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# IMPLEMENTATION OF CONSTITUTIONAL PROVISIONS REGARDING MASS MEDIA IN A PLURALIST DEMOCRACY

## Nicosia, 16-18 December 1994

## Proceedings

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**Opening session**

Opening statements by

a. Mr Michael TRIANTAFYLLIDES, Attorney-General of the Republic of Cyprus, Vice-President of the European Commission for Democracy through Law

b. Mr Nicolai V. VITRUK, President a.i. of the Constitutional Court of the Russian Federation, Associate Member of the European Commission for Democracy through Law

c. Mr Xenios L. XENOPOULOS, President of the Cyprus Bar Association

d. Mr D.G. STYLIANIDES, President of the Supreme Court of Cyprus

e. Mr Alecos EVANGELOU, Minister of Justice and Public Order

f. Mr Glafcos CLERIDES, President of the Republic of Cyprus

Introductory statements

a. by Mr Michael TRIANTAFYLLIDES, Attorney-General of the Repubic of Cyprus, Vice-President of the European Commission for Democracy through Law

Mr Triantafyllides thanked the European Commission for Democracy through Law for accepting the proposal by the Government of Cyprus to hold a Seminar on Freedom of the Media in Cyprus. The European Commission for Democracy through Law of the Council of Europe, better-known as the Venice Commission due to the place where it meets, has as its mission the safeguarding and consolidating of the democratic institutions in all of Europe and even beyond Europe as in the recent case of the advice given to South Africa on its draft Constitution.

The present Seminar was an example of the Commission's work, its aim being to investigate and to determine the limits of freedom of expression and the mass media on the one hand and of constitutional and legislative regulation of the media on the other.

He apologised on behalf of the President of the Commission, Mr La Pergola, who should have been at the Seminar but had been prevented by a strike in Italy from coming to Cyprus in time. Mr Vitruk, Chairman of the Constitutional Court of the Russian Federation, had replaced Mr La Pergola.

b. by Mr Nicolai V. VITRUK, President a.i. of the Constitutional Court of the Russian Federation, Associate Member of the European Commission for Democracy through Law

It is a great honour for me to address you on the occasion of the opening of this Round Table on the Implementation of the Constitutional Guarantees of Media Freedom in a Pluralist Democracy. Our Commission, the European Commission for Democracy through Law, better known as the Venice Commission due to the place where it meets regularly, is honoured that the Government of the Republic of Cyprus has chosen us as co-organisers of this Round Table at a time when Cyprus has the Chair of the Committee of Ministers of the Council of Europe. I think that thanks to the efforts of the Cypriot authorities, in particular our friend Michael Triantafyllides, and of our Commission we have succeeded in bringing an interesting set of people coming from various areas of the law and the media here to Nicosia.

The subject of this Round Table, "Freedom of the Media", is extremely topical in all the democracies in Western and in Eastern Europe. The problem of the relationship between the media, in particular television, and political power is common to all democracies, and all countries have to carefully reflect on how to organise their media system.

This is the point where our Commission, which mainly deals with constitutional law, comes into play. Which approach has to be chosen, should the legal system simply guarantee the freedom of the media in the hope that competition will prevent undue influence of particular groups, or should the legal system try to guarantee a certain structure of the media, in which there is a balance between private and public law bodies ?

These questions have gained an entirely new dimension in recent years in Western Europe due to the technical developments allowing for a large number of broadcasters to reach the private homes of the individual citizens. Earlier, most European countries had public law monopolies on broadcasting or at least a closely-regulated competition between public and a few private broadcasters and

this was easily justifiable by the need to allocate the few available frequencies. The argument of the technical monopoly now has lost its value and constitutional lawyers have now to adapt the rules derived from Constitutions adopted before this change to the new situation.

In Eastern Europe, and we have invited a particularly large number of participants from Eastern Europe to the Round Table, these new developments have coincided with the liberation of the societies from one-party rule and the introduction of pluralist democracy. If Western Europe already has problems to digest technical change in the media area, how much more difficult is it in central and eastern Europe where freedom of expression has only recently been re-established after a very long period of dictatorship. Legally, at least in theory, freedom of expression can be introduced by constitutional fiat and all the countries concerned now uphold the principle of freedom of expression in their new constitutions. However, the constitution can not regulate all the important questions concerning the structure of the media and the mentality of both those in power and the people working in the media does not change from one day to the other. Politicians, used to having subservient media, do not appreciate suddenly being the object of, often violent, criticism, and journalists may be either too careful in using the newly-found freedom, conscious not only of the possibilities of interference the people in power had in the past but also of the possibilities they may still have despite the provisions on media freedom proclaimed in the constitution, or they may tend to abuse their newly-found freedom forgetting their obligation to report facts accurately.

I do not want to go any deeper into the subject matter of the Round Table. I think we have more than enough material for stimulating discussion during those two days. I do not however want to conclude without expressing the heartfelt thanks of our Commission and myself to the Cypriot authorities for the perfect organisation of the Seminar and for their traditional hospitality.

c. by Mr Xenios L. XENOPOULOS, President of the Cyprus Bar Association

It is indeed with particular pride that I avail of the opportunity to address this important seminar on behalf of the Cyprus Bar Association.

I strongly believe that the subject, the distinguished speakers and also the choice of the venue for the seminar are of importance to the legal world of Cyprus. This is because all the aspects and subjects that this seminar will cover are matters which refer and touch upon constitutional, legal and human rights as delimited by a common interest in "legal science".

Today, the tremendous increase in mass media communications, strong competition, and the development of technology often lead, through competition,

to violations of the above constitutional, legal and human rights. Particularly in our own country where basic rights have been violated and continue to be violated as a result of the Turkish invasion, the role of the mass media is of extreme importance. In the struggle which we are carrying out, lawyers have an increased responsibility and role as the defenders of the principles of justice and freedom. Lawyers, having such an obligation, will no doubt benefit from this seminar. The Government of Cyprus will also benefit, not only in the exercise of its regulatory powers and duties in respect of the fourth power (as the press and the mass media is called), but also as a main defender of the basic principles of justice and human rights, flagrantly violated in our country as a result of the Turkish invasion.

The unconditional application of constitutional provisions concerning the mass media is of the highest duty in a democratic society, particularly in the difficult circumstances of today. With the above thoughts I welcome you to our beautiful country and wish you every success in the work of the Seminar as well as a pleasant stay on our Island.

d. by Mr D.G. STYLIANIDES, President of the Supreme Court of Cyprus

It is a pleasure and an honour for me to attend this seminar on "Implementation of constitutional provisions regarding mass media in a pluralist democracy".

On behalf of the Supreme Court I should like to welcome the members of the Venice Commission who are here today and all the participants.

In 1948, after the devastating fury of the Second World War, the United Nations - representing humanity as a whole - issued the Universal Declaration of Human Rights, which provided the basis for the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The Council of Europe, of which the Republic of Cyprus has been a member since the earliest days of its independence, is the hub and heart of human rights on the European continent.

The Republic of Cyprus has incorporated the provisions of the European Convention into its Constitution.

Freedom of speech and expression is protected by Article 19 of the Constitution, which is based on Article 10 of the Convention.

The right to freedom of speech and expression is one of the most fundamental human rights and is truly essential in a democratic state. It included freedom to hold opinions and to receive and impart information and ideas without interference by any public authority and regardless of national frontiers. It may be

subject to such restrictions as are prescribed by law and are necessary for the preservation of democracy and the constitutional order, for public safety, for the prevention of disorder, for the protection of public health and 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.

Freedom of information is a basic right which all citizens must enjoy on an equal footing.

Democracy cannot exist or function without information and communication. Correct information is a prerequisite for full participation in the democratic system.

The mass media act essentially for the benefit of the public and exercise the rights deriving from this provision of the Constitution and the Convention.

The rapid changes in the mass media have sharply underscored the problems confronting them. If they are to fulfil their purpose, they must have access to sources of information.

Governments, except where certain restrictions apply, must be amenable to full information of the public so that citizens may form their own opinions independently.

In a liberal democratic society, legislative restrictions are constitutionally legitimate only insofar as they are necessary for the protection of a lawful good protected by the Constitution.

