposals, although they stressed that the proposal could turn out to be constitutionally disputable in “future debates.” This detail is just further proof of the real power of the media even in relation to state bodies.

The amended media law approved by the Government in March 2004 and handed over to the National Assembly obviously made no one happy after all. The bill received comments from both the culture Minister and the Association of Journalists.¹⁵ The President of the Association, Grega Repovž, mentioned, among other things, that they had expected more and that they understood this proposal as a draft that would undergo further enhancements. As

15 »Vlada: Spremembe medijske zakonodaje, kako do javnih informacij“ (Government: Amendments to Media Legislation, How to Obtain Public Information), *Delo*, 5.3.2004.

for the Government side, they too expected improvement at the next stage.

The proposed amendment of Article 45 is actually a mess. Even the naming of accessible information is controversial. In Article 45 of the Zmed, the definition is “public information” (*javne informacije*), while the ZDIJZ uses a definition in harmony with the diction in the constitution, i.e. “information of a public nature” (*informacije javnega značaja*). This alone shows that the drafters of the media law had in mind a different scope of information than that applying to the general public under ZDIJZ. The difference in the scope of exemptions is also controversial because the ZDIJZ does not provide for a different regulation of this issue under special laws. Exemptions listed in Article 6 of the ZDIJZ are *numerus clausus*, so it is not possible to expand or reduce these exemptions by special laws. The proposal is also deficient with respect to the administrative procedure. Article 6(8) stipulates that a negative reply has the “nature of a decision,” but at the same time the medium is entitled to request “additional explanation” within three days, and the body in question must supply it “promptly.” The complaint is processed by the information commissioner “through the reasonable use” of the ZDIJZ and “taking into account the principle of promptness.” The deficiency of such wording is obvious even to those whose knowledge of administrative procedure regulations is only superficial. In Article 6(9) it is said that the body must “implement the decision of the commissioner immediately or within five working days from the issuing of the decision at the latest.” Such a provision cannot have serious effect either, because the commissioner, even under the ZDIJZ, does not have any effective instrument to ensure that his decision is implemented in practice. The commissioner himself has already pointed out that the implementation of his decision is decided by a body of first instance which may have already turned it down. In addition, the body is allowed to initiate an administrative dispute against the commissioner. On the whole, the issue of the implementation of the commissioner’s decision is not adequately regulated by the ZDIJZ. This provides an additional argument in support of the NGOs’ proposal to separate the ombudsman’s informal protection of this right from judicial protection.

With the new mandate of the National Assembly and the new government, previous drafts are placed outside the formal legislative procedure, so this is an opportunity for the

new government to renew the ZMed amendment procedure, and possibly also amend the ZDIJZ, and propose a more suitable solution for access to information of a public nature.

3 THE RIGHT TO PRIVACY

3.1 AN ATTEMPT TO (LEGALLY) DEFINE THE RIGHT TO PRIVACY

Privacy is a multifold concept so it is difficult, if not impossible, to legally define all aspects of the right to privacy. During research completed in preparation for writing this book, the collection and study of the materials dealing with various aspects of the right to privacy consumed most of my time. I must admit that the information I gathered frequently left me confused. Eventually, I had to conclude that virtually every theoretician, every state and every legal system had their own view on the (legal definition of the) scope and content of this right.

At any rate, I hold that theoretical “pigeonholing” of individual aspects of this right is of minor importance only, as would probably agree all those who have ever been involved in resolving real-life cases. Another related question is whether judges, particularly those of the courts of first instance with very tight schedules, have time for the study of legal theory when they are pressed to make a decision in a concrete situation, perhaps involving new aspects of the right to privacy not considered until then. This area is actually relatively new and dynamic, so the doctrine pursued by the courts, including international ones, is still in the process of being shaped. Despite these setbacks, I will venture the attempt to define, in a language as understandable as possible, the right to privacy and individual rights.

In addition to the concepts of “privacy” and “the right to privacy,” another term found in expert literature is “individual rights.” In my understanding, the right to privacy is a human right that has protection in public law and is meant to guard the individual from the intrusion of state authorities. Therefore, it belongs in the domain of constitutional and administrative law. Individual rights, on the other hand, are considered to be the domain of civil law and to protect the individual from the intrusions of other individuals or legal person; this is the horizontal protection based on the mechanisms of civil law.

Undoubtedly, the right to privacy has its origins in natural law. In other words, this is a right that is innate to humans and one that an individual feels instinctively without being able to define it with any precision. An average citizen does not need to have legal knowledge about the right to privacy

to know that he/she is affected if he/she is secretly pursued or recorded, or if his/her personal diary is secretly read, or details about his/her private and family life disseminated. If such actions are taken by the authorities, one feels even more affected, and also powerless. The right to privacy is part of human dignity seen as a “primeval source” of all human rights. It is an inalienable and absolute human right. An individual may exercise it against anyone: the state, or natural and legal persons.

The legal origins of this right can be traced back to the oldest legal documents, most of which prescribed restrictions imposed upon public authorities regarding their intrusion on certain aspects of this right. This was the basis for the inclusion of this right in the earliest documents on human and civil rights. It became an internationally recognized right in the second half of the 20th century when it was included in the first UN document on human rights (the Universal Declaration of Human Rights).

The right to privacy renders inadmissible any intrusions into one’s private and family life, and home. This includes an invasion of physical and mental inviolability; affronts to one’s honor and good name; disclosure of unpleasant details about one’s private life; the use of another’s name, identity or image; snooping, surveillance, eavesdropping, and intrusions in written or oral communications, to name just a few. The development of information technologies brings with it new types of invasions of privacy, for example, secret surveillance using the minute electronic cameras that are today accessible and widespread practically everywhere, then intrusions into electronic communications, interception of telephone conversations and sms messages and the like. These new forms only expand the range of conduct that infringes upon the right to privacy.

Legal theorists have attempted to categorize invasions of privacy, placing them in several groups that share certain common features. The basis for such categorization is provided by international documents on human rights protection, where the most frequently listed protected values are private and family life, the home and private correspondence/communications. This led to a rough categorization of privacy into four areas. Private and family life are seen as representing specific aspects of “decisional” and mental privacy; home is an aspect of spatial privacy, and correspondence of informational privacy. Any such category cannot but be broad, since individual aspects of

privacy overlap, interrelate and complement one another, thus enabling only more or less theoretical definitions of elements constituting this right.

In Slovenia, individual rights have been extensively treated by Dr. Alojzij Finžgar. In his definition, individual rights are a person's inalienable non-property rights; they are also absolute rights, because they can be exercised against anyone; individual rights are unique attributes of one's individual and intellectual essence, because they are part of the person and are not transferable. This category primarily includes the right to life, health and bodily integrity, dignity and good name, personal identity, personal image, secrecy of communication, private life and spiritual integrity, and the right to voice.¹⁶

Based on the rulings of American courts, several torts that threaten individual elements of the right to privacy have been formulated. These include intrusions upon privacy, appropriation of one's likeness, public disclosure of private facts and publicity placing one in a false light. Within the European legal system there were several attempts, some more and some less successful, to introduce a more detailed legal definition of the content of the (constitutional) right to privacy. However, practice has repeatedly proved that it is not possible to anticipate all real-life situations in which this right may be infringed, so most countries adhere to more or less abstract definitions already included in their constitutions or international documents on human rights. The definition of this right in Europe is significantly determined by the decisions of the European Court of Human Rights.

To sum up, the right to privacy is one of the basic human rights recognized by international documents on human rights protection as well as the constitutions of individual countries. In these documents, the right to privacy is a right protected by public law. But at the same time, this is an individual right protected by a series of mechanisms stipulated by civil law. This is a right that stems from human dignity and protects it against the intrusions of the authorities, or of natural and legal persons.

3.2 THE RIGHT TO PRIVACY

AS AN INTERNATIONALLY PROTECTED HUMAN RIGHT

Article 12 of the Universal Declaration of Human Rights adopted on December 10, 1948 (this day is now

¹⁶ Dr. A. Finžgar: *Osebnostne pravice* (Individual Rights), *Čz Uradni list*, 1985.

celebrated as Human Rights Day) reads: “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.” The Declaration stimulated the codification of this right in other international, universal and regional documents. The International Covenant on Civil and Political Rights, adopted by the General Assembly of the UN on December 16, 1997, practically repeats the text of the UN Declaration in its Article 17. The main difference between the Declaration and the Covenant is the legal nature of the two documents. As its name suggests, the Declaration is not a legally binding document, but its signatories only make a commitment to incorporate the norms laid down by the Declaration into their legal systems. On the other hand, the Covenant is a binding document and, together with the accompanying first optional protocol, it defines the mechanisms for the monitoring and implementation of the provisions contained in it: “A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant.” However, much more effective and consequential than this UN mechanism is the supervisory mechanism stipulated by the European Convention on Human Rights.

In Europe, the right to privacy was defined in The Charter of Fundamental Rights of the European Union adopted at the intergovernmental conference in Nice, in December 2000. Respect for private and family life is the subject of Article 7 of Chapter Two (Freedoms), where it is defined as “the right to respect for his or her private and family life, home and communications.” Practically the entire text of this Charter, including the said provision, later became part of the draft treaty establishing a Constitution of Europe submitted to the member states for ratification. Respect for private and family life is the subject of Article 7 of Part II of this treaty.

In these documents, the right to privacy is defined as a fundamental human right exercised by the individual against the state and its agencies. Recent theory, based primarily on the decisions of the European Court of Human Rights, emphasizes that human rights are not the domain of public

law only, but should be given protection in civil law as well. In literature, this phenomenon is referred to as the “third party effect” or horizontal effect of human rights (the German term is “drittwirkung”). According to this theory, human rights are protected against the intrusion of anyone. Therefore, the states should ensure the protection of privacy against invasions by other individuals and groups as well. If this protection is not ensured by specific legal and judicial systems, the state is accountable according to the provisions of the European Convention on Human Rights (indirect effect of Convention provisions).

3.3 RESOLUTION OF THE PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE ON THE RIGHT TO PRIVACY

The death of Princess Diana in August 1997 initiated many debates about the inadmissibility of the conduct of paparazzi and the commercial tabloid press. Such debates were also held within various bodies of the Council of Europe, including the Parliamentary Assembly of the Council of Europe. This prompted the Committee on Legal Affairs and Human Rights to discuss the possibility of introducing a separate convention that would protect the right to privacy of public figures. The ensuing discussions clearly demonstrated differences in opinion between those who, under the influence of current events, required more rigorous measures against the intrusion of commercial media and stricter protection of privacy, and those who saw these proposals as a threat to freedom of expression, arguing that the right to privacy was satisfactorily regulated by national laws and the provisions of the European Convention on Human Rights. Another fact that was highlighted in these discussions was the significant differences between individual legal systems with respect to their approach to the protection of the right to privacy against media intrusion. For example, in Great Britain the right to privacy has protection only in civil law, while the state does not ensure positive measures for the exercise of this right. On the other hand, France has quite detailed regulation of this right including restrictions imposed upon the media. Regulations in most other countries are somewhere between these two solutions.

Once the situation following the events of the autumn of 1997 settled down, the Parliamentary Assembly of the Council of Europe adopted, on June 26, 1998, Resolution

1165 (1998) on the right to privacy. It is clear from the preamble that this resolution originated in response to the circumstances leading to the tragic death of Princess Diana.

In this Resolution, the Assembly first establishes frequent invasions of privacy, even in countries with the relevant legislation in place, and concludes that private lives of people have become a “highly lucrative commodity for certain sectors of the media.” The victims of this trend are primarily public figures, since details about their private lives are exploited to increase circulation figures, viewing shares and profit.

Under Point 7 we can read the definition of the term “public figure.” These are “persons holding public office and/or using public resources and, more broadly speaking, all those who play a role in public life, whether in politics, the economy, the arts, the social sphere, sport or in any other domain.” According to the Resolution, “[a] special role of the public figures in society justifies, under certain conditions, the disclosure of certain details of their private life.” The Assembly further stressed that the viewpoint held by some media, that their readers are entitled to know everything about public figures, stems from a one-sided interpretation of the right to freedom of expression defined in Article 10 of the European Convention on Human Rights. “It is therefore necessary to find a way of balancing the exercise of two fundamental rights, both of which are guaranteed by the European Convention on Human Rights: the right to respect for one’s private life and the right to freedom of expression.” Neither of these rights is absolute or inferior, that is, both rights are equally important. Another point brought to attention is that, although Article 8 of the European Convention on Human Rights refers specifically to the protection of an individual against interference by public authorities, this right should also encompass protection against interference by private persons or institutions, including the mass media. To put it differently, the Assembly confirmed that the right to privacy based on this convention is also exercised horizontally, that is, against other individuals, and that the states must ensure mechanisms for the exercise of this aspect of the right to privacy as well. Given that all member states have ratified the European Convention on Human Rights, and that many national legislations contain provisions guaranteeing this protection, the Assembly believes that there is no need for a new convention.

Nevertheless, the Assembly invited the governments of the member states that have not yet passed the relevant legislation to do so. It also formulated the guidelines to be observed when drafting, or amending, the legislation. The guidelines are as follows:

- I. the possibility of taking an action under civil law should be guaranteed, to enable a victim to claim possible damages for invasion of privacy;
- II. editors and journalists should be rendered liable for invasions of privacy by their publications, as they are for libel;
- III. when editors have published information that proves to be false, they should be required to publish equally prominent corrections at the request of those concerned;
- IV. economic penalties should be envisaged for publishing groups which systematically invade people's privacy;
- V. following or chasing persons to photograph, film or record them, in such a manner that they are prevented from enjoying the normal peace and quiet they expect in their private lives or even such that they are caused actual physical harm, should be prohibited;
- VI. a civil action (private lawsuit) by the victim should be allowed against a photographer or a person directly involved, where paparazzi have trespassed or used "visual or auditory enhancement devices" to capture recordings that they otherwise could not have captured without trespassing;
- VII. provision should be made for anyone who knows that information or images relating to his or her private life are about to be disseminated to initiate emergency judicial proceedings, such as summary applications for an interim order or an injunction postponing the dissemination of the information, subject to an assessment by the court as to the merits of the claim of an invasion of privacy;
- VIII. the media should be encouraged to create their own guidelines for publication and to set up an institute with which an individual can lodge complaints of invasion of privacy and demand that a rectification be published.

In addition to these guidelines, the Assembly also called upon the governments to do the following:

- I. encourage the professional bodies that represent journalists to draw up certain criteria for entry to the profession, as well as standards for self-regulation and a code of journalistic conduct;

- ii. promote the inclusion in journalism training programmes of a course in law, highlighting the importance of the right to privacy vis-à-vis society as a whole;
- iii. foster the development of media education on a wider scale, as part of education about human rights and responsibilities, in order to raise media users' awareness of what the right to privacy necessarily entails;
- iv. facilitate access to the courts and simplify the legal procedures relating to press offences, in order to ensure that victims' rights are better protected.