The mass media must tell the public the full truth. Neither the state authorities nor private economic interests are entitled to exert pressure to the contrary.

Media companies must not be used to disorientate the public ideologically or to broadcast programmes, messages or pictures that glamorise violence or pornography.

Seeking and receiving information must not involve any infringement of the individual's right to respect for his or her private and family life, which is protected by the Constitution and the Convention.

In Cyprus, besides the basic constitutional provisions, there are three main laws regulating the mass media : the 1989 Press Act, the 1990 Radio Stations Act and the 1992 Television Channels Act.

In the exercise of its jurisdiction the Supreme Court of Cyprus acts to secure the human rights protected by the Constitution and to ensure their effective application.

The themes to be discussed at this seminar are both topical and essential to the development of a pluralist democracy governed by the rule of law.

On behalf of the Supreme Court, I wish the participants every success in their discussions and in the pursuit of the seminar's goals.

e. by Mr Alecos EVANGELOU, Minister of Justice and Public Order

It gives me particular pleasure to address the opening of the deliberations of this most significant international seminar, and I hope that the views which will be expressed during the analysis and discussion of its extremely interesting subjects will shed light on new ways of seeking and creating the best possible conditions for the unobstructed functioning of journalism within the framework of a democratic society.

To the participants from abroad, who honour and grace this seminar by their presence and their personality, I address a warm "welcome to Cyprus". I wish them a pleasant stay in our island whose history, traditions and present tragic fate may provide to them additional food for thought in connection with the matters that will be dealt with at the seminar.

Distinguished Delegates from abroad,

You are in the only partitioned capital of the world, in a European country which has been partitioned by the Turkish invasion and army of occupation. Archaeological finds at the Cyprus Museum confirm that our country has links with Europe dating back to 4.000 BC. Now it is not only access to the occupied area that is prevented. An effort is being made by the invasing power to prevent Cyprus's accession to the European Union. And this because the occupying regime, which has been condemned by a host of UN resolutions as well as by Security Council decisions, will not survive the implementation of the principles of the European Union and will disappear under the burden of its illegal actions and flagrant violations of international law.

The basic object of the government and my Ministry is the consolidation of the rule of law which includes freedom of expression, unobstructed access to sources of news and the right to objective information of the citizen.

Article 19 of the Cyprus Constitution contains these fundamental and other principles which are common in the constitutions of democratic countries and

particularly of the countries of the European Union, principles which are reinforced and broadened by international treaties as well as by the Report of the International Committee of UNESCO of 1980 which includes obligations regarding free information combined with all-round investigation, approved by the countries that signed the Final Act of the Helsinki Conference.

I would, at this point, like to note, parenthetically, that the semantic depth of the Greek word for information, the word "Pliroforia", responds fully to the spirit and target of this effort. That is "Pliroforia" means "Pliri-fora", the global approach to an event or to a situation in contrast to other words or terms which express a subjective concept (in-form, information).

However, what is a practical significance and what is even more important than the recognition and declaration of principles, is the securing of suitable conditions for their implementation. This need is also reflected in the title of this seminar : "The implementation in a democratic society of the constitutional provisions regarding the mass media". Besides, we, here in Cyprus, are experiencing the tragic consequences of the gap between, on the one hand, the theoretical declaration and recognition of principles and, on the other, the inability to implement them in practice. For the critical condemnation of the occupation in UN resolutions remains unimplemented.

This also is one of the reasons why the President of the Republic and the Government feel particularly sensitive to the practical implementation of principles of justice and constitutional provisions. The late eminent journalist Walter Lippman in his classical work "Public Opinion" underlines the importance of information in the shaping of responsible attitudes and options of ordinary citizens. He stresses the need for the citizen to have in his mind a picture that will be closer to reality. For only thus will he be in a position to shape a responsible opinion. A healthy democracy based on the people's sovereignty requires a properly informed and thinking citizen.

Evangelist John says : "You shall know the truth and the truth shall make you free". A free citizen is a well informed citizen. Sir John Donaldson said in a decision of the British Court of Appeal in 1988 "... the free press in which I include also the other mass media is an essential element for the maintenance of parliamentary democracy ... But it is important to remember why the press holds this decisively important place ... The mass media are the eyes and ears of the public at large, this right of whom they express".

The principles of ancient Greek democracy and philosophy and also the principles of the Christian religion shed light on the course of Cyprus through history (the founder of Stoic philosophy, Zenon, was born here). The deeper meaning of true democracy, which means that Demos - the people hold, rule, is expressed through the principle that is set out in the first page of the Bible ... "In the beginning was

the Word, and the Word was with God, and the Word was God". The object of this seminar, as it may also be gathered from the subjects that will be discussed, is to turn into a priority the necessity that the Word should be "in the beginning" not only through the mere declaration of principles but also through the seeking of suitable functional structures.

We all know and recognise as self evident some principles, particularly the power of freedom of speech, which means freedom of expression and in the shaping of opinion on public affairs. However, this power is sometimes misused to promote propaganda, for brain washing or even for the satisfaction of sickly curiosity which reaches into the bedrooms of prominent persons.

I know that public figures should not be thin skinned under the light of publicity even in their private life when their personal weaknesses affect their function. But the line between the right to privacy and the right of the press to information constitutes a delicate legal matter regarding which there is plenty of literature. But even the negative aspects of this matter are placed within the framework of the commercialisation of the Mass Media and are subjected to conditions of acute competition for winning a greater section of the public or for securing means of survival. The publication of a newspaper, or the establishment of a broadcasting or a television network, requires millions of pounds in investments, and the channels of information do not always sure freedom of expression. The technological revolution has worked miracles that allow us to see important events while they are happening in all parts of the globe. Thus, we saw closely the Gulf War, we were not merely informed about it.

However, the deeper meaning of communications is not based merely on information but also on the angle of approach to, and the possibility of penetrating and analysing, the events beneath the surface. This has to do with the ethics of journalists, who should examine things in depth and should not confine themselves to a superficial glance. Thus, the field of journalistic expression should be freed from expediencies, interests, special bans, political tricks and commercial aims. Where there is need for silence, for reasons of public interest, for the protection of the reputation of minors or for safeguarding confidential evidence (regarding medical matters, defence, etc), there should be mutual understanding and acceptance within the framework of a Code of Understanding between the State, those working in State bodies and those working in the Media. There are also cases in which the interest of society demands publicity rather than silence.

I believe that these and other matters will be discussed at this Seminar in conjunction with the conditions governing the present possibilities of expression of the word, the word that serves man and democracy. In conclude this short address with the assurance that the Government of Cyprus, and the Ministry of Justice and Public Order headed by me, espouse the principles of freedom of

speech and expression, not only through theoretical dedication but also through practical will, to implement any measures for their safeguarding.

I wish success to the deliberations of the Seminar and a pleasant stay to foreign participants.

f. by Mr Glafcos CLERIDES, President of the Republic of Cyprus

Mr Clerides congratulated the Venice Commission and the legal services of the Republic of Cyprus for having organised the seminar in co-operation with the Ministry of Justice and the Supreme Court of Cyprus. He welcomed the distinguished foreign scientists who would discuss with their Cypriot colleagues the problems of media freedom. Cyprus was to be regarded as a particularly suitable venue for such a Seminar due to its history and civilisation. The principles of democracy had been developed and elaborated in Cyprus now for more than 2,000 years. The freedom of the mass media was one of the basic principles necessary for the functioning of democracy in contemporary society. The constitutional principle of the freedom of speech included the freedom of opinion and the freedom of broadcasting and receiving information and opinions. It was not possible to have a democratic society without freedom of the media. There was no true democracy without properly-informed citizens and informing the citizens was the task of the media. Therefore it was the duty of all democratic societies to safeguard to the fullest extent possible the free operation of the mass media. The general public interest had to be taken into account in the same way as the individual interests of citizens. The Republic of Cyprus was moving in this direction.