Obviously, the Council of Europe expects that the governments of member states will pay more attention to, and ensure stronger legal protection of the right to privacy. The decision not to propose a new convention is based on the expectation that journalistic organizations in particular will employ mechanisms of self-regulation to effectively protect privacy of public figures. As we shall see later in the text, this Resolution had an impact on the decisions of the European Court of Human Rights.

3.4 DECISIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS REGARDING FREEDOM OF EXPRESSION AND THE RIGHT TO PRIVACY

Undoubtedly, Article 10 of the European Convention on Human Rights is one of the central provisions that plays an important role in establishing the level of democracy in countries whose cases are brought before the European Court of Human Rights. The right to freedom of expression is not only the foundation of democracy, but also the condition on which depends the exercise of many other rights and freedoms guaranteed by this Convention.

The right to freedom of expression defined in Paragraph 1 of Article 10 of the European Convention on Human Rights encompasses freedom to hold opinions and receive and impart information and ideas without interference by public authority and regardless of frontiers. Crucial for the implementation of this right is Paragraph 2 of this article, stating that “[t]he exercise of these freedoms [...] may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or

crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.” What should be noted is that the said restrictions must be “necessary in a democratic society.”

Article 8 of the Convention has a similar structure. The first paragraph reads: “Everyone has the right to respect for his private and family life, his home and his correspondence.” The second paragraph stipulates the conditions and cases in which the public authority is permitted to intervene with the implementation of this rights. The first condition is that such an interference is grounded in law and is carried out in the interest of “national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.” Again, interference must be deemed “necessary in a democratic society.”

What is obvious is a similarity in the structure of these two important provisions, both of which grant the governments, as the court frequently noted, sufficient maneuvering room when formulating exemptions and restrictions. Notably, both provisions stipulate that invasion of privacy grounded in law must be “necessary in a democratic society.” The legal standards of “necessity in a democratic society” have been shaped on the basis of the case law of the European Court of Human Rights. Among other things, the Court established that the legal prohibition must arise from “pressing social need.”

Cases involving a clash of the rights stipulated by Articles 8 and 10 have been relatively few. However, even if few, they are significant, and not only for the interpretation of Article 10, but also for the shaping of the European standards that govern the understanding of freedom of the press and the right to freedom of expression. That the number of cases in which this provision has been invoked is small can primarily be attributed to the fact that appeals brought before the European Court of Human Rights almost exclusively referred to the restrictions on freedom of expression imposed by the state, i.e. the government. Most of these involved journalists who were found guilty in their home countries of using insulting remarks in their texts. Crucial for the interpretation of Article 10 of the European Con-

vention on Human Rights are cases in which insults were part of texts criticizing politicians.

The most frequently quoted example regarding the use of Article 10 was an appeal by a publisher called Handyside (*Handyside v. Great Britain*, 7.12.1976). This previously little known publisher earned his place in history when he published a book containing advice for teenagers including advice on sexuality. The court in Great Britain found him guilty of publishing a book with obscene content. However, in explaining its decision in favor of the publisher, the European Court of Human Rights stressed that media are not meant to mediate only content that is received favorably or assessed as inoffensive or “as a matter of indifference.” Freedom of expression as stipulated by Article 10 also protects “information” and “ideas” that “offend, shock or disturb the State or any sector of the population.” Such are the “demands of pluralism, tolerance and broadmindedness without which there is no ‘democratic society.’”

It is interesting that one country frequently brought before the court for infringing journalists’ rights has been Austria, whose legal system is in many respects similar to the one used in Slovenia. A well known case is *Lingens v. Austria* (8.7.1986). Lingens, a journalist, criticized the then Chancellor Bruno Kreisky because of his excessively reconciliatory attitude towards former Nazis, describing Chancellor’s conduct as immoral and undignified. The Chancellor brought two lawsuits and the journalist was found guilty of defamation and fined. Lingens, however, held that the decisions of the Austrian courts violated his right to freedom of expression as stipulated by Article 10 of the Convention. The European Court of Human Rights agreed with his argument, stating in the explanation of its decision that freedom of the press “affords the public one of the best means of discovering an opinion of the ideas and attitudes of political leaders.” In the words of the European Court of Human Rights, “freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention.” The Court also stressed that in cases involving politicians, the limits of acceptable criticism were wider than when a private person was involved. Although Paragraph 2 of Article 10 protects the reputation of all individuals including politicians, in cases involving politicians, the requirements of protection have to be weighed against the interests of an open discussion of political issues.

In the same decision (1986), the European Court of Human Rights was critical of the Austrian law on defamation because it shifted the burden of proof to the defendant. It held that a careful distinction had to be made between facts and value-judgments; the existence of facts can be demonstrated, whereas the truth of value-judgments is not provable. Consequently, in cases like Lingen's, journalists in Austria could not avoid the sentence of guilty, but this meant that the very defamation legislation used in Austria could be interpreted as violating freedom of expression as stipulated by Article 10 of the European Convention.

The Court further stressed that sentencing of journalists who criticize political figures represented a kind of censorship that could deter journalists from contributing critical views to public discussions about issues affecting the life of the community. In the view of media theorists, this sentence actually acknowledged the media's role as public watchdogs.

Another case that received wide publicity was that of a journalist named Oberschlick. He first appealed when he was found guilty in Austria of likening one politician's proposal to halve social aid to immigrant families to Nazi philosophy. The European Court of Human Rights concluded that the sentence of the Austrian court violated the journalist's right to freedom of expression, since he obviously incited public discussion about issues that affected society as a whole. It was of the opinion that in making a value judgment about the facts related to the politician's proposal, he exercised his right to freedom of expression. It further stressed that although politicians enjoyed the right to protection of their dignity, this protection must be balanced against the interest of the public in having political issues publicly discussed. In this case, journalist's opinion obviously contributed to the public discussion about an issue of general public interest.

Oberschlick appealed again when the Austrian court found him guilty of calling the leader of the Austrian Freedom Party, Haider, an idiot (Germ. *trottel*). This expression was used in an article commenting on Haider's speech in which he said that all soldiers in the Second World War had fought for freedom and peace and contributed to contemporary democratic society. The European Court of Human Rights again decided that the ruling of the Austrian court was a violation of Article 10 of the European Convention. It thought that the author framed his polemical article on

the basis of Haider's speech that was itself polemical. Therefore, his judgment could not be viewed as a personal attack on the politician but as part of the polemics triggered by the said speech (*Oberschlick v. Austria*, 1.7.1997).

The European Court of Human Rights received the third appeal by the same journalist in the mid 1990s (*Prager and Oberschlick v. Austria*, 26.4.1995). However, in this case the journalist's criticism was aimed at Austrian judges, and the European Court of Human Rights decided that the sentence of the Austrian court did not represent a violation of Article 10 of the Convention. The view of the European Court of Human Rights was that the judiciary, owing to its important role in the government system, had to be protected from unfounded and destructive attacks. Some other examples (e.g. *Perna v. Italy*, 2001) also show that the European Court of Human Rights always valued highly the need to protect the judiciary and judges, and that it acknowledged the importance of the role they played, not only as a branch of government, but also as an institution protecting the rights of individuals. Judges and courts must enjoy reputation with and the confidence of the public, so they must be protected from unfounded attacks. Although judges are public figures, the European Court of Human Rights recognizes a much higher degree of protection for them than for politicians.

A shift towards greater protection of privacy has been indicated by the decision in the *Tammer v. Estonia* case (*Tammer v. Estonia*, 6.2.2001), in which the European Court of Human Rights ruled that the sentencing of the Estonian journalist Tammer did not represent a violation of Article 10 of the Convention. The journalist was sentenced in Estonia in criminal proceedings following a lawsuit brought by Mrs Laanaru, the former wife of the Estonian Prime Minister. When interviewing her biographer, the journalist alleged that she was "an unfit and careless mother and a person who broke up another's marriage." The European Court of Human Rights established that at the time of the interview Mrs Laanaru was already the ex-wife of the politician and had no public function, and since the remarks were aimed at her private life, the journalist could have posed his question to the biographer without using offensive terms. Taking into account all the circumstances in this case, i.e. the (non)public status of the plaintiff, the significance of the statements for the discussion of public issues, and also a moderate fine imposed upon the journalist, the Court

assessed that the sentence was not disproportional viewed from the perspective of realizing the legitimate goals of a democratic society.

A shift towards greater protection of the right to privacy can also be discerned from the President of the European Court of Human Rights Luzius Wildhaber's lecture delivered at the University of Dublin on October 11, 2001.¹⁷ In this lecture he analyzed several crucial decisions of the European Court of Human Rights dealing with the balancing of the right to freedom of expression against other rights protected by the European Convention, including decisions in the case of *Handyside* (1976), that of *Lingens* (1986), and some more recent ones. Wildhaber explained that, on many occasions, the Court decided that the sentencing of journalists for the defamation of politicians represented a violation of Article 10 of the Convention. These decisions clearly showed that the Court placed emphasis on, and gave protection to, freedom of expression, which also includes the freedom to shock, offend and disturb, since these are the requirements of the values of pluralism, tolerance and broadmindedness, as the Court explained in 1976 in the case of *Handyside*. Such expressions are acceptable when they are used to alert the public to important social issues and stimulate public discussion. So, on many occasions the Court tolerated privacy invasion on the part of the media acknowledging their role in democracy and democratic processes. Therefore, the Court's decisions show that the right to freedom of expression, which includes freedom to hold opinions, and to receive and disseminate information, has a key place in democratic societies. Contributions to public discussions about issues of public interest, even those using exaggerated expressions aimed at specific individuals, attract attention. "We have seen," stressed Wildhaber, "that the competing interest of the right to protection of reputation has so far carried little weight in the balancing process."

However, in the conclusion to his lecture, President Wildhaber expressed concerns over taking this development too far. "With the enormous power and immediacy of the modern media, the potentially devastating effect of public statements reinforces the duties and responsibilities of those making them. While the Court has rightly stressed the potentially chilling effect of placing restrictions on speech that

¹⁷ This lecture titled "The right to offend, shock or disturb? – aspects of freedom of expression under the European convention on human Rights" is available at <<http://www.ucd.ie/law/bsl/wilecture.htm>>.

may be offensive to individuals or sectors of the community, genuine debate may also be stifled by over-aggressive and inadequately researched journalism. It also seems to me, though this is not the subject of today's talk, that the nature of the media has changed since the Court decided the *Lingens* case. In the harsh competitive world of the modern media, the emphasis has inevitably shifted from the aim of imparting ideas that further the democratic process to the commercial reality of the need to sell newspapers, advertising space and so on. This truism may perhaps influence the way the judicial balancing of freedom of expression against the different interests which compete with it, and notably the right to reputation, is carried out." Wildhaber's prediction was most notably fulfilled in the case of Princess Caroline of Monaco, recapitulated below.

3.5 THE DECISION OF THE EUROPEAN COURT OF HUMAN RIGHTS IN THE CASE OF PRINCESS CAROLINE OF MONACO

The decision of June 24, 2004 in the case of Princess Caroline of Monaco,¹⁸ represents an important shift in the practice of this court. Until June 2004, when deciding on cases that required the balancing of the right to freedom of expression against other Convention rights, the European Court of Human Rights mainly took the view that sentencing of journalists for defamation or invasions of other rights represented a violation of freedom of expression and the right to be informed. However, the ruling in the case of Princess Caroline, as well as some other steps taken by other bodies of the Council of Europe (Resolution 1165 on the right to privacy), provides grounds for the conclusion that the scales that for a long time remained tipped on the side of freedom of expression, were now tipped towards the protection of individual rights.

For more than a decade Princess Caroline strived to restrict the annoying tabloid intrusions into her private and family life. Especially bothersome were the photographers who traced practically her every step and used zoom lenses to capture scenes of her most intimate moments. When she exhausted all possibilities offered by the German legal system, she turned to the European Court of Human Rights appealing against the publication of three series of photo-

18 »Von Hannover v. Germany" available at <<http://cmiskp.echr.coe.int>>.

graphs featured by German tabloids (*Bunte* and *Freizeit Revue*) since 1993.

In the German courts, Princess Caroline fought to achieve prohibition of the publication and dissemination of the said photographs and prosecution of the publishers. The majority of these photos were taken in France, but were carried by German magazines, because French regulations on the protection of privacy are stricter, prohibiting the publication of photographs depicting scenes from private and family life without approval from the affected person, even when that person is a public figure. In her appeal to the European Court of Human Rights, Princess Caroline stated that she was haunted by paparazzi whenever she left her home. In Germany, her case was processed by several courts, including the regional, the appeal and the federal court and eventually the Federal Constitutional Court (*Bundesverfassungsgericht*).

Her application was dismissed by both the regional and the appellate courts. Both decided that in publishing these photos without her approval the media pursued their legitimate goal, i.e. to inform the public. The Federal Court (*Bundesgerichtshof*) allowed her appeal only on the count relating to the photographs of her and a certain gentlemen taken secretly in a secluded part of a restaurant in Provence. The Federal Court's explanation was that even when outside their homes public figures par excellence had the right to retreat to a private place away from the public eye where they may behave differently than when exposed to the public. In this case, the Princess, indeed, was in a public place (a restaurant), but by retreating to the far end of the restaurant's garden, she had clearly expressed her wish to be alone, away from the prying eyes of the public. As regards other photographs, the Federal Court dismissed her appeal, justifying the decision by the right of the public to know how a "public figure par excellence" behaves in public.

Despite partial success and prohibition of the publication of certain photos, even the Federal Constitutional Court (*Bundesverfassungsgerecht*) essentially agreed with the view that, since she was a figure of contemporary society par excellence, her right to privacy stopped at her doorstep. Its decision of December 15, 1999 is interesting because it puts into practice the theory of the private sphere that also has impact on the theory and decisions adopted by Slovenian courts. Another of its interesting aspects is the attempt to define the constitutional meaning of the tabloid press, to

which it refers as the “entertainment press.” The Constitutional Court thought that the entertainment press, too, fulfilled the mission of shaping public opinion and that the distinction between the information-providing press and entertainment press was increasingly blurred, because many readers obtained information from the entertainment press. Therefore, in the view of the Federal Constitutional Court, the tabloid press has an important role in shaping public opinion and thus fulfills an important social function. Moreover, the indisputable legitimate interest of the public in the private lives of politicians also extends to other public figures. Many individuals shape their lifestyles and images on the basis of patterns set by celebrities. This, in the Constitutional Court’s view, justifies their interest in various details of celebrities’ lifestyles. The court established that the media had considerable maneuvering room when deciding who is a person of contemporary history or who is politically significant. It further held that the public had the right to know whether public figures behaved differently in private situations than in public. However, it also concluded that this principle is not applicable if the person withdraws to a secluded place “outside home,” where even public figures have the right to relax and enjoy peace. In the case of Princess Caroline, this conclusion applies only to the photos of her at the far end of the restaurant, but not also to other photos taken in other public places (in shops, on the tennis court, by the pool etc.). Furthermore, special criteria should be applied to the photos showing the Princess with her children. In this case, the Constitutional Court agreed that her right to peaceful enjoyment of her family life had priority over freedom of expression.