It was well-known that the development of contemporary democratic societies brought about new problems requiring innovative approaches. These problems had to be solved and he hoped that the seminar would contribute to finding the right solutions and the correct approaches to the problems arising in democratic societies marked by a proliferation both of the written press and the electronic media under conditions of strong competition. He was sure that the conclusions of the Seminar would be useful and shed light on the efforts of all those working for the freedom of the press and the media. He wished the seminar every success and a pleasant stay in Cyprus for the foreign participants.

## First session

**Mass media and political power in a pluralist democracy**

A. Report by Prof. Guy DROUOT,
Institut d'Etudes Politiques d'Aix-en-Provence, University of Aix-Marseille III

B. Statements by :

a. Prof. Snejana NATCHEVA, Sofia University

b. Mr Valentin GROZDANOV, Counsellor, Legal Department, Bulgarian National Assembly

c. Prof. Anatoly B. VENGEROV, President of the Court Chamber on Information Disputes of the Russian Federation

d. Mr Danilo SLIVNIK, Deputy Chief Editor, Journal "Delo", Ljubljana

C. Summary of Discussion

## MASS MEDIA AND POLITICAL POWER IN A PLURALIST DEMOCRACY

A. Report by Mr Guy DROUOT Institut d'Études Politiques d'Aix-en-Provence University of Aix-Marseille III

### I. Preliminary remarks

#### 1. The concept of the media

For the purposes of this paper, we shall define "media" as referring to all means of mass communication, comprising the press (newspapers and magazines) and the audiovisual sector (radio and television). Under this definition, the concept of the "media" refers not only to information carriers, but also to the individuals involved in the information process, in particular journalists.

#### 2. The features of pluralist democracy.

Similarly, in seeking to identify the features of pluralist democracies, we shall use as a basis the definition given by Professor Georges BURDEAU (in La Démocratie, Édit. du Seuil, Paris, coll. Points, revised edition, 1978, p. 104) who states that democracies are pluralist when "on the one hand, they view the sociological variety of the political world as natural - and basically desirable -and, on the other, they regard the independence of each and every human being as a perfectly respectable value. Pluralism is therefore both social and spiritual." The two criteria of sociological variety and respect for the independence of each individual can be fully expressed only if freedom of opinion and freedom of communication are established by the Constitution. We may add a further element

to our definition : a feature of democracies is the existence of, and respect for, certain mechanisms of political life such as :

- a multi-party (or at least a two-party) system with a recognised opposition, ie an opposition which enjoys a status guaranteed by the Constitution,
- free and fair elections,
- regular changes of government,
- the existence of counterforces, including the media, in civil society.

The problem we are faced with is the following : What role should the media play in a pluralist democracy and what role do they play in practice?

## II. Thoughts on the troubled history of relations between the media and political power

### A. Antagonistic relations

From the outset, when powers were not clearly defined, relations between the media and political power have been hostile and antagonistic, with the media arriving on the scene, "disturbing" the hitherto unwitnessed exercising of power and informing public opinion of any wrongdoings.

#### 1) The forms

The most frequent forms of antagonism have been prior censorship, the banning of newspapers, repression, injunctions, preventive measures of a fiscal kind such as stamp duty, deposits etc. The information professions have often had to cope with measures of this kind : initially, when the written press first began, it was journalists, writers, publishers, bookshops, printers, vendors etc who suffered. Then with the advent of the audiovisual era, producers, directors, presenters, channel controllers etc were also subjected to such measures.

#### 2) The causes

The media have represented, and occasionally still do, in the eyes of political authorities, a threat to their image, ie their prestige, authority and perhaps their very existence. In the old political systems when power was exercised secretly, those wielding it were not to be seen by ordinary men. The main concern of the monarch was to ensure that his image (based on secrecy) was not tarnished in any way. Hence the total ban on reproducing this image, in force in the ancient autocratic systems (Chinese Empire : in the Forbidden City it was not permitted, on pain of death, to look up at the Emperor). In such systems, communication was non-existent - at least not in a form which relied on image. Power succession presented no problem since people were unaware of what the government looked like : the successor would be equally impersonal, even though, it should be added,

the power he exercised was personal. Exposing the image could diminish prestige and authority.

B. The reactions of political power

1) Repression of the media

The first response from the authorities was to subjugate the media, ie to reduce them to silence through the repressive means referred to above. In Italy in the Middle Ages, gazeteers and writers were the victims of such repression. There are numerous instances where the press has been tolerated, but prohibited from publishing any information of a political nature. With the advent of the audiovisual era, the monopoly of the State became challenged when technical progress enabled pirate broadcasters to mushroom. In turn, these too were subjected to repression by the authorities.

2) The enslavement of the media

The second response from the authorities was to use the media as an instrument of propaganda. There are countless examples of this - from the creation of the state press to the use of propaganda radio broadcasts during World War II (the war of the airwaves between London and Berlin), and subsequently during the Cold War.

The enslavement of the media was aimed at ensuring the enslavement of the masses by media conditioning on a huge scale. It should not be forgotten that the totalitarian regimes were not the only ones to use the media as instruments of propaganda. Democracies in war time had no hesitation in using the media in order to bring down dictatorships. In peace time, propaganda was used primarily for electoral purposes. Then, having come of age, the media was ready to act as a counterforce.

III. The media as a counterforce

While the role of the media as a counterforce is fundamental and vital for the smooth running of pluralism, this role cannot be carried out unless a number of conditions are fulfilled.

A. The role of conterforce

Voltaire, who died three hundred years ago, paved the way by standing up to censorship to criticise the abuse and arbitrary nature of power. The media, having set themselves up as a counterforce (the "fourth estate", to use the well-known phrase of Edmund Burke), have shown themselves able to oppose the government effectively and to act as a counterweight to political power, by acting as a critic of

the latter and by condemning instances where the rules of democracy have been violated and departed from.

1) <u>The role of criticism and challenging of power</u>

The challenging of power derives primarily from the opposition press, but this should also be the role of any independent press, the role of journalists. Constant harassment is an essential feature when it comes from outside the political sphere, ie from civil society. The fact is that the media are part of this civil society and as such they can be classified as the fourth estate or power, alongside the three traditional powers defined by Locke and Montesquieu. In this way, they provide "checks and balances" in the event of shortcomings by traditional political institutions.

2) <u>The role of denouncing undemocratic practices</u>

The media fulfil the role of bringing to light instances where democracy is not operating as it should (abuse of power, violations of the Constitution, arbitrary acts). This is where they act as a counterforce : the Watergate affair is a striking example of how effective the media can be with regard to such excesses. In France, the revelations of corruption involving the most significant spheres of power are unprecedented. In Italy, the "mani pulite" operation provides another example of this phenomenon.

B. <u>The conditions in which such a role can be fulfilled</u>

1) <u>Legal conditions</u>

There are certain legal conditions which must be met for this role of the media to be carried out effectively : freedom of communication recognised by the Constitution (there may be instances where the press act outside the law - this is in fact a sign of a liberal regime, but such limits must be exhaustively defined and interpreted restrictively by the courts). The status of press companies must include the freedom to set up such companies. There is still the problem of public aid to the press. This applies equally to radio/television companies (status of the freedom of audiovisual communication). The status of journalists must guarantee their independence and their freedom of expression. Finally, with regard to the public, freedom of choice and freedom of reception must be ensured.

2) <u>The socio-economic conditions</u>

Even though the media may form a market in the economic sense of the term, information is a product which, because of its intellectual content, should not be classified as a mere commodity. Communication pluralism must be respected (cf once again Burdeau's concept of pluralist democracy) and on the economic level,

this means ensuring there is a minimum degree of competition. Pluralism must be preserved externally (competition between the media) and internally (this applies specifically to radio/television where the various shades of opinion should have equal access to air-time). However, journalism must enjoy the trust of the public, which can only be achieved if journalists themselves scrupulously abide by an ethical code of conduct thereby ensuring that what they have to say is not tainted by any feeling of suspicion. Unfortunately, the frequent notorious excesses in recent years clearly show that we cannot afford to lower our guard in this respect. The media must, for their part, conform to a professional ethical code.