Contrary to the Federal Constitutional Court, the judges of the European Court of Human Rights unanimously agreed that Germany had violated her right to respect for private and family life as defined in Article 8 of the European Convention on Human Rights. In their decision dated June 24, 2004 they said that the courts in Germany, even when taking into account “the margin of appreciation,” i.e. discretion granted to individual countries when applying the provisions of this Convention, did not weigh correctly the right to privacy against the right to freedom of expression. The European Court of Human Rights called upon the plaintiff and the government to try to settle within six months the amount of compensation for non-pecuniary damage or this decision will be taken by the court itself.

The European Court of Human Rights established that privacy includes elements of personal identity, such as name and image. Privacy includes a person's physical and psychological integrity that enables him/her free development of personality in relations with other people without interference from the outside. Private life thus also includes contacts with other people, in private or in public. It also repeated its view expressed on several occasions that Article 8 of the Convention stipulates not only the obligation of the state not to interfere with the exercise of this right, but also its positive obligation to ensure the exercise of this right in relation to natural and legal persons, including the media.

It further stressed that freedom of expression represented the foundations of democratic societies and that it did not apply only to information and ideas that are non-problematic, but also to those that may offend, shock or disturb. Despite this, the media must not overstep certain limits, particularly when respect for the rights of others is involved. Taking into account these principles, the European Court of Human Rights found that the publication of photos was not justified from the perspective of the public interest. In its view, the photographs showing scenes of Princess Caroline's everyday activities did not serve the function of informing the public, but only satisfied the curiosity of readers.

The European Court of Human Rights also commented on the view of the German courts that Princess Caroline was a public person *par excellence* and that this justified the publication of all photographs depicting her outside the privacy of her home. The Princess, in the view of the European Court of Human Rights, is just a member of the reigning family and has no official function in the Monaco government or its bodies. Therefore, details from her private life cannot contribute to public debate about the relevant public issues in a democratic society. This criterion is different from the one applied in cases involving politicians, where intrusions into privacy are justified by the media's role of a "watchdog in a democratic society." Accordingly, the European Court of Human Rights, taking into account the Resolution of the Parliamentary Assembly of the Council of Europe on the right to privacy, pointed out that the one-sided interpretation of freedom of expression, used by some media to justify their intrusions into privacy when they refer to the readers' right to know everything about public figures, was unacceptable. In such situations, freedom of expression stipulated by Article 10 of the Euro-

pean Convention on Human Rights should be interpreted more narrowly. In this connection, an interesting remark can be found in the concurring opinion by the Slovenian judge, Dr. Boštjan Zupančič, who said that (German) courts made a fetish out of the freedom of expression under the American influence.

The European Court of Human Rights holds that everyone, including persons known to the wider public, has the right to enjoy the legitimate expectation of protection of his/her privacy and individual rights. It stressed that new technologies bring new forms of intrusion into privacy, so the states must actively and effectively protect the right to privacy in these circumstances. The rights protected by the Convention, including the right to privacy, are not only theoretical or illusory rights, but rights that have to be effectively protected in practice. As regards public persons par excellence and other, “relatively” public persons, it stressed that the boundary must be clear and defined, so that an individual may unambiguously determine how to behave. In other words, the individuals must know “exactly when and where they are in a protected sphere or, on the contrary, in a sphere in which they must expect interference from others, especially the tabloid press.” In the view of the European Court of Human Rights, the notion of a secluded place as adopted by German courts was too vague, so it did not provide reliable grounds for public persons to exercise their rights effectively.

3.6 IMPLICATIONS OF THE ECHR DECISION IN THE CASE OF PRINCESS CAROLINE

The decision in the case of Princess Caroline will undoubtedly influence the conduct of (commercial) media in Europe, primarily concerning information or images referring to private life, including the private lives of public figures. The European Court of Human Rights has not processed many similar examples so far, and their number is not likely to increase in the future. Princess Caroline invested a considerable sum of money and time in the proceedings that lasted 11 years altogether, but the majority of individuals whose right to privacy is violated by the media do not have the needed money or time for court proceedings. Therefore, we should draw attention to the obligation of the signatories of the European Convention on Human Rights to include the Convention norms in their legal systems.

This also applies to Slovenia where the courts, when taking decisions in similar cases, may invoke directly the provisions of the Convention and decisions of the European Court of Human Rights.

In essence, the European Court of Human Rights adopted the interpretation that protection of the privacy of politicians needs to be distinguished from that of other public figures. The media have a legitimate right to be interested, to a certain extent, in the private lives of politicians, since this interest arises from their right to disseminate information important for the public. However, the scope of this right is different when other public persons are involved, even those who became public figures of their own will, in situations when details from their private lives do not contribute to the public debate on significant issues. The arguments of satisfying readers' curiosity and of providing entertainment "demanded by the readers," cannot on their own justify invasions of privacy. The decision in the case of Princess Caroline does not mean that it relinquished the defense of freedom of expression as a whole, but only in cases when intrusion into privacy does not contribute to public debate. By stressing that it is necessary to strike a balance between the two Convention rights, i.e. the right to privacy and the right to freedom of expression, and that neither of the two rights is absolute or inferior to the other, the European Court of Human Rights confirmed a shift towards greater protection of privacy.

This conclusion raises the question of whether the course set by the European Court of Human Rights would be pursued only in the "old democracies" or in the "countries in transition" as well, since in the latter the media are exposed to greater pressure from politicians. It is believed that in old democracies the media are under the control of economic corporations, while in new democracies they have not yet managed to wrench themselves from the grasp of politics. In future cases requiring the balancing of the provisions from Articles 8 and 10, the European Court of Human Rights will certainly take into account this aspect as well.

What may be the implications of this ruling in Slovenia? If one tried to determine the justifiability of publication of certain photos in the Slovenian tabloid press using the criteria of the European Court of Human Rights, many photos would not qualify for publication. Unfortunately, given that the value of ethics compared to that of profit is low in the world of commercial media, there is not much

hope that the tabloid press will of its own accord apply the criteria set by this decision of the European Court of Human Rights. The media's respect for privacy will essentially change only when more individuals bring lawsuits against them on the grounds of invasion of privacy, and when journalists and publishers will have to pay high compensation for their ungrounded invasions of privacy.

3.7 LEGAL PROTECTION IN THE CASE OF AN INVASION OF PRIVACY BY THE MEDIA

To sum up, in exercising their right to freedom of expression, the media sometimes impinge on other rights, including constitutional rights and rights protected by international law. One of the rights frequently threatened is the right to privacy. The question of the limits of this right, or rather, the question of the extent to which one right can be exercised at the expense of another right, is a dilemma as old as the press itself. Many theoreticians and practitioners have tried to give a definition of the standards and criteria that could clarify the question of when the intrusion of the media is acceptable and when it is not. However, every attempt at defining these criteria proved either deficient or outdated, since the rapid development of the media and information technologies constantly brings new forms of intrusion that were not possible in the past. At the same time, individuals have been displaying greater sensitivity to invasions of privacy. Sometimes their motives are honest, arising from a genuine feeling that they have suffered harm; at other times, the goal they have in mind is material, given that the compensation for intrusions given in some legal systems is quite high.

The tool most frequently mentioned in defining the limits of the (un)justified invasion of privacy is the theory of spheres that has been elaborated in most detail within German legal theory and jurisprudence. The spheres of individual rights are shaped and graded with respect to the social relations of the individual. The most protected is the intimate sphere that comprises primarily the details of one's sexual life. This sphere must have the highest protection in law, and the legal system must ensure the lowest tolerance of intrusion. Intrusions into the intimate sphere are possible only in exceptional situations.

The opposite pole is the public sphere that comprises an individual's social contacts in the area of politics, culture,

entertainment, sports and business. However, not every intrusion into the public sphere is allowed. What has to be taken into account is the consent of the individual in question, or at least the presumed approval of the person appearing in public.

Between these two spheres is the wide expanse of the private sphere, into which intrusion is permitted under certain conditions, when justified by the public interest or a legitimate interest of others. This sphere is divided into privacy “inside one’s home,” the private sphere “outside home,” and the private sphere “in the area of what is known as the outside world.”¹⁹ These definitions are intended to help the courts dealing with concrete examples of privacy invasion to decide, after balancing the right to privacy against other rights, whether or not the invasion is permissible.

Furthermore, there is a distinction between separate aspects of informational privacy that comprises records of a confidential nature and audio records of this kind: records of telephone conversations, private letters, diaries, notes or records referring to sexual practices, alcoholism, drugs and diseases, especially mental diseases. Protection of personal data is an area that has been established in the last decade as a special (sub)category of (informational) privacy. With the new European Constitution, it has gained the status of a separate, internationally recognized human right.²⁰ One special feature of the system of personal data protection is that this protection is grounded in public law. In other words, owing to the importance of this aspect of privacy, it is protected by the state through its own mechanisms. In Slovenia, these are the inspectorate for the protection of personal data (since 2001) and administrative courts. In 2005, the tasks of these two bodies will be transferred to the national authority for personal data protection.²¹

One differentiation that has been gaining recognition in practice recently is differentiation on the basis of the individual’s role in society. Public figures are treated differently from other individuals who do not have, and do not want to have, any public function. A category between these two comprises “relatively” public persons who, because the event is limited in time and space, do not enjoy the protection of privacy as before.

19 Dr. Rok Lampe: *Sistem pravice do zasebnosti* (The Right to Privacy System), Bonex, 2004, pp. 116-123.

20 For more on this, see chapter of this book on the protection of personal data.

21 This body is instituted by the new Personal Data Protection Act –ZVOP-1, *Uradni list*, No. 86/2004.

A person's image, as an aspect of privacy, is also protected by law. In principle, every individual has the right to decide whether his/her picture may be published or shown to the public. The pictures may be featured by the media only upon obtaining approval from the affected person. Such approval is not required if the person in question is a public person who has an important role in contemporary history (members of royal families, politicians, artists, actors, singers and sportsmen). Photos, including photos of public figures, may not be exploited for commercial goals (in advertisements).

Judging by court decisions so far, politicians must tolerate more intrusions into their privacy than other citizens. The public has an interest in obtaining information about their private lives, health and social contacts, since on the basis of this information it can form a picture of their credibility, moral principles and truthfulness. It is important for politicians, who are expected to be morally irreproachable, to possess these qualities. Since the voters give them the mandate to decide in their name about public issues, the public has the right to know how they behave when not in the spotlight.

Viewed from the perspective of possible intrusions into privacy, particularly controversial are the crime sections of newspapers. It is clear that the media must report notorious crimes. However, the reporting must be proportional to the importance of the issue. Coverage of previous criminal proceedings is permissible only if these are related to on-going criminal proceedings and in situations involving the assessment of the conduct of a public figure. Special protection should be given to underage offenders or defendants. Generally, it is prohibited to report names of the victims, particularly if the offense involves invasion of their intimate sphere. Especially disputable is the publication of the defendant's name during the investigation, as proved by the experience of the Human Rights Ombudsman in Slovenia, where appeals referring to this infringement are in the majority.²²

3.8 RECOMMENDATIONS OF THE COUNCIL OF EUROPE ON REPORTING CRIMINAL PROCEEDINGS

The importance of media coverage of criminal proceedings is confirmed by a separate document adopted by the

²² The viewpoint of the ombudsman on trial by the media is presented in the chapter dealing with personal data protection.

Committee of Ministers of the Council of Europe. In this recommendation,²³ adopted on July 10, 2003, the introductory part stresses the right to the freedom to receive and impart information which, however, is subject to certain restrictions arising from other Convention rights, i.e. presumption of innocence, the right to fair proceedings and respect for private and family life. The Recommendation then lists 18 principles that should be observed by the media when reporting criminal proceedings. Every one of these principles deals with an interesting aspect of reporting criminal proceedings, both during the investigation and during the court proceedings. Principle 8 requires protection of privacy during the on-going criminal proceedings, in accordance with Article 8 of the Convention. It is stressed that special protection should be accorded to minors and other vulnerable groups, victims, witnesses, and families of suspects, those accused and convicts. In this respect, particularly interesting is Principle 18, which requires the protection of convicts' identities with the aim of enabling their reintegration into society. Without their approval, the public should not have access to information about their previous offenses.

When deciding the permissible extent of intrusion into individual rights, the decisive criterion is the public interest. In addition, the courts take into account other criteria as well, including the approach employed when gathering information, diversity of sources etc.

3.9 PROTECTION OF PRIVACY IN CIVIL LAW

In Slovenia, the mechanisms intended to guard individual rights in general, and in this connection the right to privacy in particular, are prescribed by the Obligations Act. This law envisages a special request by which anyone may "request from the court or other competent body to order the termination of an act that infringes upon the inviolability of person's identity, private or family life or some other right emanating from person's identity." An intrusion into privacy as an individual right is also a civil offense.

3.10 PROTECTION OF PRIVACY IN THE PENAL CODE

In the Penal Code of the Republic of Slovenia, the chapter dealing with criminal offenses against honor and good

²³ Recommendation Rec(2003) 13 on the provision of information through the media in relation to criminal proceedings.

name defines, among others, the following criminal offenses: defamation (Article 170), injurious accusation (Article 171), exposure of personal and family circumstances (Article 172) and reproach of a criminal offence with the intention to disparage (Article 173). In case of two of these offenses, prosecution is initiated by a civil lawsuit. If these offenses are done against a state body or against an official or military person and relate to their performing of official duties, the prosecution is initiated on proposal (Article 178/1 of the Penal Code).

The most common offenses leading to private lawsuits are slander and injurious accusation. In principle, it is possible to say that supplying of untruthful information could be used as grounds for the criminal offense of defamation, while value judgments could include the elements of slander or injurious accusation.

In Slovenia, before the introduction of the multi-party system, it was the provisions of the Penal Code that were most frequently invoked when the protection of reputation, honor and good name was at stake. In addition, the public prosecutor was frequently engaged in cases involving the "officials" of that era. After the introduction of the multi party system, private lawsuits prevailed. The Council For the Protection of Human Rights and Fundamental Freedoms, and later the Human Rights Ombudsman, mainly advised this course of action when individuals turned to us complaining of the harm caused by media coverage.