## IV. The media as instruments for legitimising power

The media's role as a vehicle for political debate

In a very short space of time, the media in pluralist systems took on the role of promoting political debate insofar as newspapers lent their columns to political parties, and radio and television broadcast programmes with a political content. From being a political platform the media soon became an electoral platform. This is particularly true for the audiovisual media.

### 1) The media as a political platform

President Roosevelt's "fireside chats" are often quoted as pioneering broadcasts in audiovisual political communication. Developments in radio and television prompted those in authority to pay greater attention to these effective means of communication which reached wide audiences. First of all, radio and television were used as instruments of persuasion ; the initial role they were given was to convince viewers or listeners of the sound reasoning behind a given policy, or to gain the support of citizens for a specific cause, programme or ideal - governing by the airwaves. Subsequently, another role was developed : that of a forum. Political debate took place on new ground to win over larger audiences. Radio and television were therefore used to make political debate into a media event. This prompted a change in the content of the debate.

### 2) The media as an electoral platform

This is not really a new role. According to research carried out by the American historian John Rockiki, the eruption of Vesuvius (79 AD) would appear to have occurred while Herculaneum and Pompeii were in the middle of an electoral campaign. Over sixteen hundred posters were found in the ruins, extolling the virtues of almost one hundred candidates. More recently, the roles of the audiovisual media have changed within a very short space of time. First of all radio and television were used simply as a means of broadcasting electoral debate. They acted merely as onlookers, but nevertheless played a major role since they enabled the population to follow the process first hand. Subsequently, they were

used to further the campaign and then became an integral part of the electoral process. Legislation has incorporated the audiovisual media into the arsenal of resources available to parties and candidates. They supplement (and sometimes are gradually replacing) the traditional methods (posters, tracts, meetings, manifestos etc). In this way they have become an integral part of the democratic process of appointing the nation's representatives.

B. The media as a mean of attaining power

In this respect, the role of the media is fundamentally different from that in a conventional electoral process. It is not a question of broadcasting an electoral campaign, but of short-circuiting the process and replacing it with a new one. Hence the role of legitimising the attainment of power.

1) New ways of using the media

Recent examples from the Italian (the coming to power of Silvio Berlusconi) or French political scene (eg Michel Noir, Bernard Tapie, Bernard Kouchner) illustrate a new role for television in a pluralist democracy : a role of legitimising political leaders. This new role is not without its risks in that it tends to lay greater emphasis on the form of political competition at the expense of the substance of debate. The candidate's media "image" is more important than the content of his or her political programme and the ability to govern effectively.

2) The impact on the process of legitimising leaders

We are witnessing a real upheaval in the process of coming to power: "The traditional process of legitimising political leaders starts off with recognition by the party rank and file, then appointment by electors at local and national level, and culminates in the acceptance by the leading circle of political professionals"[1]. As a result of relocating the debate, the use of television in a strategy to come to power means that electors are no longer observers in the traditional areas of political communication (forums, rallies, meetings) nor in the conventional forms (as one of a crowd, part of a mass response) but in the privacy of their own homes (the intrusion of television).

V. Conclusion

The role of the media as a counterforce is fundamental since it helps safeguard pluralism, one of the foundations of democracy. As such, the media must be allowed to continue with this role, whatever the cost.

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[1] *Patrick LECOMTE, Stratégies de pouvoir médiatiques: dérive vers la télécratie?, Regards sur l'Actualité, no. 203, July-August, La Documentation Française, Paris, pp. 15-35.*

But in its excesses, using the media (and television in particular) can have harmful, even dangerous, consequences for pluralism : the "malaise in representation"[2], caused by the upheavals to the concept of representation in democracy.

## BULGARIAN LEGISLATION ON THE MEDIA - A GOOD CONSTITUTIONAL BASIS NOT FOLLOWED BY APPROPRIATE LEGISLATION

B. Statements

a. Statement by Prof. Snejana NATCHEVA, Sofia University

The role of the media in relation to political power in a pluralist democracy must above all be determined in relation to the real requirements of the pluralist democracy in itself. The legal framework enabling the media to carry out their role is quite considerable, both at the constitutional, legislative and infra-legislative levels, as well as at the level of the concrete legislative system governing the media. Legislation on fundamental issues but also on issues surrounding the organisation and activity of the various media can either foster or frustrate the exercise of their role. While it is not the only factor, legislation is without doubt one of the factors involved, and I have every reason to believe that this opinion is shared by all of you here today, who in one way or another co-operate with the European Commission for Democracy through the Law and, for most of you, that your belief in the truth of that statement is also the motivation behind your work.

I should like to draw your attention to these issues in the context of the Republic of Bulgaria, and within the general framework of the judicial legislation, to inform you in more concrete terms about a few unusual rulings concerning Bulgarian National Television and Radio.

The Constitution of the Republic of Bulgaria adopted in 1991 developed the principle of pluralism in politics. It proclaims and guarantees personal freedom and the inviolability of the individual, the inviolability of private life, the right to hold opinions and the freedom of speech, the right to information, the freedom of the press and the other media, and the ban on censorship (see appendix). It should be particularly emphasised that when the Constitution was passed, we were in the midst of radical political change in East Europe, with an on-going determination to integrate with the European systems, which foreshadowed the major influence of the European Convention on human rights and fundamental freedoms in the

[2] *François FURET, Jacques JULLIARD, Pierre ROSANVALLON, La République du centre: la fin de l'exception française, Paris, Calmann-Lévy, 1988.*

provisions of the Constitution, well before it was ratified by Bulgaria. Since its ratification in 1992, the Convention has been an immanent part of our current legislation. In article 5, paragraph 4, the Constitution accepted the principle according to which "Any international instruments which have been ratified by the constitutionally established procedure, promulgated and come into force with respect to the Republic of Bulgaria, shall be considered part of the domestic legislation of the country. They shall supersed any domestic legislation stipulating otherwise". Given these conditions, we may therefore state that in the Republic of Bulgaria there exists a solid constitutional base for the organisation and activity of the media within a pluralist democracy. Given that the edicts of the Constitution have immediate effect, it is possible to imagine the media working efficiently without any need for assistance from the legislator. That possibility may be open to societies with a history of political pluralism behind them, but it is most certainly not the case in countries where political pluralism is only just finding its feet. In countries such as these, the absence of any legislation in favour of the media, equivalent in spirit to the edicts of the Constitution, considerably hinders the possibility for the media to perform their role under the conditions of a pluralist democracy. I shall attempt to demonstrate this, based on the current situation in Bulgarian national television and radio.

During the democratic process which began in the autumn of 1989, the role and importance of the media were viewed under a new light in society, being thereafter considered as actors in their full right in the democratic process. Even before the Constitution was passed, that process created the goal of finding a model for the relationship between the media and political power that would be completely different from the totalitarian system. That goal was sought with the awareness that a maximum degree of independence had to be ensured for the national media, and above all for Bulgarian national television and radio.

Against this background of the birth of pluralism in 1990, until we have drafted all the pertinent legislation, we have provisionally adopted a model which, to our great regret, is still in force. The two media were placed under the patronage of the constituent National Assembly of 1990 - 1991, which kept a directly watch over their work, appointed and dismissed their director general via a permanent Parliamentary commission for radio and television and controlled their activities. In addition, by a resolution which was published in Official Journal No. 3 of 1991, the constituent National Assembly adopted the "general positions of the Charter governing the Bulgarian national television and radio services".

The constituent National Assembly which drafted and passed the new Constitution presumed that amongst the legislation to be given priority consideration by the newly elected National Assembly would be the laws on the two media. Furthermore, the provisional and final resolutions stipulated a lead time of 3 years for doing so. At the same time, paragraph 6 (see appendix) stipulates that until new legislation was passed for the Bulgarian national

television service, the Bulgarian national radio service and the Bulgarian national telegraph office, the National Assembly is to exert the powers held by the constituent National Assembly concerning these national institutions.

Unfortunately, even after expiry of the 3 years period, the National Assembly has yet to pass a law on the media. Right up to its dissolution by the President of the Republic on 18 September of this year [1994], the 36th National Assembly has preferred to continue its parliamentary control of the media instead of passing legislation.

The result is that with a good constitutional basis and no equivalent legislation, the issues concerning the media are governed by various differing legal provisions. Independently of the provisions of the Constitution or the European Convention on human rights, instances of these worth mentioning are the "general positions of the Charter" cited above, several decrees of the electoral law concerning Members of parliament, Prefects and Mayors, and in particular the section on electoral propaganda in the law on communication (Chapter IV), a few regulations of the Council of Ministers and various other rules and regulations. The only reassuring thought is that the situation is temporary, without forgetting the dictum that "nothing is more permanent than the passing".

In the Republic of Bulgaria we are actively engaged in drafting government bills on information, television, and radio or an comprehensive law on the media. To pass these, however, there has to be a comparable political aim in the Bulgarian Parliament. We can only hope that such an aim will soon see the light of day. If not, the dominating influence of parliamentary political parties on the media will continue to limit the real possibilities of serving a pluralist democracy.

## APPENDIX

## THE CONSTITUTIONAL BASIS FOR MEDIA LEGISLATION IN THE BULGARIAN REPUBLIC

Constitution of the Bulgarian Republic

Art. 4 (2) The Republic of Bulgaria guarantees the life, dignity and rights of the individual and creates conditions for the free development of man and society.

Art. 5 (2) The provisions of the Constitution have direct effect.

(4) International treaties ratified by constitutional edict and which are published and come into force in respect of the Republic of Bulgaria form part of the municipal law of the state. They have precedence over any legislative rules which are at variance with them.

Art. 11 (1) Political life in the Republic of Bulgaria is based on the principles of political pluralism.

Art. 18 (3) The state has sovereign rights over the radiofrequency spectrum and the geostationary positions orbit set in respect of the Republic of Bulgaria under international agreements.

(5) The conditions and terms of state licences with regard to the assets and activities mentioned in the previous paragraphs are regulated by law.

Art. 30 (1) Each individual has the right to freedom and inviolability of the person.

Art. 32 (1) The private lives of citizens are inviolable. Everyone has the right to protection by the law against unlawful interference with personal or family life and attacks on his honour, dignity or reputation.

(2) No-one may be followed, photographed, filmed, recorded or subject to similar actions without his knowledge, or in spite of his categorical refusal, except in cases provided for by law.

Art. 39 (1) Everyone has the right to express his opinions freely and to disseminate them in writing or in speech through sounds, images or any other means.

(2) This right may not be invoked in order to interfere with the rights and reputation of other persons, to encourage forcible change in the established constitutional order, to commit crimes, or to incite hatred or violence against the person.

Art. 40 (1) The press and other media are free and may not be subject to censorship.

(2) The suspension and confiscation of printed matter or any other vehicle of information are authorised only by decision of the judicial authorities, if they are harmful to public morals or encourage forcible change in the established constitutional order, the commission of crime or violence against the individual. If no confiscation has taken place during the ensuing 24 hours, the suspension shall cease to be effective.

Art. 41 (1) Everyone has the right to seek, receive and disseminate information. The exercise of this right may not adversely affect the rights and reputation of other citizens, national security, public order, health or morals.

(2) Citizens have the right to obtain information from a public organisation or establishment on matters in which they have a legitimate interest, in cases where such information does not constitute a state secret or other secret protected by the law, and does not adversely affect the rights of other persons.

Transitional and final provisions

§ 3 (3) The National Assembly shall adopt within a period of three years the laws expressly mentioned in the Constitution.

§ 6 Pending the drafting of new legislative rules governing the Bulgarian National Television Service, the Bulgarian National Radio Service and the Bulgarian National Telegraph Office, the National Assembly shall exercise the powers vested in the Grand National Assembly concerning these national institutions.

## THE IMPLEMENTATION OF CONSTITUTIONAL PROVISIONS CONCERNING MASS MEDIA IN THE REPUBLIC OF BULGARIA

b. Statement by Mr Valentin GROZDANOV, Counsellor, Legal Department, Bulgarian National Assembly

1. Constitutional provisions concerning mass media under the new Bulgarian Constitution.

The Constitution of the Republic of Bulgaria established by the Grand National Assembly on 12 July 1991 proclaimed the fundamental principle of freedom of information, especially the freedom of mass information media.

Under the Constitution, these freedoms find expression as follows :

- Everyone shall be entitled to express an opinion or to publicise it through words, written or oral, dound or image, or in any other way. This right shall not be used to the detriment of the rights and reputation of others, or for the incitement of a forcible change of the constitutionally established order, the perpetration of a crime, or the incitement of enmity or violence against anyone ;
- The press and other mass information media shall be free and shall not be subjected to censorship.

An injunction on or an confiscation of printed mater or of any other information media shall be permitted only by order of the judicial authorities in the case of an encroachment on public decency or incitement of a forcible change of the constitutionally established order, the perpetration of a crime, or the incitement of violence against anyone. An injunction shall lose force if not followed by a confiscation within 24 hours :

- Everyone shall be entitled to seek, obtain and disseminate information. This right shall not be exercised to the detriment of national security, public order, public health and morality ;
- Citizens shall be entitled to obtain information from State bodies and agencies on any matter of legitimate interest to them which is not a State or official secret and does not affect the rights of others.

All these constitutional provisions shall apply directly and not other law shall contravene them.

In my opinion, the fundamental human rights and freedoms proclaimed in the European Convention on Human Rights and in the Declaration on Freedom of Expression and Information, adopted in 1982, have taken an important place in our Constitution. On the basis of these international and domestic legal instruments, the Bulgarian National Assembly shall adopt the Law on Mass Information Media.

Parallel with constitutional regulation, protection of the implementation of the freedoms of mass information media is also governed by civil and penal law.

The Bulgarian Penal Code provides for penal responsibility both in order to protect freedom of the press and other mass information media, on the one hand, and to protect against the abuse of this freedom, on the other.

Whosoever says or does something degrading to the honour and dignity of another shall be punished for insult. When this is performed publicly or spread through a printed work or in some other way, the offender shall be punished for insult with deprivation of liberty or with a fine on a larger scale.

Whosoever makes public a shameful fact about someone or ascribes to him a crime shall be punished, and when such is done in public or spread through a printed work or in some other way, the punishment shall be aggravated.

Everyone who :

- damages a television or radio communication system ;
- builds, holds or uses a radio which broadcasts without a written licence ;
- hinders or jams the operation of a radiotransmitter or broadcasting service, or TV or radio relay station or transrelay centre, shall be punished with deprivation of liberty and a fine.

2. Mass media during time of elections under Bulgarian law

All candidates for the National Assembly and all parties and coalitions shall enjoy access to the national mass information media in a manner which shall be established by a resolution of the Grand National Assembly.

The editor or publisher of a daily newspaper or another periodical which was published matters affecting the rights and reputation of a candidate for the National Assembly, for municipal councillor or for mayor shall publish that candidate's reply in the first subsequent issue. The reply shall be printed in a similar position and with a similar type. A reply shall be free of charge and shall not exceed in volume the item which it addresses.

Political parties, coalitions and candidates shall be free to employ campaign items such as posters, placards, advertisements, stickers, leaflets, appeals, etc... Each printed campaign item shall state the name of the issuing political party, coalition or candidate.

Campaign items endangering citizens' life and limb, private or public property, the safety of traffic or which are of prurient content, or offend the honor or dignity of a candidate shall be subject to removal or confiscation by the local authorities pursuant to a resolution by the District Electoral Commission.

No previously unpublished results of public opinion polls with relevance to the election shall be published in the last 14 days before the election or on election day. Demonstrations shall be prohibited in the last 24 hours before election day and on election day itself.

The Central Electoral Commission has adopted the following regulation on access to the national mass information media in the curse of election campaigns :

a) Political parties shall be granted the right to political discussion - 90 minutes on TV and 120 minutes on national radio, as well as in introductory and final debates in accordance with the Decision of the National Assembly as follows :
   - 45 % of the total time for electoral discussion on Bulgarian National TV (BVTV) and Bulgarian National Radio (BNR) shall be granted to the Union of the Democratic Forces (UDF) ;
   - 45 % to the Bulgarian Socialist Party (BSP) ;
   - 10 % to the Movement of the Rights and Freedoms (MRF).