These trends led Alenka Šelih to conclude, in 1994, that journalists adopted a different position saying that "... while in the previous circumstances they were Davids fighting against Goliaths, the situation has now changed. At present, their behavior is much closer to that of the 'fourth estate' than to that of David, and their power is exceptional. One who observes this state of affairs from aside may obtain the impression that journalists are either not aware of this or that they are overly aware. As much as freedom of the press is one of the corner stones of democratic systems, it also imposes upon journalists the requirement for a high degree of professionalism and accountability for what they do."²⁴

²⁴ Dr. Alenka Šelih, Tisk in (kazenskopravno) varstvo časti (The Press and the Protection of Honor (in the Penal Code)), *Podjetje in delo*, No. 5/1994.

4 PROTECTION OF PERSONAL DATA

Protection of personal data, as part of the right to privacy, has become an autonomous area of the protection of human rights. In Slovenia, the right to personal data protection as a human right was first defined in 1989, in amendment XLIV to the 1974 Constitution. In the Constitution adopted in 1991, the protection of personal data is the subject of Article 38. On the international level, too, the right to personal data protection has become a separate human right only recently.

The European Convention on Human Rights itself does not include any special provision on the protection of personal data. This area is regulated by the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data (Convention No. 108), ratified by Slovenia in 1994.

On October 24, 1995, the European Parliament and the Council adopted Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data (we shall return to this directive later in the text). Recently, the EU has been paying considerable attention to individual rights including the right to privacy. The Charter of Fundamental Rights of the European Union proclaimed by the European Parliament, the Council and the Commission in Nice in December 2000, defines the right to the protection of personal data in Article 8 of Chapter One (Dignity). In the first paragraph of this article it is said that “[e]veryone has the right to the protection of personal data concerning him or her.” The second paragraph defines the basic principles of protection. “Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.” The third paragraphs says that “[c]ompliance with these rules shall be subject to control by an independent authority.” The Charter of Fundamental Rights is not a legally binding document, but it does have political and symbolic impact particularly on the process of the adoption and implementation of the measures of EU bodies and member states. In addition, the Charter was fully incorporated in the draft treaty Establishing a Constitution of the European Union (i.e. its second part).

4.1 TWO APPROACHES TO PERSONAL DATA PROTECTION

Two approaches to personal data protection are possible. In the one used in Slovenia, protection of privacy and restrictions regarding personal data protection are regulated by particular laws based on guidelines provided by the Personal Data Protection Act. The examples from Slovenia described later in the text clearly illustrate the drawbacks of this approach.

The second approach takes into account the rapid development of information technology, changes in the data protection doctrine (e.g. on the basis of national or European courts' decisions) and the development of economic and social fields. Accordingly, the systemic legislation determines only the basic principles that must be observed in personal data processing, while the setting up of a particular database is subject to approval issued by an independent and professionally strong authority for personal data protection. In this system, the prospective database administrator (controller) submits to such a body a request to set up a particular database together with an explanation of the purpose of data processing, the method of data collection, duration of data storage and other relevant information. The supervisory body, which may approve or turn down the request, thus has an overview of all personal data filing systems and can exercise efficient control over these. This approach also enables greater flexibility. For example, when a new database has to be established, there is no need to amend the existing legislation or pass a new law. Another advantage is a clearer distribution of responsibility for particular databases, since in this case responsibility does not lie with the legislator, i.e. an abstract body, but with a specific person identified by name. Since this person has the status of a high and independent official, it is expected that his/her decisions are not influenced by political or economic interests. Those dissatisfied with such an official's decisions may choose to seek judicial protection.

Given the increasingly rapid development of information technologies and increasingly complicated and ramified administration in both the public and the private sector, in my opinion the second approach is more suitable.

4.2 REGULATIONS IN SLOVENIA

Slovenia was among the first countries to include in its constitution the right to personal data protection. Similarly, the law on personal data protection based on amendment XLIV from 1989 and enacted on March 7, 1990, that is to say, even before the adoption of the new Constitution, was one of the first in Europe pertaining to this area. Although once a pioneer in this field, Slovenia now lags behind others. The 1990 law has long been waiting to be harmonized with Directive 95/46/EC, and Slovenia still does not have an independent authority for personal data protection invested with the powers required by the this Directive. The 1990 law was very rigid and strict towards database controllers, and the same provisions are still in use despite several amendments.

Under this law, the public sector could set up a database containing personal information only on the basis of a separate law which determined the purpose of its use, the method of data collection, the duration of storage and the protection of the confidentiality of personal information. No profound analysis is needed to conclude that throughout the validity of this law these requirements were not strictly observed. In most cases, separate laws were passed to regulate the setting up of databases in specific areas, but they were deficient, usually stipulating only the naming of authorized databases but failing to address other issues required by the systemic legislation. On the other hand, contrasting examples could also be found, of excessively detailed and casuistic regulation that allowed excessive invasion of privacy. Such an example is the law regulating databases in the health insurance field (ZZPPZ), which will be discussed later in the text.

The private sector was allowed to process personal information only upon obtaining written consent from the person in question. That person had to be informed, before giving such consent, about the purpose of data processing, the use of information and the duration of its storage. There is no doubt that on many occasions the private sector collected personal information, including sensitive items, without obtaining written consent from individuals.

It is also clear that the strict requirements of the Slovenian systemic legislation on the protection of personal data could not be implemented in practice. The gap between legal requirements, on the one hand, and everyday

needs, on the other, led to frequent breaches of this law. The rapid development of information technologies only added to this.

Furthermore, the Personal Data Protection Inspectorate instituted by this law has not been able to prevent or penalize all breaches of the law. The reason has been physical limitations, since it employs two inspectors only, and one also has to fulfill management functions. Owing to such a structure, the inspectorate can react only in the aftermath of the event, on the basis of appeals, and it is also left with few opportunities for surveys, supervision of the implementation of protective measures and the like. In addition, being understaffed, the inspectorate is not in a position to dedicate sufficient time to preventive activities, education and the raising of awareness, meaning activities through which citizens could learn about their rights and about the potential abuse of personal data. Small-scale preventive activities mean a small number of appeals. The result is that Slovenia, compared to other EU member states, has few appeals and a disproportionately small number of inspectors who keep watch over protection of privacy and personal data. Even the majority of existing inspectors' proposals for penalties have ended in court backlogs and have not been processed within the legal deadline.

In the Slovenian system of personal data protection based on a type of law usually referred to as the "systemic law," meaning an umbrella law that stipulates only general principles, while particular laws regulate the setting up of particular databases in specific areas, the responsibility for personal data processing was thus transferred to the legislator. However, decisions regarding personal data processing inevitably involve the balancing of different rights, of which many have the status of constitutional rights or belong in the group of rights protected by international conventions. In most cases this requires the balancing of individual rights against the right to freedom of expression or the right of access to information. Since the exercise of the last two mentioned rights is restricted by the provisions regulating personal data protection, every decision should be based on a priority test. It is not realistic to expect that the legislation could determine in advance which right will have priority in a real-life situation. Also, since the legislator represents the political will of the majority, it cannot be the responsible person for a task of this nature, nor can it effectively protect the rights of individuals or minorities. The expectation that

the legislator could select the wisest and the generally applicable solution based on the principles set by the systemic legislation was illusionary. As a result, in many cases particular laws passed to regulate personal data processing in specific areas did not anticipate the setting up of databases that were necessary for the normal functioning of economic or other processes, while on the other hand, they frequently made possible serious invasions of privacy, even involving the most sensitive data, without taking into account the principles laid down by the systemic legislation.

4.3 IMPORTANCE OF CONTROL MECHANISMS

An extremely important instrument for preventing abuse and protecting individual rights is a control mechanism available to individuals who think that their personal data have been processed unlawfully.

One of the requirements found in Directive 95/46/EC (Article 28) is that every country should establish an independent supervisory authority for personal data protection. The autonomy of such an authority is necessitated by its tasks and responsibilities. Directive 95 stipulates that this authority should be consulted in the process of drafting regulations and other administrative measures relating to the protection of individuals' rights and freedoms with regard to the processing of personal data. It should also give its opinion on the justifiability of establishing a specific database and on exemptions. The independent authority should further have the right to engage in administrative and judicial proceedings. These powers clearly show that this independent authority should be a competent institution willing to balance various rights, independently take decisions on whether a specific instance of the invasion of privacy should be allowed, and determine under what circumstances such an invasion could be endorsed.

One serious flaw of the existing solution in Slovenia has been the absence of effective and independent control mechanisms. For a long time (ever since 1991), the only supervisory body was the inspectorate for personal data protection; until recently, only one inspector was appointed for the entire country. Realistically, he could not fulfill the numerous, demanding tasks that are necessary for the system of personal data protection to be effective. Since this inspector was also a state official responsible to the minister, it is understandable that persons in this role performed their

tasks perfunctorily and in a manner that relieved them of any responsibility. Their standpoint was that anything that was not explicitly allowed (by particular legislation) was prohibited, meaning that if no legal basis existed for setting up a particular database, it was unlawful. By the same token, they did not consider an excessive invasion of privacy based on a specific law to be their concern. This approach reflects, among other things, a still enduring legal culture dating from the previous system: officials, inspectors and even judges, were responsible solely for the technical implementation of regulations that were expected to lay out as detailed norms of conduct as possible. This practice relieved them of any responsibility (including political responsibility) for a potentially “wrong” decision that would have been possible had these officials taken decisions based on general principles or on the Constitution, or had they performed a test of proportionality in weighing different rights.

4.4 HOW THE FLAWS OF THE EXISTING LEGISLATION HAVE BEEN MANIFESTED IN PRACTICE

4.4.1 *A Case of Excessive Intrusion into Privacy Enabled By the Legislation*

The Public Health Registers Act is a typical example of the law that enables excessive intrusion into privacy and disproportionate collection of the most sensitive personal information. There were no extensive debates on the content of this law in the National Assembly, and its main implications are actually discernible from the appendices. These enable the setting up of databases of the most sensitive personal data, and almost all of them include the citizen’s unique identification number (abbreviated to EMŠO in Slovene). For example, the register of drug users (IVZ 14) includes not only the identification number, sex, date of birth, permanent address and other identifying data, but also information on sexual orientation, previous sexual relations, the number of sexual partners, condom use, psychiatric diagnosis and even data on police investigations or judicial proceedings. However, the Public Health Registers Act does not stipulate that the individual in question should be informed in advance to whom these data may be forwarded or for what purpose. Most individuals who turn for help to the center for the prevention of drug addiction

are not aware that their data are forwarded to the Institute of Public Health, although the information is forwarded in a form that makes possible easy identification of the person. It is obvious that in drafting this law, and its appendices in particular, mainly one side was invited to collaborate, i.e. the medical profession, which has an interest in gathering the greatest possible amount of information, which it needs for its own research. The legislator obviously failed to carry out the balancing test, particularly the weighing of the right to privacy against the right to personal data protection. The principle of minimal invasion of these rights, meaning a proportionate invasion that still enables the realization of the legitimate objective in this field (i.e. monitoring of diseases), was not observed. The consequence is that even the most sensitive data with no direct connection with this objective are collected and processed.

This example aptly illustrates how systemic legislation, even when formulated with the best purpose in mind, can produce undesired effects, in this case the excessive invasion of privacy. If an independent data protection authority had been asked to take a decision, the scope of data gathered or published would definitely be smaller and better thought out, as would be the control of their use and protection.

It is true that an individual has the option of applying to the Constitutional Court for its opinion if he/she deems that a specific law permits excessive invasion of privacy. However, the affected individuals are frequently not aware that their personal data have been processed, and even when they are, many lack the will, or the required knowledge or resources, to initiate the constitutional proceedings. On the other hand, the Constitutional Court itself is very restrictive when weighing the legal interests of affected individuals. The corrective role of the Constitutional Court thus remains an underused option.

4.4.2 *Bank Accounts On the Web*

In October 2004 there was a stir caused by the publication of information about bank accounts, including personal bank accounts, on the web page of the Bank of Slovenia, based on the provision in Article 29 of the Payment Transactions Act. Opinion on this decision was divided. Some considered it an inadmissible invasion of protected personal data and thought that it opened the door to abuse, while others welcomed this decision, arguing that it made easier

execution proceedings for creditors. The inspector for personal data protection issued a decision requiring that the Bank of Slovenia prevent access to information about the bank accounts of natural persons until it provided a tracking system that would enable control over who was the recipient of this information, which, under the Slovenian legislation, falls into the category of personal data.

On October 6, 2004, the commissioner for access to information, Ms Nataša Pirc Musar, issued a statement making public her standpoint on this issue. Contrary to the inspector, she thinks that the first/second name and the bank account number are not personal information. Furthermore, in her opinion, a piece of personal data “loses the status of protected personal data the moment a law stipulates that it may be published.”

Both reactions from state officials aptly illustrate the deficiencies of the system of personal data protection used in Slovenia. In this case, the inspector and the commissioner acted like legalists. The statement by the information commissioner, effectively saying that an invasion of privacy stipulated by law is acceptable, is unusual for two reasons. First, because by saying so she actually renounced the balancing of the right to be informed against the right to privacy, and second, because she declared in advance her view on an issue on which she might be required to take an official standpoint sometime in the future. Under the Access to Information Act, the information commissioner has just one duty: to take a decision in the administrative appeal procedure. Accordingly, an appeal body should not make public its unofficial standpoints, since that could cause doubts about its impartiality sometime in the future when it might be required to take an official standpoint on the same issue.²⁵

4.4.3 *Information About Criminal Suspects*

The impracticality and rigidity of the Slovenian legislation regulating personal data protection became particularly obvious in early 2004²⁶ when the inspector for personal data protection, Jože Bogataj, publicly stated his opinion that it was not permissible to publish the initials of and other data

²⁵ I responded to the commissioner's editorial published in *Pravna praksa* (Legal Practice), “Kljub zakonu še nejasno kaj je informacija javnega značaja” (Meaning Of Information of a Public Nature Still Ambiguous Despite the New Law), *Pravna praksa*, No. 39/2003.

²⁶ See, for example, the article titled “Osumljenci kaznivih dejanj in varovanje osebnih podatkov” (Criminal Suspects and Personal Data Protection), *Delo*, 26 January, 2004.

about criminal suspects without an explicit legal basis. Furthermore, the system of personal data protection was also the argument he used in explaining the inaccessibility of information about salaries in the public sector, and even about the court hearings timetable.

It is not surprising that this statement attracted wide media attention. The protection of personal data is a highly unpopular issue among journalists. It obstructs or prevents them from disclosing and highlighting the events that they find interesting, or attractive to the public. What is the sense of reporting excesses if no names are attached to protagonists? Moreover, the protection of personal data is a handy excuse exploited by information suppliers from the public and economic sectors when they refuse to give information to journalists.