   Within the framework of radio and TV electoral time granted to the main political parties, opportunities are also given to the representatives of the small parties and coalitions to take part in debates.

b) The election campaign shall start after the expiry of the deadline for registration of candidates and shall finish 24 hours before voting day. The election campaigns of the different parties and coalitions and independent candidates shall be broadcast and treated objectively. The materials from the archive of Bulgarian National Radio and TV shall be used by political parties and coalitions in their election videotapes.

c) The right to access to the national mass information media within the meaning of par. 1 of the curren decision shall relate to First Channel of the BNTV, Broadcasting "Horizon" and "Hristo Botev" of the BN Radio. Local broadcasting TV centres shall be used by political parties, coalitions and independent candidates that are registered to compete in the election in the district in question. Reports shall be authentic and objective.

d) The Central Electoral Commission shall establish the list with the names of political parties and coalitions which have their candidates registered to compete in at least 11 electoral districts, and which shall be granted time to the take part in discussions twice in the course of the election campaign. 5 minutes is granted to an election speech in the first and tenth day of the election. Election videotapes shall be entitled to be broadcast twice a week.

e) No previously unpublished results of public opinion polls with relevance to the election shall be published within the period 3 December 1994 - 24 December 1994.

f) Broadcasting and emission of foreign TV and Radio programmes in the Bulgarian language shall be forbidden in the course of the election campaign.

g) Disputes shall be solved by the Central Electoral Commission and the Local Electoral Commission within 3 days.

h) Money for teh financing of electoral campaigns shall be granted by the State Budget.

i) Decisions of the Central Electoral Commission shall be obligatory for the national mass information media.

Further work is required of the National Assembly for adopting the Law on Mass Information Media so as to the approximation and harmonisation of Bulgarian law in the media field with other European models.

## CONSTITUTIONAL FOUNDATIONS OF THE FREEDOM OF THE MEDIA

c. Statement by Prof. Dr. Anatoly B. VENGEROV, President of the Court Chamber on Information Disputes of the Russian Federation

Freedom of the media is a relatively new and important feature of civil society and an element of the greatest importance for democracy. It concerns, first of all, the relation between the State and the means of mass information and supposes a non-interference of state structures in the creative and professional activities of news reporters. It also demands that the State initiate a policy of supporting the means of mass information: the creating of conditions for news reporters which give them access to information, the prohibition of censorship, the protection of news reporters etc.

Freedom of the media also supposes a struggle against abuse of this freedom. The State support for the freedom of the media, as well as limitations to curb possible abuses in the field of the media, must by realised on a constitutional basis.

In the Russian Federation the legal basis for freedom of the media may be found in para. 5 of article 29 of the Russian Constitution, the Law on the Means of Mass Information and the Civil Code. However, many questions in this field need additional legislative action. At present, such work is being carried out in the Federatian Council.

A number of laws - on television and radio transmission, on state support of means of mass information and book publishing, on information, informatisation, protection of data and others - are either under consideration or have already been adopted. New draft laws are being prepared, in particular on the right to information.

This legislative activity has been necessary to meet the need to further democratisation of Russian society, the strengthening of freedom of the media, and the overcoming of difficulties and controversies in consolidating that freedom.

A new social and State institution is the Court Chamber on Informational Disputes responsible to the President of Russia. The Court Chamber was established by a Decree of the President, which also determined its competences.

Being the successor to the Information Court of Arbitration, which supervised the pluralistic character of the electoral campaign in 1993, the Court Chamber has become the competent organ for the resolution of concrete information disputes of a public law character. These are disputes about the protection of news reporters from actions of State organs because of critical publications, their right of access to information, the freedom to express their own opinions about social-political events etc..

Alongside this, the Court Chamber also takes decisions condemning abuses of media freedoms, basing itself on the Constitution. But the main task of the Court Chamber - protecting the freedom of the media - remains the most important and topical.

## THE MASS MEDIA, POLITICAL POWER AND INVESTIGATIVE JOURNALISM DURING THE PERIOD OF TRANSITION FROM SOCIALISM TO A DEMOCRATIC SOCIETY (Slovenia : a practical example)

d. Statement by Mr Danilo SLIVNIK, Deputy Chief Editor, Journal "Delo"

Let's face it, investigative journalism in Slovenia is thoroughly out of favour :

- it is attacked by the state institutions ;
- it is rejected by theoreticians on communications and the media ;
- it is harassed by the law-courts ;
- it is campaigned against by political parties ;
- it is subject to criticism by many of the media ;
- it is belittled and attacked by press associations, etc.

It is accepted only by the public, on whom it is gradually beginning to dawn that investigative journalism is of vital necessity. It is, indeed, a great need - perhaps even the greatest.

1. All the same, we are speaking of a professional problem : an issue which cannot be clarified in Slovenia on the basis of some purely communicational model. The fact is : we are in transition. That's a terrible word, yet it is the only one which can afford some rational explanation of what is happening in Slovenia during the present times (which began in 1990, with the first multi-party elections). Furthermore : the use of all other purely sociological, politicological or communication-oriented models remains misleading, because in developed and democratic societies - notably the USA and Western Europe -investigative journalism is something different to what it is here, or elsewhere further to the East. At once, someone will say : but it should be the same here as it is in the developed world. Yet it is the distance separating us from the developed world which gives rise to a far more fundamental problem : whether or not we should actually have investigative journalism. There are some of us who feel that it is better to have the present state of affairs (even with its short-comings) than to have no investigative journalism at all, for most of the (professional) observations today must be understood as a requirement that we should not have it at all, or that we do not need it. That is indeed regrettable.

2. I do not intend to take up the defence of investigative journalism, for I feel sure that in this circle it is well known. I would say only that, in Slovenia, there are many of us who stand behind the American definition of investigative journalism, and that this definition is by reflex best suited to the phase of transition. However, as has been noted by the Americans (e.g. Martin Mayer, Stanley Baldwin, Suzanne Garment and others) : investigative journalism is like police work - after all, the now celebrated Bob Woodward and Robert Bernstein investigated the Watergate Affair as a matter for the police, not a political story.

Nonetheless, in Slovenia, there is no clear definition of journalism in general, nor of its role and significance in the democratic order. What especially is not clear - or is not wished to be clear - is the relation of journalism to politics and the

authorities. The argument that journalism is constantly opposed to the side of the powers-that-be is firmly rejected because, throughout the period of Socialism, journalism was constantly on the side of the authorities. So, it is hardly surprising that agreement can never be reached on the question of what investigative journalism should be. However, as Martin Mayer himself puts it - with more acerbity : "Journalism is a heartless job ... Journalism is espionage, that is, journalistic reporting is like police reporting, and anyone who can't come to terms with that should not take up this profession."

The same should also hold for Slovenia : that is, the purpose of investigative journalism is not to cause the collapse of the state, but rather to get the public to begin thinking about the kind of people by whom they are led.

3. The difficulties of investigative journalism in the post-Socialist era can be explained only by the laws governing transition :

a) we are speaking of the so-called period of "transference" from a Socialist state order to a Democratic order. During this period, the transition process is gradual, which means that it is in no way an instantaneous occurrence, but rather a process. It is a period of the co-existence of different orders, the prevalence of diverse political groupations, customs, etc.. ; it is also a period when no clear rules exist in any area. That is why political manipulation already becomes possible, if it is only journalism that is required to abide by certain rules.

b) neither a legal state nor a democratically legal situation has yet been established. This is extremely important because there is constant talk of a legal state, yet a legal state is often a mask for illegal acts. The term "legal state" is also misused in order to criticize investigative journalism ; this leads to a most perverse situation, since those who have never respected human rights now all of a sudden demand absolute conformity with these rights - even with regard to those embroiled in scandals. The refrain is well-known : "Any person shall be deemed innocent, unless proven guilty by sentence of the Court". But what this effectively means is that the person's guilt should not be revealed. In other words : all of a sudden, only journalists are being required to respect the legal state - so that their mouths can be gagged. The legal state respects neither itself nor others, for the new democratic legislation is still being adopted, new state institutions are emerging, and the jurisdictional bodies (the courts and prosecution offices) are being transformed.

c) the political parties, one might say, do not recognize the principle of the division of authority into three basic branches : legislative, executive and judicial. Thus the present executive authority is attempting to subordinate certain regulatory services which should remain independent (financial

control, public prosecution, state media, etc...). Meanwhile, the Constitutional Court is expected to pass precedential judgements.

d) during the period of transition, political influence has remained chiefly in the hand of the left. The left, which is by its origins non-democratic, desires the subordination of the media, and fiercely attacks investigative journalism because it unmasks the injustices of the times, and hence in many respects also exposes the undemocratic nature of transition. The problem is not one of principle or of a theoretical nature, it is of a practical order, since transition is the restructuring of the former non-democratic economy and political power.

Conclusion : Transitional investigative journalism is unwelcome because (firstly) the former authorities are not used to it, and (secondly) because objectively - on account of the nature of transition - it is directed more against the former left than against the newly former parties.

4. Slovenian investigative journalism is still in its infancy. It has developed out of the so-called alternative press, though in those days it was more often labelled journalistic provocation, and frequently also political provocation. The alternative press, in fact, was not re-instated as a system of action, as a well thought through, multi-faceted professional activity. It is only over the past two years that it has begun to develop as a system, and mainly in the newspaper Delo.

In Slovenia, the Delo journalists set to work on the most important area : uncovering the financial and economic malpractices, for which the period of transition together with privatization was absolutely ideal. Privatization must indeed be seen as a practical problem : from the viewpoint of the former (socialist) relationship towards property, which was deemed to have no value and to belong to all - though effectively it belonged to the communist elite - this may seem a hopeless problem, since it runs counter to the fundamental legal and ethical norms.

Consequently, we ran up against great misunderstanding, which unleashed a campaign : not only was resistance offered by certain state institutions and political parties, leading to numerous law-suits (over 180), but also some of the left-oriented media joined in the attack. Thus, when Delo uncovered some affair it never happened that over the next few days other newspapers would be quick to follow it up by revealing further details ; instead, they began to belittle Delo's discoveries, or even to launch direct counter-arguments. In the West, this could almost never have happened.

This is why up till now in Slovenian journalism there has never been time to clear up certain fundamental problems :

a) how to deal with the sources of confidential information, how to check them, when to reject them outright, and when to respect them ;
b) how to deal with classified documents - to publish them or not. It is particularly with regard to this question that attempts were immediately made to impose the standpoint that such information should not be revealed, and that journalism - not the State - should be concerned with the protection of "state secrets" ;
c) to whom and under what conditions should access be given to the archives, since in this matter the malpractices of the old system still persist ;
d) how to defend people's rights to privacy, and when for example is their political function more important, and when their actual privacy ?
e) and what legal mechanisms should the state build into the legislation to make clear, as well, the relations between legal norms and investigative journalism.

This is why investigative journalism during the period of transition is left no choice but to abide by certain very pragmatic rules : especially, that "all information is more", which is better than less ; that the transparency of events is of great importance ; that the interests of political minorities must be protected ; and that it is the duty of the media to provide the public with all information, however unpleasant, on any event. But, in the words of a certain American : "Government and authority means order, the media mean disorder, so life is the imitation of disorder ...".

C. Summary of discussion

Mr Slivnik stressed the fact that transition could not be understood only by changes to laws but constituted a difficult process that was far from being finished.

Mr Ci_ak was critical of Croatia having ratified various treaties of the Council of Europe without giving them effect in the Croatian Constitution. He too observed that not primarily the laws but the minds of people had to be changed. 95 per cent of journalists in the East had been selected by the party and were still in place. It would, however, be a mistake to simply replace them although he personally had been in prison for three years for criticising of the government.

A wave of nationalism could lead to the election of undemocratic leaders. Anybody who criticised the government risked immediately being called a traitor. The house of the Vice President of the Croatian Helsinki Federation had been destroyed because he had declared publicly on TV that the government had committed atrocities against Serbs in Croatia.

Mr Gavrilescu underlined the main tasks of journalists. It was upon them to contribute to the consolidation of the State and to defend the individual against the State. To accomplish these tasks the independence of the media was required.

In fulfilling this function, Romanian press reports on corruption had led to the sacking of the Attorney General and the Minister of Defense. On the other hand, journalists would often criticise the government immediately after elections without giving it a chance to implement its programme.

Freedom of information required a legal framework. In Romania, a law on the audiovisual sector had been adopted whereas a law on the press had been rejected.

Mr Jakubowicz pointed out the problems facing those Central and Eastern European Countries which were not yet stable although their laws sounded democratic. To safeguard journalistic freedom, a market system was required that enabled new media to survive on advertising.

Often journalists would see their role as being similar to politicians, using other means. Journalists had a special function within society as a whole. It was incumbent upon them to help construct society. The population would become frustrated if it was always confronted with criticism of the government by journalists.

Mr Sakharelidze declared that in Georgia any mass media was free to publicise information. Problems were only of an economic nature. This factor might, however, even lead to a backlash on the path to democratisation. Georgia needed not only legal but above all economic and financial support from the West in order to prevent a fall-back into dictatorship.

Mr Stadtrucker informed the round table about political pressures by the Supervisory Board of Slovak TV. The nine members of the board were elected by Parliament and therefore reflected political majorities. The rights of the Board included the acceptance of general programme structures and the election of the TV director. Mr Stadtrucker was already the ninth TV director since the fall of communism, and expected to be replaced soon as a result of the recent parliamentary elections.

The rapporteur, Mr Drouot, saw two major tendencies in the discussion :

a) the role of the media in countries in transition,
b) the necessity for a legal framework for media.

In history, the press had often played a vital role in the toppling of authoritarian systems. This process was now repeating itself in the East. After the fall of

communism, however, the media has the task of helping to maintain the democratic system.

According to one formula, the product of power and communication is constant : the more power is exerted, the less freedom of communication is possible, and vice versa. This meant also that the required density of the legal framework for the media would vary from case to case. Independence for the media was not only required from the government, but also from private powers.

## Second session

**Freedom of the press in constitutional practice**

A. Report by Prof. Gabor HALMAI,
Legal Adviser at the Hungarian Constitutional Court

B. Statements by :

a. Prof. Cesare PINELLI, University of Macerata

b. Dr. Kestutis LAPINSKAS, Judge at the Constitutional Court of Lithuania, Member of the European Commission for Democracy through Law

c. Prof. Nicolas VITRUK, President a.i. of the Russian Constitutionnal Court, Associate Member of the European Commission for Democracy through Law

d. Mr Aleksey SIMONOV, Glasnost Defense Foundation, Moscow, Russian Federation

e. Mr Michel ROSSINELLI, Lawyer, Dudan & Richard, Lausanne, Switzerland

f. Prof. J.J. SOLOZABAL ECHAVARRIA, Universidad Autonoma, Madrid

C. Summary of Discussion

# FREEDOM OF THE PRESS IN EUROPEAN CONSTITUTIONAL PRACTICE WITH SPECIAL REGARD TO HUNGARY

A. Report by Prof. Gabor HALMAI, Legal Adviser at the Hungarian Constitutional Court

For those ex-Socialist countries which have stepped on the path of democracy and constitutional government and which are trying to institutionally separate the traditional spheres of power from each other, there is a special significance in the freedom of the so-called fourth power - the public - and in the legal guarantee for this freedom. In these countries, the restructuring of social publicity, described in the classic writing of Jürgen Habermas for the Western European public in the past decades, has been different.

These differences are due first to the fact that in the ex-socialist countries the political public developed almost at the same time as social freedoms did. On late medieval Europe, the "public", that is persons meeting in cafés and salons, created a politically neutral literary freedom. But this development in East-Central Europe was stopped by nearly half a century of State socialism in which such public meetings were not possible. In the stormy revolutions of present day Central-Eastern Europe, these institutions for freedom of thought, for instance the different clubs and associations, which originally were only meant for purposes of leisure, immediately became political in nature and started to represent the demands of the society to the State party. At practically the same time, the different political parties and trade unions were born, and it was in this period when democratic parliamentary freedom and its institutions, and also when the written and electronic press, emerged. Unlike in the rest of Europe, this "Wild Eastern" process of regeneration of society and the breaking down of political power barriers was carried out by means of radio and television. This not only made the changes more sudden, but also connected them to the international public with the help of satellites. (In December 1989, the television brought the Romanian revolution straight into our rooms, and in August 1991, we had to admit that a coup carried out in front of the whole world is not the "real" thing.).