In an earlier address to the press secretaries of the police in the beginning of 2004, the inspector for personal data protection explained his view that, when reporting suspects' data, the police must observe the provisions of the Personal Data Protection Act. Since this law does not allow the publication of identifying data of persons under criminal investigation, and since no exemptions are provided by another law (e.g. the law on the police or on the media), his recommendation was that the police should change their approach so that the information they supplied would make impossible the identification of persons appearing in media reports. His opinion was that, according to the Slovenian regulation, anything that is not explicitly allowed is prohibited, and that the inspector for personal data protection is not authorized to weigh, on a case-to-case basis, the right to personal data protection against the right of the public to be informed.

Quite understandably, journalists were annoyed by his opinion that the Constitution and Personal Data Protection Act equally protect the privacy of all, regardless of their social position. In other words, suspects, defendants and convicts enjoy equal protection of their rights as do "ordinary" citizens, officials and other public figures. Formally, viewed from the perspective of the rigid system of personal data protection, the inspector's views may have been correct, but one thing he overlooked is that the Constitution, in addition to the article regulating personal data protection, includes other articles concerning other rights and freedoms, among these the right to be informed (I will expand on this later in the text). In their protests in response to the

inspector's view and decisions based thereon, the journalists, the media companies and the Association of Journalists all referred to the need for openness in the work of the entire public sector and the right of the public to receive important information.

4.5 THE STANDPOINT OF THE OMBUDSMAN ON "TRIAL BY MEDIA"

The Human Rights Ombudsman, who from 2001 has been fulfilling the function of an independent body overseeing personal data protection as required by the EU Directive 95/46/EC, gave support to the decision of the police to cease revealing suspects' initials to the media. This decision actually corresponded to a proposal that the ombudsman repeatedly included in his reports since 1996. The ombudsman's office established that, in informing the public about their findings relating to the identification and investigation of various criminal offenses, the approach of the police was inconsistent. The police representatives sometimes gave full names and sometimes only initials, variously combined with the age of the suspect, his/her address, profession, activity or function. In many cases, this actually amounted to a premature disclosure of suspects to the environment in which they lived or worked, that is, during the earliest stages of the criminal procedure. Suspects were thus labeled criminal offenders in advance, although, according to both the Constitution and the legislation, their actual responsibility could be established only on the basis of court decisions. On top of that, neither the media nor the police inform the public about potential subsequent dismissals of charges, suspension of procedures or acquittals, or rather, the media are not interested in this information.

This phenomenon of early disclosure is known as "trial by media." It involves an invasion of privacy of the person who is the subject of such a trial and threatens the honor and reputation of that person. In other words, by reporting criminal acts or other acts with an element of criminal offense, the media accuse the person of wrongdoing. The "trial by media" also violates the principle of presumed innocence and the right to fair trial.

Examples of this kind involve the collision of several constitutional rights: freedom of expression (Article 39 of the Constitution) on the one hand, and presumed innocence (Article 27) and privacy protection (Article 35) on

the other. The balancing of constitutional rights should be made on a case-to-case basis. We have already stressed that the charge represents an early phase of the legal proceedings, meaning that stricter observation of the principle of presumed innocence is required in this phase. Under both the Constitution and the valid legislation, a criminal procedure becomes public only when it reaches the court stage, i.e. a court hearing which is public (Article 24 of the Constitution). Indeed, it is sometimes permissible to communicate the full names of suspects, for example, in high-profile cases that involve public figures, because in such cases the right of the public to be informed prevails. This is also recognized by the legislation regulating the work of the police.

Another inconsistency in the conduct of the police deemed by the Ombudsman's office as unacceptable was the variation in the information supplied. In some cases the police communicated, for example, a suspect's initials, position in a company and the name of the company, effectively enabling the media to identify the person, while in others the communicated information was not sufficient for identification. However, when informing the public, state bodies should observe the equality treatment principle.

By taking the decision to cease supplying the initials of suspects, the police actually shifted the responsibility for the disclosure of names to journalists, who, understandably, are not keen to undertake such a responsibility because of the danger that the disclosed person could initiate a criminal or civil action against them. Journalists themselves admit that in most cases they have no difficulty in obtaining the names of suspects, either through other channels or off-record. Essentially, the fundamental issue here is who will take on the responsibility for weighing up the right to be informed against the right to privacy.

4.6 ENDEAVORS TO IMPROVE THE SYSTEM OF PERSONAL DATA PROTECTION

The standpoint of the inspector for personal data protection, that anything that is not explicitly allowed is prohibited, suggests that, in his view, legislation that would balance the interest of the public, the right to privacy and the right to personal data protection would be a solution to all problems related to the communication of personal data. In contrast to the inspector, I hold that no legal provision can determine which right will have priority in a specific case.

In balancing these rights, all circumstances should be taken into account and this can be done only by an adequately trained body or individual with adequate knowledge and the power to take decisions.

In his 2002 annual report, the Human Rights Ombudsman proposed a consideration of changes in the personal data protection regulation and the establishment of a special independent body to supervise the setting up and the use of personal data filing systems. This demand is grounded in the EU Directive on the protection of individuals with regard to the processing of personal data (Directive 95/46/EC). Following the discussion about the ombudsman's report, the National Assembly adopted three decisions relating to personal data protection. Among other things it recommended that the Government should consider granting more powers and professional independence to the Personal Data Protection Inspectorate and that it should prepare, as soon as possible, a new law on personal data protection that would be in line with Directive 95/46/EC.

4.7 NEW PERSONAL DATA PROTECTION ACT (ZVOP-1)

To sum up, until 2004 Slovenia had a very strict systemic regulation of personal data protection that actually prevented personal data processing in the public sector unless based in particular laws, and required that the private sector obtain written consent for data processing. This type of regulation made this area highly unpopular. Although no empirical data are available about the implications of this type of arrangement, there is no doubt that rigid legal requirements obstructed the development of activities that, thanks to state-of-the-art technologies, could have enabled easier management of databases. Under the Slovenian legislation, the person's first and second name and address are considered personal data. As a result, economic and other entities from the private sector often resorted to arbitrary methods in order to satisfy their needs for data processing, knowing that massive violation made impossible efficient supervision. Such legislation led to many absurd situations in the public sector as well, and was frequently criticized by the Human Rights Ombudsman.²⁷ For several years the

²⁷ Among the most notable cases, let me mention that of a plaintiff who was bitten by a dog, but the police refused to reveal the name of the dog's owner, and that of mothers who could not obtain information about the employers of their children's fathers, who were avoiding alimony payment.

ombudsman stressed the need for a revision of data protection principles and control mechanisms.²⁸ The pressure exerted by the ombudsman and especially by the Brussels administration, which drew attention to the discrepancy between the Slovenian and EU legislation in this area, eventually compelled the government to propose a new law. The initial idea was to amend the previous law, but it soon turned out that essential changes were needed.

When explaining the need to propose a new law, the government stated as the reason the new harmonization with EU Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data. This Directive was issued on October 24, 1995, and its primary objective was to enable implementation of the main EU goals – free flow of goods and services inside the unified economic space; national regulations of the personal data protection field should not hinder the implementation of these objectives. However, the Slovenian government's explanation of the need for the new law becomes unconvincing when one remembers that in Slovenia a new law on personal data protection (the Personal data Protection Act or ZVOP) was passed in 1999 precisely for the purpose of harmonization. It was then amended in 2001 in order to “finally harmonize” it with Directive 95/46/EC which, however, had not changed in the meanwhile. Yet the draft submitted to the National Assembly in March 2004 includes as many amendments as there are articles in this law. Therefore, the explanation that the law had to be harmonized again with the said Directive on the basis of discussion held in Brussels suggests either a lack of professionalism in previous drafting procedures or an inordinately fast succumbing to EU administration requirements.

The new Personal data Protection Act (ZVOP-1) passed by the National Assembly on July 15, 2004²⁹ and taking effect on January 1, 2005, introduces several important new features and largely closes the previous gap between strict legal requirements, indeed frequently ignored so far, and practice that largely went its own way. The new law, and especially amendments adopted in the final phase of the legislative procedure based on the EU remarks, opens a number of new possibilities in the data processing field, but also creates room for the invasion of privacy. This raises concerns

²⁸ See the Ombudsman's Annual Reports for 2002 and 2003 at <<http://www.varuh-rs.si>>.

²⁹ *Uradni list*, No. 86, 5.8.2004.

that the new law goes to another extreme, i.e. that it provides too much room for unfounded or excessive invasion of privacy, especially in the private sector. This is particularly made possible by insufficiently clear formulations.³⁰

ZVOP-1 thus raises doubts as to whether the drafters' assurances that the level of personal data protection would remain unchanged are based on realistic circumstances. The main reasons are the unclear formulation of certain provisions in this law, excessive leniency towards database managers concerning the grounds for personal data collection, and the absence of effective supervisory and complaint mechanisms.

The new ZVOP-1 does not, in fact, introduce any radical change in the existing system, but only several new solutions that attempt to mitigate the existing (overly) rigid provisions stipulated by its predecessor. This cannot be attributed predominantly to the drafters' unwillingness to really modernize the system of personal data protection and make it more flexible and clearer. A more crucial obstacle to the realization of this goal is the limitation on establishing new institutions and on employment in the public administration sector. A flexible approach to personal data protection presupposes the existence of an independent and powerful body for personal data protection that would take on responsibility for this area. It should consist of several departments. One would take decisions on the setting up of new databases and participate in the formulation of regulations and codes in the public and private sectors; another department, comparable to the existing inspectorate, would supervise the implementation of the decisions; finally, it would also be necessary to include a department for promotional activities and education of users and individuals who are the subjects of personal data protection. The rule frequently stressed by the Human Rights Ombudsman, that rights cannot be exercised if citizens are not familiar with these or do not put them into practice, is more relevant in this field than any other. Personal data protection is certainly one area in which citizens' familiarity with individual rights is low, and even lower is the number of administrative or legal actions initiated in order to ensure the exercise of these rights.

³⁰ I responded with a detailed overview of personal data protection. See Jernej Rovšek: Varstvo osebnih podatkov (Personal Data Protection), *Pravna praksa*, No. 27, 26.8.2004.

Particularly worrying is the loose wording of new solutions pertaining to the processing of sensitive personal information, such as racial origin, ethnicity, nationality, belief, health condition, sexual life, criminal record, biometric and other data. The processing of this information is no longer tied to written consent, but consent now has to be in writing only “as a rule.” In addition, ZVOP-1 stipulates more exemptions that allow the processing of sensitive personal data without consent from the person in question. These exemptions allow database owners to take an arbitrary approach when deciding about data collection.

Another concern is related to the use of a unique identifier (for example, a health insurance or tax number), which is the feature that most threatens the security of personal data. A unique identifier enables the cross-referencing of databases to create a “picture of the individual.” This provides room for the abuse of personal data. It is a short step from there to “Big Brother,” so some countries prohibit the use of unique identifiers. Although ZVOP-1, too, stipulates that a unique identifier cannot be used as the sole method of acquiring personal data, it also provides exemptions, meaning that such an identifier can be used if it is the only piece of data in a concrete situation that leads to the disclosure or persecution of a criminal offender, protection of the life or physical integrity of the individual, or enables the intelligence or security services to fulfill their tasks. This in fact means that the state is allowed to use a unique identifier without any external control.

In the last phase of the legislative procedure to amend the previous Personal Data Protection Act, the drafters proposed the replacement of the existing inspectorate with a data protection authority as required by the EU Directive. Despite the new name and assurances that this body will be autonomous, it is clear that it will just carry on, to a greater or lesser extent, the work of the existing inspector. In fact, the minimum number of supervisors envisaged by this law is four (of these just one graduate of the law faculty), and they will not begin work before January 1, 2006. In my opinion, four supervisors will not be able to fulfill all the tasks required by the implementation of this law and dictated by the nature of personal data protection. The areas that will be inevitably neglected are preventive and promotional tasks.

Therefore, the proposal put forward by the Human Rights Ombudsman’s office, and supported by the coal-

tion of NGOs working under the framework of the Peace Institute, to establish an autonomous and independent information ombudsman who would be responsible for the areas of access to information and personal data protection, has not lost its currency. The right to personal data protection is frequently cited when arguing for exemptions to the right to obtain information, so there is no good reason to have two bodies deciding about essentially one and the same subject. By having one body, we would also eliminate situations in which two national bodies affirm different opinions on the same subject, as happened in the case of information about salaries in the national *Radio Television Slovenia*. The amended law on personal data protection resolves this issue by allowing the information commissioner and the national supervisory body for the protection of personal data to challenge each other's decision by invoking an administrative procedure. Yet it would be more rational if both areas were covered by one body with a stronger professional background, which would build its reputation over time. This would enable more efficient operation in both related fields. Both issues involve the constitutional rights of the individual, so both issues should be resolved by a strong, independent and reputable body.

5 OMBUDSMEN, PRESS COUNCILS AND MEDIA OMBUDSMEN

Human rights and fundamental freedoms are just dead letters unless complemented with effective protection mechanisms. Similarly, the constitutional and legal provisions on the protection of human rights mean little unless accompanied by a democratic system, an independent judiciary and freedom of the press. Effective formal (court) and informal (ombudsman) mechanisms furnish content to these rights and make possible their exercise in practice.

Every state provides court protection when constitutional and legal rights are violated. However, since these mechanisms are slow, expensive and professionally demanding, ombudsman offices (in the public sector) and self-regulatory mechanisms (in the private sector) have been gaining recognition as supplementary methods of protection. The decisions taken by these bodies are not binding, but they do offer an opportunity for a faster, and frequently consensual, resolution of disputes between individuals and the state, or individuals and the media.

The relation of a press council or media ombudsman to the media is similar to that of the ombudsman to state bodies. Both the human rights ombudsman and the media ombudsman pursue an informal, fast and more friendly approach to the resolution of complaints.

5.1 OMBUDSMEN

5.1.1 *Informal and Extra-Judicial (ombudsman) Mechanisms are Increasingly Popular*

The number of relations between individuals and state bodies has been increasing. This is the result of an increasing number of areas of life that are becoming subject to legal regulation, but also of the increasing complexity of social relations which, in turn, require normativization of more and more areas. On the other hand, citizens are not sufficiently familiar with regulations or procedures providing the framework for the exercise of various rights, and court protection is not always a suitable option for the resolution of contentious relations, particularly if the matter is of minor importance or if it is not governed by legislation (e.g. attitude towards customers, speed of procedure etc.). Were every dispute of this kind to be brought to court, their

workload would increase considerably and the time to final decision would be prolonged. Precisely such minor cases bring to light the advantages of informal, ombudsman-mediated resolution of disputed matters between individuals and government bodies.

The ombudsman procedure is free of charge and eliminates the need for costly expertise or legal assistance. On top of that, the ombudsman also resolves cases that may seem to be of minor importance at first glance, or those that do not qualify for court protection, but nevertheless have great significance for the individual. Furthermore, an ombudsman's intervention has a preventive effect, since every particular resolution influences the future conduct of public administrative bodies in similar situations. Another welcome feature of this kind of approach is resolution through mediation that eliminates the need to use enforcement mechanisms. By proposing a specific resolution or by giving recommendations, the ombudsman aims to bring the wrongdoer to acknowledge the error and take corrective action. This mediator approach is especially characteristic of the type of ombudsman found in Latin countries, e.g. the French ombudsman (*Médiateur*).

The reasons stated above most crucially contributed to the rapid development of informal mechanisms of individual rights protection, and the ombudsman as the most widespread form. Ombudsman offices are established on the national or local levels, for the protection of groups or separate areas in the public and private spheres.

5.1.2 *The History and Development of the Ombudsman Office*

The term “ombudsman” is of Swedish origin and means “a representative, an authorized person.” The first such representative was appointed by King Charles XII of Sweden in 1713. Following the battle at Poltava in 1712, where he was defeated by the Russian tsar, Charles XII took refuge at the Ottoman court where he “was forced to remain as a guest” for several years (today we would probably say that he was given asylum). Being afraid that his court officials, judges and tax collectors would abuse their powers during his absence, or would use them for personal advantage, in a document of October 26, 1713 he ordered his government to appoint a high representative (Högsta Ombuds Man) whose task was to supervise the work of the government

while he was away. It is believed that he found the model among the institutions used by the Ottoman court and administrative system for the handling and resolution of complaints. Some hold that his model was the “khadi,” a judge in Ottoman times, and others³¹ that it was the “ahilik,” a form of independent mediator established by associations of craftsmen and merchants to resolve disputes between “customers” and the entrepreneurs of the time. Whichever the case, the Swedish temporary “ombudsman” obviously fulfilled his task satisfactorily, given that he later became the king’s permanent representative, although not a real ombudsman in the modern sense of the word. The first real (parliamentary) ombudsman was introduced later, in 1809, when the Swedish parliament won for itself the constitutional right to appoint an ombudsman, following a dispute with the king.

For more than 100 years, Sweden remained the only country with a parliamentary ombudsman, to be joined by Finland only in 1919. This could be described as the first phase of development. The second phase began after the Second World War with the establishment of ombudsman offices in the developed liberal democracies of Europe, in Canada, Australia and New Zealand. Denmark appointed an ombudsman in 1954. The Danish ombudsman office, which differed from the Swedish and Finnish ones in that it excluded control over the judiciary, served as a model for all subsequent ombudsman offices. The first ombudsman outside the Scandinavian states was appointed in New Zealand in 1962. The third phase began towards the end of the 1980s and is most notably characterized by the proliferation of ombudsman offices in the countries in transition, i.e. the countries known as “new democracies.” These ombudsman offices, which spread rapidly through Central and Eastern Europe, Asia, Africa and South America, primarily place stress on the protection of human rights and the implementation of international conventions in this field. In certain countries, particularly in Africa, Asia and South America, the task of the ombudsman also includes the fight against corruption. Another term found in connection with this institution is the “post-conflict” ombudsman, used for ombudsman offices in the Balkan countries (e.g. Bosnia and Herzegovina, Kosovo etc.).

³¹ The Turkish historian Galip Demir, in his contribution on the history and development of the ombudsman office, presented at the international symposium in Nevsehir, 8.-11. May 2004.

Before I proceed to give an overview of the ombudsman's history, let me briefly explain the convention behind the use of the term "ombudsman" in this text. I use the term ombudsman as a generic name for this type of office. The Slovenian expression for this institution is "varuh," similar to some other local expressions such as commissioner, *médiateur* or *defensor*, although the term ombudsman is concurrently in use in all countries.

5.1.3 Categorization of Ombudsman Offices

Despite great diversity, the institution usually referred to as the "ombudsman" can be roughly divided into four main groups:

- **PARLIAMENTARY OMBUDSMEN** constitute the most important group; some refer to this type as the "real" ombudsman. A parliamentary ombudsman office is based in the Constitution or a special law and covers the whole territory of the country. This group also includes some national ombudsman offices in whose establishment is involved, owing to some special features of individual constitutional systems, the executive branch of government (the head of state or the government, or both).
- **SPECIAL OMBUDSMEN**, who constitute the second large group, protect special segments of the population (women, children, people with special needs etc.). A special ombudsman may be appointed by parliament, although it usually operates under the auspices of various government bodies. An example of ombudsman belonging in this group would be a special, government-appointed ombudsman in Scandinavian countries.
- **REGIONAL, LOCAL AND MUNICIPAL OMBUDSMEN** constitute the third group. These are established by local governments and their jurisdiction is limited exclusively to local communities independent of government bodies.
- **PRIVATE SECTOR OMBUDSMEN** make the last group. Some refer to them as "quasi" ombudsmen. In most cases, they are established by larger private providers of services with the aim of convincing their customers that their goal is to secure the highest quality services and serious treatment of customers' complaints. Frequently, it is the government that stimulates private companies to establish such ombudsman offices, usually by introducing legislation that prescribes the mechanisms of initiatives and sanctions where no ombudsman is available to handle such issues. These mechanisms

have been particularly often used in the United Kingdom. The media ombudsman may be included in this group.

5.1.4 *The Ombudsman And the Media As the "Fourth Estate"*

The question of where the office of ombudsman belongs in the division of government powers is an intriguing constitutional question which, however, has received little theoretical consideration so far. The tripartite structure of government, consisting of the executive, the legislative and the judicial branches, as defined by Montesquieu in the 18th century, remains the foundation of the majority of modern constitutional systems. It is based on the principle of checks and balances, meaning that each particular branch controls the other, and none has excessive power that could lead to despotism or dictatorship. Although the idea of separation of powers still forms the foundation of modern government systems, many justifiably argue that the legislative and executive branches are in the hands of the same political structure, with only functional distribution of responsibilities dividing the two. The real control over these two branches should be performed by the judiciary (constitutional or supreme courts).

In addition to this traditional tripartite separation of powers, contemporary countries also use other levers that further enhance the system of checks and balances. Among these, the most important is the control exerted by civil society and the media. The crucial factors that make this control possible are publicity and transparency of the work of government bodies. Other institutions that could be described as auxiliary levers (the fourth branch of power), are the constitutional court, which has a very important role in controlling the executive branch, the audit court, which oversees how the executive and administrative branches spend public funds, and the parliamentary ombudsman.

Obviously, the ombudsman office cannot be categorized as belonging to either of the three government branches in the traditional division. Legal experts like to say that the ombudsman is a constitutional category *sui generis* which, within the framework of its fundamental role, i.e. the protection of the rights of individuals against the intervention of government bodies, enters into a special relationship with each of the three traditional branches. Accordingly, the ombudsman is sometimes categorized as belonging to "the

fourth estate,” together with the media. Taking the traditional system of government division as a point of departure, the ombudsman office most closely approaches that of parliament, which appoints it and to which it is accountable. It could also be defined as an institution that assists the representative body in controlling the executive and administrative branches. Historically, the ombudsman was indeed conceptualized as a long arm of parliament in its role as controller of the executive branch of power.

5.1.5 *Press (Media) Councils and Media Ombudsmen*

The naming of media self-censorship bodies frequently involves terminological confusion and inconsistency, in Slovenia as well as elsewhere. In my opinion, media ombudsman is a suitable name for a supervisory body consisting of one person, and “council” for a collective body. Such collective bodies were initially called “press councils” (*tiskovni svet* in Slovene), since their responsibilities were limited to the print media. The term “media council” gained currency later, when technological development added television, the Internet and other new media to the group of the “supervised” means of mass communication. Advocates of a new self-regulatory body within the Slovenian media use both expressions, although “press council” is more common. In his essay on self-regulation in the media, Gojko Bervar proposes that the more suitable term, given the development of the Internet, would be “media council.”³² However, since the term “press council” has been widespread, including in relation to the initiative for the establishment of a new regulatory body in Slovenia, I will adhere to it in this book.

5.2 PRESS COUNCILS

Press councils, as media self-accountability bodies, have a long history and they are also more widespread and effective than press ombudsmen. Press councils are collective bodies composed of the representatives of publishers and journalists’ associations and, sometimes, the representatives of civil society. In addition to handling complaints by dissatisfied individuals, they also address wider issues concerning the ethics of public communication. Furthermore, some councils also function as self-regulatory bodies, meaning that

³² Gojko Bervar, *Mediawatch: Freedom of Non-Accountability*, p. 64.

they lay down the rules of ethical conduct (code of ethics) within the media, although more commonly, the code of ethics is formulated by the publisher/founder.

In this text, I will not dwell on the comparison of various models of press councils used by individual countries, since this issue has been treated quite extensively by several authors whose texts appeared in the Media Watch book series and journal. I will present in more detail only the Swedish model, the first of its kind, which, in my opinion, is also a good and effective combination of the ombudsman and the press council.³³

Sweden has a long tradition of freedom of the press and freedom of expression; the first law regulating this issue was passed in 1766, and the first press council was established in 1916. Sweden is also the country that “invented” the ombudsman and “exported” it to other countries around the world. Soon after the Second World War, the Swedish press council faced a crisis of credibility, which is a phenomenon not unusual in media self-regulatory bodies. The crisis was provoked by the expansion of the commercial (tabloid) press, and the press council was accused of ineffectiveness and impotence. In the 1960s there ensued a public debate about the reformation of media (self-)regulatory mechanisms. The Swedish Parliament called for legislative amendments that would enable better protection of privacy against media intrusions.

In response to this criticism, Sweden embarked on the reformation of self-regulatory mechanisms and in 1969 added the press ombudsman to the existing press council.³⁴ Ever since then, Sweden has had an effective and balanced system of media self-regulation. It is interesting to note that the press ombudsman is jointly appointed, for a period of three years, by the Chief Parliamentary Ombudsman, the chairman of The Swedish Bar Association and the chairman of The Swedish Press Cooperation Council. The Press Ombudsman’s operation is (mainly) funded by publishers’ associations and the union of journalists.

In the system of appeal bodies in Sweden, the press ombudsman’s door is the first stop when one has a complaint or objection, or when one’s right of correction is not respected (complaints concerning Internet publications included).

33 I proposed a similar model for Slovenia in an article featured by *Delo*’s Sobotna priloga in 2000. *Medijski varuh? Zakaj pa ne!* (Media Ombudsman? Why Not?), *Delo*, Sobotna priloga, 2.9.2000, p.6.

34 Source: <<http://www.jmk.su.se/global03/project/ethics/sweden>>

The complaint must be submitted to the press ombudsman within three months of the publication of disputed text. The ombudsman may choose to investigate a case on his/her own initiative as well, but this is subject to approval by the affected individual. Complaints submitted within the prescribed time limit and deemed acceptable are examined, and the ombudsman first tries to resolve the case by intervening with the medium. If this intervention, which is aimed at achieving the publication of a correction, reply or apology, is unsuccessful, the ombudsman may hand over the case to the press council or some other second-instance body. In fact, the press ombudsman (and other types of ombudsman for that matter) is not authorized to issue executive orders or impose penalties. In addition to processing individual cases, the press ombudsman also has other, wider responsibilities pertaining to the promotion and public discussion of ethical issues concerning the media.

The press ombudsman in Sweden receives approximately 400 complaints a year. Roughly 30% of the total number of complaints are passed on to the press council. The press council also accepts complaints by individuals and the media themselves that have objections to the ombudsman's recommendations. The decision taken by the press council is binding on the media. The council may also impose a fine in accordance with the code.

One reason for this detailed presentation of the responsibilities of the Swedish ombudsman and press council is that my proposal for a media ombudsman put forward in 2000³⁵ was not adequately presented nor properly understood. My idea actually was that the press ombudsman in Slovenia should be appointed by a press council that would be composed of the representatives of media owners, journalists' associations and civil society. This ombudsman would be responsible for examining media invasions of the rights of individuals. The ombudsman's decisions would be respected and published by the media. Any media that disagreed with the ombudsman's decision could appeal to the press council for a final decision. However, there was a degree of misunderstanding. For example, Gojko Bervar, the author of the book "Freedom of Media Accountability," took it to mean that the media ombudsman would be part of the Human Rights Ombudsman's office and thus funded by the government, while the press council, which would take final

35 *Medijski varuh? Zakaj pa ne!* (Media Ombudsman? Why Not?), *Delo*, Sobotna priloga, 2.9.2000, p.6.

decisions, would be funded by the founders of the press council. In fact, what I had in mind was the Swedish model, meaning that both the media ombudsman and the press council would be parts of the same financial structure. My proposal was grounded in the demand for professionalism in complaints handling, and such professionalism is more easily attainable and more effective if the complaint is examined by a professional. The collective body, on the other hand, consists of non-professional members, and on top of that it meets only occasionally, so owing to the nature of the task, it cannot possibly handle complaints in a satisfactory manner. The reports by the Ethics Commission of the Association of Journalists of Slovenia and related responses³⁶ clearly demonstrated the importance of professional support offered to the Commission members in handling individual cases, which in their case was lacking.

In addition to the Swedish press council, other frequently quoted examples are the German Press Council (*Deutscher Presserat*) established in 1956, and the British Press Council founded in 1953. The first British Press Council largely lost its credibility and saw confidence in it declining in the 1980s, when parliament concluded that it did not provide sufficient protection of privacy and proposed legislation that would regulate the right of reply and the protection of privacy in the media. Pressure from parliament, coupled with high fines imposed by the English courts on media that invaded privacy, proved a sufficient reason for media owners to concede to the establishment of an effective self-regulatory body. The new Press Complaint Commission began to work in 1991. That its reputation has increased since then is obvious from the increase in the number of complaints - it rose from 1,396 in 1991 to 2,944 in 1997.

It is interesting to note that all press councils, i.e. the self-regulatory bodies mentioned above, were established only after the government threatened to introduce stricter legal regulation of privacy protection in the media, i.e. mechanisms for the protection of this right.

5.3 PRESS OMBUDSMEN AROUND THE WORLD

In some countries, press ombudsman offices³⁷ function as special bodies of self-control and (or) self-regulation. These

³⁶ Peter Jančič: Kdo ustanavlja tiskovni svet? (Who Should Establish a Press Council?), *E-novinar*, No. 1, 25.04.2002.

³⁷ In this essay I will use the term *press ombudsman*, although other terms are also in use, e.g. *readers' ombudsman* or *public editor*.

are individual bodies, in most cases consisting of one person only, or internal bodies mainly found in the print media, which is why they usually have the prefix “press.” Other media only exceptionally establish such offices. These internal press ombudsmen are usually appointed by the executive boards of one or several media companies. As has already been said, ombudsmen in the private sector are primarily appointed by owners in order to enhance the reputation of the medium in the eyes of consumers and the public in general. Undoubtedly, the bottom line is that they want to obtain the best possible market position. Dissatisfied readers whose objections are not heeded or whose replies are not published often express their grievances by canceling subscriptions or turning to another paper. Frequently, it is only the press ombudsman who actually gives ear to them, reassuring them that their complaints, remarks or criticism are taken seriously into account. In many media companies, ombudsmen also take readers’ letters or phone calls in an attempt to restore their trust in the paper. It is obvious that these press ombudsmen are primarily mediators between the media owners and editors, on the one hand, and the consumers/readers, on the other. Many also write columns in which they comment on the letters received, criticize poorly written articles and treat wider issues concerning media ethics. Most press ombudsmen come from the ranks of experienced journalists who used to work for the company, and only a few are recruited from outside the company. Each of the two solutions has its advantages and disadvantages. An ombudsman who is an ex-employee has good knowledge of the company and can more easily gain the trust of the editorial board members than an outsider. On the other hand, an external ombudsman may find it easier to establish the needed distance and create the impression that he/she is more independent from the editorial office. Press ombudsmen are in most cases the guardians of the ethical codes on which they base their moves and decisions. Some argue that the role of the press ombudsman could be performed satisfactorily by editors in chief, because they already fulfill similar tasks. However, readers tend to have greater trust in an independent ombudsman than an editor in chief, because an ombudsman creates the impression of being more independent.

The first press ombudsman was founded in 1922 by the Tokyo daily *Asahi Shimbun*. In the USA, the first press ombudsman was appointed in 1967 by the Kentucky papers *The*

Courier-Journal and *The Louisville Times*³⁸ and has since become a widespread form of in-house supervision. It should be noted that the USA is a country in which scandals exposing the lack of credibility of journalists and media are particularly rife. One factor that significantly contributed to the proliferation of in-house media ombudsmen in the USA was the failure of the National News Council that operated from 1973 to 1984. Once it was dissolved, there followed a period of public criticism and distrust in the work of the media. The media responded by establishing internal press ombudsmen, which in some states supplemented regional news ombudsmen (e.g. in Washington and Minnesota). Unfortunately, since most of these ombudsmen are introduced in an attempt to regain the shattered trust of readers, most are short-lived, because in any cost-reduction scheme ombudsmen tend to top the list of items slated for cutback. They also lack the basic elements of “independence” that could earn them a place among “real” ombudsmen. The standards that should be met by media ombudsmen were laid out by the United States Ombudsman Association – USOA and approved on October 14, 2003.³⁹ This paper addresses four main issues – independence, impartiality, confidentiality of procedure and credibility of the review process – each worked out in great detail. The core principle is independence that should rest on a firm legal basis for the establishment of the ombudsman, permanency of mandate, stable funding and independence from entities subject to the ombudsman’s jurisdiction.

An ombudsman’s reputation and credibility are largely dependent on his/her personality and moral attitude. An ombudsman who succeeds in establishing distance and independence from other journalists and editors may hope to enjoy readers’ confidence. Yet such an attitude inevitably entails heavy pressure from the editorial board, which is usually unwilling to accept a critical appraisal of their work, particularly public appraisal. A press ombudsman once stated that journalists have very thin skin when their professionalism is under scrutiny. However, an ombudsman who succumbs to the pressure exerted by owners and editors soon becomes simply an embellishment eventually not needed by anyone.

38 Lucia Moses: Increasingly, newspapers call on ombudsmen to cure what ails them, available at <<http://www.newsombudsmen.org/moses.html>>.

39 Governmental ombudsman standards at <http://www.usombudsman.org/References/USOA_STANDARDS.pdf>

Despite my critical assessment of press ombudsmen, I must stress that they are not an unimportant mechanism of self-regulation. They are definitely not a sufficient mechanism such as would justify anyone's saying that they ensure effective and independent control over the media. Yet, they still represent an important piece in the mosaic and are especially worthwhile in combination with a wider media council based in law and having a reliable source of funding, meaning a council that ensures professionalism in handling complaints.

In Slovenia, the code of the *Radio Television Slovenia* (RTVS), officially titled "Professional Standards and Principles of Journalistic Ethics in the Programs of RTVS" and adopted by the RTVS Council on May 18, 2001 envisages a kind of media ombudsman.⁴⁰ However, this ombudsman who should protect "professional standards and principles of journalistic ethics" has not so far been appointed. Moreover, the situation is not likely to change soon, because the professional standards themselves have not yet been put into practice. When I first read them I stated that standards such as formulated in this booklet are a noose around the neck of journalists and the national television company, because such detailed normativization of journalists' work can only stifle the creativity and independence of journalists and editors alike.

5.4 INITIATIVE TO ESTABLISH A PRESS COUNCIL IN SLOVENIA

In 2000 the Peace Institute put forward an initiative to establish a press council in Slovenia. The circumstances that surrounded the debate and (non)adoption of this proposal were presented in detail by Gojko Bervar in his book "Freedom of Non-Accountability,"⁴¹ so in this text I will focus only on some related commentaries.

Initially, the prospects for this initiative seemed good. The idea was first presented at the Journalism Days in Bled in 2000, and it was received favorably. It was supported by the executive board of the Association of Journalists of Slovenia which appointed Gojko Bervar to lead further consultations. A team of journalists, media experts and lawyers was formed, and it soon put forward a proposal to establish

⁴⁰ Available at RTVS web page, <<http://www.rtvsllo.si>>.

⁴¹ Gojko Bervar: *Freedom of Non-Accountability*, Peace Institute, Mediawatch series, 2002.

a tripartite press council composed of the representatives of publishers, journalists and civil society. Several debates were organized, similar bodies in other countries were presented, and several renowned individuals were invited to present their experiences. Speaking at a Journalism Evenings session in Ljubljana in September 2000, Claude-Jean Bertrand of the French Press Institute stressed the importance of winning the trust of the public, which could be achieved through a professional approach. Indeed, it is precisely the possibility of invoking their obligation towards the public that gives journalists the power to resist political and economic pressures.

When it already seemed that the initiative was close to realization, the proposers encountered a lack of understanding among the circles from which they expected least resistance, i.e. journalists or, to be more precise, the new leadership of the Association of Journalists (elected in 2001). The reasons for their negative attitude towards this initiative were presented by the new president of the Association of Journalists, Grega Repovž, in the *Media Watch Journal*,⁴² and by journalist Peter Jančič in the on-line magazine of the Association, *E-novinar* (E-journalist).⁴³ Repovž stated two main reasons for their opposition. His first concern was that, according to this proposal, journalists were expected to discuss their errors with the publishers (i.e. media owners), who, however, have opposing interests. In his opinion, a press council would open a new window of opportunity for media owners to settle accounts with journalists, and what made this concern even deeper was the fact that the debate about a future press council coincided with the increasingly tense negotiations about the regulation of journalists' status. As the second reason, he stated the danger that civil representatives in the press council would act as a conduit for political influence over journalists. As an example of a basically good idea of civil society inclusion that failed in practice, he gave the RTVS Council and the National Council. The government, according to him, already had ample opportunity to control journalists through legislation that generously provided for the right of reply and the right of correction. Similar arguments against the establishment of the press council were presented by Peter Jančič, for

42 Grega Repovž: *Iskanje lastne pasti* (Seeking Our Own Pitfalls), *Media Watch Journal*, summer/autumn 2001.

43 Peter Jančič: *Kdo ustanavlja tiskovni svet?* (Who Try To Establish a Press Council?), *E-novinar*, No. 1, 25.04.2002.

whom the only warrants of press freedom are the bodies of the Association of Journalists.⁴⁴ One cannot but note that the reaction of the Association of Journalists' leaders was a short-sighted one, and that their views were framed by a perspective typical of professional "guilds" or trade unions. Such organizations see their mission solely in defending the interests of their members and profession against all external control. Since in their view they know best what the interests of their members are, others do not have the right to judge them. Several public reactions of various professional associations well demonstrated such a stance. For example, in 2004 the president of the Lawyers Association of Slovenia protested in the National Assembly over the title "Dog Doesn't Eat Dog" in the Human Rights Ombudsman's Report. This was the title of the section criticizing the practice of the disciplinary commissions within the Lawyers Association which, in deciding on clients' complaints, uncritically protected the lawyers. Similar behavior has been demonstrated by the Medical Chamber of Slovenia when the reputation of its members was at stake, and the same motives guided the efforts of the police and their trade union to restrict the involvement of external representatives in decisions concerning the overstepping of their authority. Such responses by professional associations are short-sighted, and in the long term they undermine the reputation of their members. While from the human point of view it is possible to understand why protection of their members is so uncritical even when they are in the wrong, we cannot but observe that such an approach impairs the reputation of the profession. An open and honest confrontation with mistakes and efficient dealing with weak or dishonest individuals would certainly contribute more towards a good reputation. Curiously, the journalists who frequently criticize precisely such behavior when practiced by other professions, demonstrated a similar uncritical approach when flaws within their own ranks were on the agenda.

It is my opinion that journalists' fear of the "penetration" of politics into the press council was an overreaction. They overlooked the fact that, according to the proposal, the representatives of the public would be appointed by the

⁴⁴ Two well-researched articles were published in response to these arguments: one by Gojko Bervar appeared in *E-novinar* (Gojko Bervar: "Peter, hvala!" (Peter, Thanks)), *E-novinar*, 6/7, 2002) and the other by Brankica Petković in the *Media Watch Journal* (Brankica Petković: Kdo se noče pogovarjati o tiskovnem svetu? (Who Does Not Want to Discuss the Press Council?)), *Media Watch Journal*, summer 2002).

journalists' and publishers' associations. This alone would largely remove the danger of politics "sneaking" into the press council through the representatives of civil society.

At any rate, the fear of the intrusion of politics is also well demonstrated by the attitude of the current leadership of the Association of Journalists towards the public. In their view, their main "enemy" is politics, which allegedly intrudes into the journalistic and editorial work. Knowing that politicians never give up attempts to influence the media, either directly or through media owners, these fears are understandable. Nevertheless, I would say that by dedicating the major part of their effort to protection of their autonomy and improvement of their own social position, the journalists actually demonstrated a one-sided view. Both politics and the media are in the service of the public. The former uses government instruments to deliver this service, and the latter fulfills its obligation by informing the public about important issues. After all, the legitimate efforts of journalists to achieve autonomy and improve their material standing are more likely to succeed if they are backed by the public. If its confidence is shaken, everyone will be worse off: the public, media owners and journalists themselves.

In his book on self-regulation in the media, Gojko Bervar explained the difference between the Ethics Commission of the Association of Journalists of Slovenia and the proposed press council. The former handles complaints about individual journalists or editors, and the latter is concerned primarily with the medium that carries a controversial article. Many are not aware of this difference and see the press council as a twin-brother of the Ethics Commission. It should be stressed that the Commission accomplished an important task in the 1980s and early 1990s when on many occasions it protected journalists against pressure from the politicians of the day, or, in other words, it prevented politics from settling accounts with "disobedient" journalists and the media (consider examples such as Bogdan Novak and Pavliha). However, on the whole, the Ethics Commission failed to create for itself the image of a consistent and unbiased advocate of the ethics of public communication. The Human Rights Ombudsman has also arrived at a similar conclusion.⁴⁵ The number of complaints is the best indicator of the level of confidence in informal supervisory bodies, including ombudsmen. The low number of com-

⁴⁵ The Human Rights Ombudsman's Report for 2002, 2.1. Constitutional Rights, Ethics of Public Speech.

plaints received by the Ethics Commission, and especially the number of actual adjudications, which amount to a few dozen a year only, indicate its low reputation and the lack of confidence in it. Some journalists and media simply refuse to acknowledge the legitimacy of the Ethics Commission. As a result, several journalists resigned their membership in the Association following the Commission's adjudication on their cases, while many media, particularly those that are found "guilty," refuse to publish its adjudications.⁴⁶ Of course, there is no reason why the Ethics Commission should be dissolved once the tripartite council is established. Time will show if these two bodies could be merged into one body of self-regulation and self-control.

Recently, several authors pointed to the possibility of introducing the concept known as co-regulation wherever self-regulation mechanisms are not implemented satisfactorily or cannot effectively protect the rights of citizens.⁴⁷ The proposals for co-regulation come from the EU under the pressure of consumers' associations. Yet co-regulation is precisely the kind of model that would make the objections of the Association of Journalists justified, given that it envisages the involvement of the state in the formulation of the rules and codes regulating the conduct of the media and complaint handling mechanisms.

We have already mentioned various recommendations of the Council of Europe and the EU that call upon the media to show greater respect for privacy and other individual rights. The Council of Europe's Resolution No. 1165 (1998) about the right to privacy proposes the introduction of fines for media that systematically violate the right to privacy. These measures are directed against the conduct of the tabloid press, so rather than waiting for the state to introduce a co-regulation model, the media would do better to introduce order into their work through a self-regulation system.

Media see these initiatives, most of the time justifiably, as an attempt by politicians to impose restrictions upon them and curtail their autonomy in providing information to the public. However, one important detail, which is particularly obvious in Slovenia, is that journalists, obsessed with the feeling that they are threatened by politics, forget

46 Sandra Bašič-Hrvatini. *Novinarsko častno razsodišče v Sloveniji* (Ethics Commission in Slovenia), *Media Watch Journal*, spring 1999.

47 Saša Bojc: "Koregulacija medijev v Evropi – naslednja epizoda Velikega brata iz EU?" (Media Co-regulation in Europe – the Next Episode of Big Brother in the EU) and Gobjko Bervar "vB: Prenova pritožne komisije za tisk?" (GB: Reformation of the Press Complaint Commission), *Media Watch Journal*, March/April 2004.

that the victims are most frequently people who have no power in their hands.

In my opinion, the reason for the failure of the initiative to establish a press council in Slovenia was that it coincided with the stage of transition that affected both media owners (publishers) and journalists' organizations. In the case of media owners, changes in the ownership structure and unfinished privatization processes made it difficult for them to determine clearly who their interlocutors and partners were. The proposers of the initiative held talks with media owners as well as media editors. Yet, the press council cannot be feasible if it has no active support from the representative part of media owners, since it is they who are expected to secure the major part of the funding for its operation. On the other hand, the pressure exerted by the courts through imposing high penalties for unethical conduct or invasions of privacy is obviously not sufficiently strong in Slovenia to convince media owners that funding a self-regulatory body is a cheaper option than paying high damage claims.

Journalists, for their part, were also undergoing a transition process that involved organizational issues, which influenced their order of priorities. Obviously, their top priority was the regulation of their legal and social status that had to be negotiated with media owners and the government. For them, the press council, a broadly conceptualized body of self-censorship, was just an additional channel of potential pressure.

Perhaps the initiative would have had better prospects for success had it been more detailed, or had it been accompanied with a draft founding document and financial plan. That would have eliminated differing interpretations of the role and powers of such a body that unnecessarily hampered the debate.

The debates that accompanied and followed the journalists' strike in October 2004 raise hopes that the conditions for the establishment of a press council are now becoming ripe. In my opinion, both media owners and journalists are now better aware of their obligations towards the public, including, but not limited to, information provision. What they should acknowledge is that they are dependent on the public which is the consumer of their services and products. One of the important realizations in the wake of the journalists' strike is the necessity of making a distinction between the media that show respect for ethics in journalism, journalistic codes and labor laws, and those that reduce costs

(and reap profit) primarily at the expense of the quality of journalism, while disregarding the social rights of journalists. The media market should eliminate those media that continue to disrespect professional and ethical standards. The press council, if it comes to life, could help in distinguishing between good and bad media, by providing more transparency and by imposing adequate penalties.

6 CONCLUSIONS

There is no doubt that the media have enormous power in their hands and that there is a good reason for calling them “the fourth estate.” Yet, every power must be subject to control. A power without control is a breeding ground for abuses and violations of human rights. When individual rights are invaded by public authorities, and in most cases this is the executive branch of government, there is a number of legal and other channels of protection that have been shaped in the course of the long history of separation of powers. In addition to court protection, other informal channels of protection have been gaining recognition, among them the ombudsman. Non-governmental organizations are also indispensable in this respect.

However, individuals whose rights are violated by the media have fewer options of protection. In the majority of cases, the media violate the right to privacy, honor and reputation, or the principle of presumed innocence. This explains why the term “trial by the media” came into use - it denotes public accusation of an individual who has not (yet) been found guilty by the court, meaning that he/she has the constitutional and international right to the presumption of innocence.

In the majority of cases, by disclosing presumed anomalies, particularly in the public sector, the media fulfill their role of the “fourth branch of power.” Public disclosure of irregularities for which public figures are responsible is an indispensable component of democratic societies, so it is accorded suitable protection that is effected through the protection of another important human right, the right to freedom of expression. The courts, and the European Court of Human Rights in particular, place great emphasis on the protection of this human right, so in many examples they have ruled in favor of journalists who were sued for the invasion of honor or reputation. However, the victims of the trial by the media are also individuals who do not hold public functions. In my opinion, in the struggle between the media and the agents of power, it is the individuals who are frequently “collateral victims.” Increasing media commercialization brings with it an increasing number of invasions of individual rights of non-public persons. In addition, the expansion of the tabloid press and globalization processes introduce even greater confusion regarding the understanding of power. Is it the state that controls the

multinational corporations that own the media, or is it the other way round?

At any rate, individuals without influence or power are the greatest victims of these processes. Ungrounded allegation may leave an indelible imprint. Court proceedings are lengthy, complicated and expensive. The human rights ombudsman's jurisdiction does not extend to the media and journalists as private persons. The right of reply and the right of correction frequently do not operate in an effective manner. Personally, I do not place trust in media education that is expected to teach readers to distinguish between good and bad media. It could be beneficial, but if it is excessively intrusive, the effect may be precisely the opposite.

A faster and relatively effective mechanism, which concentrates on preventive measures rather than on reacting in the aftermath, is the mechanism of media accountability shaped by journalists and publishers themselves in collaboration with civil society representatives. Slovenian journalists displayed a high degree of distrust in such a media council or similar body, as well as a lack of understanding of this concept. In their opinion, the current Ethics Commission of the journalists' association suffices. However, so far it has not gained a sufficient reputation, and this conclusion is supported by the small number of complaints and weak effect of its adjudications. A press council conceptualized on a wider basis, which would adjudicate on the ethics of the conduct of the media as a whole and not only that of individual journalists, could be an important body effective in protecting autonomy and professionalism in journalism. In this role it could be a partner in the negotiations with state bodies, for example, in the law making process.

It is obvious that no significant shift in this field will be made without certain pressure from the outside. In Europe, the voices announcing a recommendation that member states should introduce the system of media co-regulation are becoming louder. Yet, this is precisely the kind of system that would warrant journalists' distrust, because it anticipates the influence of the state which, however, invariably poses a threat to the right to freedom of expression. Many countries adopted the effective mechanisms of media accountability that include representatives of civil society only after state bodies announced that they themselves would take such steps. Another form of pressure are high penalties for intrusions into privacy, honor and reputation. It remains to be seen whether Slovenia will need some kind of external

pressure to introduce a more effective system of media accountability, or the media people will recognize that having the public as their ally would be an advantage.

LITERATURE AND SOURCES

BARENDT, ERIC M.:

The protection of privacy and personal data and the right to use one's image and voice: when does the dissemination of information become an interference with a person's life?, paper presented at the conference on Freedom of Expression and the Right to Privacy, Council of Europe, Strasbourg, 23. 9. 1999.

BERVAR, GOJKO:

Freedom of Non-Accountability: Self-regulation in the media in Slovenia, Peace Institute, Mediawatch series, 2002;

When Will We Establish the Press Council in Slovenia?, Mediawatch journal No. 10, winter 2001;

Great Britain: Reforming the Press Complaint Commission?, Mediawatch journal No. 17/18, March/April 2004.

BERTRAND, CLAUDE-JEAN:

Media Accountability: The Case for Press Councils, Inter-media No. 6, November-December 1990 (also available at www.presscouncils.org);

Sistemi medijske odgovornosti (The Media Accountability Systems), paper presented at the Journalism Days in Ankaran, November 2004;

BOJC, SAŠA:

Koregulacija medijev v Evropi – naslednja epizoda Velikega brata iz EU? (Media Co-Regulation in Europe – A Next Big Brother Episode from the EU?) Mediawatch journal No. 15, December 2002.

ČEBULJ, JANEZ:

Varstvo informacijske zasebnosti v Evropi in v Sloveniji (Protection of Informational Privacy in Europe and Slovenia), Inštitut za javno upravo pri PF, 1992.

FINŽGAR, ALOJZIJ:

Osebnostne pravice (Personal Rights), čž Uradni list, 1985.

GALIP, DEMIR:

Development of the Institution of Ombudsman in History and its Place in the State of Law, paper presented at the seminar on ombudsmanship, Nevsehir, Turkey, 8 - 11 May.

HRVATIN B., SANDRA, LENART J. KUČIĆ *and*
BRANKICA PETKOVIĆ:
Media Ownership, Peace Institute, Ljubljana, 2004.

HRVATIN B., SANDRA:

Novinarsko častno razsodišče v Sloveniji (Ethics Commission for Journalists in Slovenia), *Mediawatch journal*, No. 6, summer 1999.

LAMPE, ROK:

Sistem pravice do zasebnosti (The Right to Privacy System), Bonex 2004.

MCMASTERS, PAUL:

Zakon o svobodi informacij (FOIA) je "matrica" (translation of the text entitled "FOIA, it's always there" first published in the Quill magazine), *E-novinar*, No. 3, <<http://www.novinar.com/enovinar>>.

MENDEL, TOBY,

The right of the public to know and freedom of entertainment: information seen from the consumer's angle, paper presented at the conference on Freedom of Expression and the Right to Privacy, The Council of Europe, Strasbourg, 23. 9. 1999.

MENDES, JAIRO FARIA:

Ombudsman: *Self-criticism in newspapers*, *ONO articles about ombudsmanship*, <<http://www.newsombudsmen.org/mendes.html>>.

MOSES, LUCIA:

Increasingly, newspapers call on ombudsmen to cure what ails them, <<http://www.newsombudsmen.org/moses.html>>.

NAHTIGAL, NEVA:

Obrekovalci pred Evropskim sodiščem (Defamers Before the European Court), *Mediawatch journal*, No. 18, October 2003.

PETKOVIĆ, BRANKICA:

Kdo se noče pogovarjati o tiskovnem svetu? (Who Doesn't Want To Talk About the Media Council?), *Mediwatch journal* No. 14, summer 2002.

PREPELUH, URŠKA:

Dostop do informacij javnega značaja: primeri evropskih inštitucij, zvezne države New York in Slovenije (Access to Information: Regulation in European Institutions, the Federal State of New York and Slovenia), Peace Institute 2003.

REDNAK, ANDREJA:

Na novinarje pritiskate, mar ne? (You Place Pressure on Journalists, Don't You?), *Gospodarski vestnik*, 2 August 2004.

REPOVŽ, GREGA:

Iskanje lastne pasti (Looking For a Self-Created Pitfall), *Mediwatch journal*, No. 12, summer/autumn 2001.

ROVŠEK, JERNEJ:

Uvodna pojasnila k zakonu o varuhu človekovih pravic, Varstvo človekovih pravic (Introductory Remarks on the Human Rights Ombudsman Act, Protection of Human Rights, *Uradni list*, 1994;

Vloga varuha človekovih pravic pri nadzoru javne uprave (The Role of Human Rights Ombudsman in The Public Administration Control), a collection of papers Dnevi slovenske uprave (Slovenian Public Administration Days), Portorož, September 1998;

Ombudsmeni v Združenem kraljestvu (Ombudsmen in the United Kingdom), *Pravna praksa*, No. 405, 23. 7. 1998;

Odprtost javne uprave in možnost dostopa do informacij javnega značaja (Openness of the Public Administration and Access to Information), a collection of papers INDO 99;

Medijski varuh? Zakaj pa ne! (Media Ombudsman? Why Not?), *Delo*, Sobotna priloga, 2. 9. 2000;

Ombudsman ne more biti poulični aktivist (An Ombudsman Cannot Be A Street Activist), *Delo*, Sobotna priloga, 3. 3. 2001;

- Ombudsmani, pravosodje in zakonodaja (Ombudsmen, Jurisdiction and Legislation), *Pravna praksa*, No. 36, 29. 11. 2001;
- Varuh človekovih pravic in posebni varuhi (Human Rights Ombudsman and Special Ombudsmen), a collection of papers VIII Dnevi slovenske uprave, Portorož 2001;
- Vloga varuha človekovih pravic pri varstvu osebnih podatkov (The Role of the Human Rights Ombudsman in Personal Data Protection), the material presented at the seminar Personal Data Protection, Nebra, November 2001;
- Dostopnost informacij javnega značaja in dopustnost omejitev z vidika ustave in varstva človekovih pravic (Access to Information and Admissibility of Restrictions from the Perspective of the Constitution and Human Rights Protection), in *Varstvoslovje - predstavitev mnenj k predlogu zakona o tajnih podatkih*, MNZ, Visoka policijsko-varnostna šola, 2001;
- Neformalni mehanizmi varstva človekovih pravic - ombudsmani in varuh človekovih pravic (Informal Mechanisms of Human Rights Protection – Ombudsmen), in *Human rights Documents with Introductory Notes*, Amnesty International in Slovenia and the Peace Institute, Ljubljana 2002;
- Je to zakonska podlaga za bolj odprto javno upravo? (Is This the Legal Basis For a More Open Public Administration? (on the bill on access to information), *Mediawatch journal*, No. 15, December 2002;
- Ali zakon o dostopu do informacij res ni pomemben za novinarje? (Could It Be That the Access to Information Act Is Unimportant For Journalists?) *Mediawatch journal*, No. 16, March 2003;
- Informacije javnega značaja: ZDIJZ - ali bo delovanje javne uprave bolj odprto in pregledno? (Information of a Public Nature. Access to Information Act – Will the Public Administration Operation Be More Open and Transparent?), *Pravna praksa*, No. 12, 3. 4. 2003;
- Freedom of Information and the E-Government projects in the Republic of Slovenia*, in *Freedom of Information and Data Protection - Transparency and E-Government in Central and Eastern Europe*, Potsdam, 10/11 November 2003;
- Kljub zakonu še nejasno, kaj je informacija javnega značaja (Ambiguity as To What Information of a Public

- Nature Is Persists, Despite the New Act), *Pravna praksa*, No. 39, 6. 11. 2003;
- Spremeniti sistem varstva osebnih podatkov v Sloveniji (Change the Personal data Protection System in Slovenia), *Mediawatch journal*, No.19, March/April 2004;
- Varstvo osebnih podatkov (Personal Data Protection), *Pravna praksa*, No. 27, 26. 8. 2004;
- Večje varstvo zasebnosti (Greater Protection of Privacy), *Pravna praksa*, No. 31, 23. 9. 2004;
- Nihalo se je od svobode izražanja obrnilo v prid varstvu zasebnosti (Scales Tipped In Favor of Privacy Protection), *Mediawatch journal*, No. 20/21, november 2004;
- Pravica do popravka ali odgovora v medijih – Primer Vladislava Stresa (The Right of Reply and The Right of Correction. The Case of Vladislav Stres), *Mediawatch journal*, No. 20/21, November 2004;

ŠELIH, ALENKA:

- Tisk in (kazensko)pravno varstvo časti (The Print Media and Protection of Honor in the Penal Code), *Podjetje in delo*, No. 5, 1994.

ŠINKOVEC, JANEZ:

- Zasebnost in sredstva javnega obveščanja (Privacy And the Mass Media), *Podjetje in delo*, No. 5-6/1996;
- Osebnostne ustavne pravice in mediji (Personal Rights Guaranteed by the Constitution and the Media), *Podjetje in delo*, No. 6-7/1997.

TULKENS, FRANÇOISE:

- Freedom of expression and information in a democratic society and the right to privacy under the European Convention on Human Rights: a comparative look at Articles 8 and 10 of the Convention in the case-law of the European Court of Human Rights* <http://www.coe.int/t/e/human_rights/media/5_Documentary_Resources/2_Thematic_documentation/Media_&_privacy>.

UDE, LOJZE:

- Ustavne podlage za varstvo zasebnosti in osebnih podatkov (Constitutional Basis For Privacy Protection and Personal Data Protection), *Podjetje in delo*, No. 5-6/1996.

WARREN, SAMUEL in BRANDEIS, LUIS:

The Right to Privacy, *Harvard Law Review*, No. 5, Vol. 14,
15.12.1890 <[http://www.lawrence.edu/fast/boardmaw/
Privacy_brand_warr2.html](http://www.lawrence.edu/fast/boardmaw/Privacy_brand_warr2.html)>.

WILDHABER, LUZIUS:

*The right to offend, shock or disturb? – aspects of freedom of
expression under the European Convention on Human
Rights*, <<http://www.ucd.ie/law/bsl/wilecture.htm>>.

ŽUREJ, JURIJ:

Pravica do zasebnosti (The Right to Privacy), Zbornik
znanstvenih razprav, LXI. letnik, 2001.