Naturally, there are significant differences in the way State bureaucratic publicity was reduced in the different countries of Eastern Europe, especially depending on how well the embryos of democratic society were allowed to develop from the ghetto of the underground press. It is certain that the disintegrating effect of electronic mass communication on centralised communication has been more pronounced in the case of Hungary, with its more developed middle class.

This newly developed social publicity has two functions. On the one hand, it forces the newly formed constitutional organisations to become legitimate in the face of the public. On the other hand, it must be able to pass on the demands of democratic society to government bodies.

## German or Anglo-Saxon Law Model ?

In the general legal regulation of methods of social publicity, the most interesting theoretical problem is what alternatives modern legal systems offer for regulating the traditionally negative "protecting" type of rights, while also preserving some positive elements.

The question is timely, because the Central and Eastern European countries stepping into the road of constitutionality must choose between possible models of regulation.

There is also another dilemma : is it possible, for example, when trying to regulate present and future Hungarian press rights and freedom of expression to introduce the one-sentence Press Act proposed in the last Century by a Hungarian politician to the effect that there should be no lying. Alternatively : is it better to follow the German legal system's positive characteristics ("whatever is allowed by laws can be carried out") or the Anglo-Saxon type negative system of regulation ("Everything is allowed that is not forbidden").

Usually in the case of human rights and especially in the case of freedom of expressing one's views, constitutional provisions dominate, although rights may be partly regulated by law. The model for this is the German Basic Law, successfully adapted to Portuguese and Spanish democratic changes. Does the elimination of dictatorial regimes in today's Central and Eastern Europe provide a similar good opportunity to use this model ?

It is sure that, in the long run, the development of the legal system through judges' decisions is very important for once-socialist countries, thus interpreting the Constitution in reality and applying, for example, elements of the Anglo-Saxon legal system. 18th century American doctrine, influenced by John Locke, did not favour constitutional or other legal regulations exactly because they would restrict the natural birth rights of man, which are independent of the government. This is illustrated by the 1st Amendment to the American Constitution : "Congress shall make no law alredging freedom of speech or of the press ..." and the 14th Amendment : "due process of law" clause which extended the reach of the Bill of Rights.

Naturally, I am perfectly aware that the road to the German "Rechtsstaat" or the Anglo-Saxon "rule of law" is a very long one, and that numerous conditions for travelling this road are absent in Hungary and other countries of similar fate in the region. But I want to call the attention to the fact that, yes, the road is passable. An example of this is the development of the Japanese legal system, which, after the Second World War - even if not totally by its own accord - did successfully change to a constitutional State governed by the rule of law.

This would naturally imply that the functions of jurisdiction should be changed at their base, which is not unimaginable on a long-term constitutional model. In this system, which is very similar to American jurisdiction in respect of constitutional protection, the courts would base their judgments more on the Constitution than on the laws (of course the personnel for this system could not be organised from one day to the next).

As Alexis de Tocqueville said about the power of judges in the United States : "The rights of American courts to proclaim that a law is against the constitution is one of the strongest obstacles ever put in the way of the tyranny of political groups". Such judgment over laws is only possible in certain individual cases brought before the courts (the cases and controversies requirement). The Anglo-Saxon solution provides for a different form of restricting State power, by protecting the basic rights laid down in the Constitution and by giving a much larger role to the courts than any of the European continental legal systems, which prefer legislation. But we know from Berlin that it is not the form of restricting State power, but the effectiveness of such restrictions, that really matters.

It seems that ex-Socialist countries cannot apply deregulation to basic rights completely until the institutional guarantees of the constitutional State have become firmly established in their legal systems. Otherwise, the application of rights as subjective rights could not be guaranteed. The historical experiences of the past few decades will probably make it necessary to restrict the power of the State for shorter or longer periods through laws in order to defend human rights.

At the same time, irrespective of the two main regulation alternatives, the expression and propagation of opinions by word, writing or visual means may require different legal treatment even within the same model.

Freedom of information, which is the prerequisite of all kinds of expression of thought, cannot be imagined without legal regulations guaranteeing access to the sources of public data. We cannot free however radio and television news from all legal regulation either. Because media frequency is a "good" which exists only in restricted amounts, it has to be divided in some way or another. Social viewpoints have to be taken into account, to a smaller or larger extent, in accordance with distributive principles. The strongest restrictions should be in the case of national public radio and television programmes and in giving permission to commercial radio and television programme. Social equality requirements in the form of regulations can be taken into account when allotting a permission, for instance in determining the proportion of national, regional and local programmes and advertisements. Even in the case of the most unrestricted programmes, such as propagation of information by cable, technical criteria have to be raised.

Legal regulations should help guarantee the neutrality of national public mass media and should prevent these media from becoming mouth-pieces of parties and the government. The laws should guarantee that no licenses shall be granted based on election results in parliament - as has been suggested in some political quarters.

The lack of legally guaranteed independence can bring about a situation where the leaders of the media will try to avoid angering government parties, even by sacrificing lawfulness. The tendency to conform to the views of political leaders kills freedom of news reporting and freedom of criticism, without which there is no freedom of the press.

Freedom of reporting does not mean that the opinion of editors and reporters should not be criticized by anybody. In fact, those institutions that return criticism to the criticizers should be developed (continuous opinion polls, non-political supervision). With the unpleasant memories of direct press supervision in ex-Socialist countries, it is essential to institutionally rule out the possibility of political interference in the actual process of editing programmes in the media. Naturally, the neutrality and objectivity of mass media is the surest guarantee for the real competition of commercial radio and television. If this occurs, the viewer or radio listener shall voice his or her criticism by switching to another channel.

The situation is totally different in the legal regulation of traditional written publications. Here, a positive type of legal regulation - for instance, that contained in the Press Act - is not really needed.

Freedom of the press in a liberal sense means prohibiting the State from interfering (for instance the establishment of agencies, distribution permissions and censorship). The father of American liberal democracy, Jefferson, said : "We did not know any other restriction except the censorship practised by the public". The prohibition on interference must also include commercial freedom, including the freedom to choose its economic partners at will.

At the same time the absolute unrestrictedness of the press does not follow from liberal ideals. The criminal code must prohibit crimes carried out through the press. The civil code must defend personal rights, for instance, but in such a way that the penalty for violating the rights is paid not to the State, but the plaintiff.

Competition law must prevent monopolies from developing, even in the field of the press, and if they exist, must liquidate them. The question is only whether these restrictions need to be mentioned in the independent Press Act, or whether they should be found in the criminal, civil and competition codes. This seemingly technical question hides the danger that a separate Press Act would bring a greater temptation to the State to unduly restrict press freedoms.

## The New Types of Media and the State

Approximately in the middle of our century, the era which was dominated by the press (printed media) came to an end, and this was of course due to the spread of electronic media, mainly radio and the television. This resulted in the almost unlimited extension of publicity. From this time on, publicity has not been the field of activity of just a relatively small group of educated and socially active people. The involvement of the masses in publicity by means of the media brought about two important consequences. First, the circle of people participating in, or at least witnessing, the political processes was significantly extended. Ongoing politics began being observed by whole nations or sometimes by the whole world. We can recall the events of the 1989 Romanian revolution, of the 1990 Gulf war, or of the August putsch in Moscow in 1991 which television brought into our homes. Another main change initiated by the appearance of the new types of media is that publicity lost its almost exclusively political character and became a domain of the arts, sciences, etc..., a means of the expression of existing opinions and thoughts in these fields. As a result of these changes, the new examples of constitutional regulation cover more than the conventional freedom of the press and now extend to subjective elements of individual self-expression, the arts and sciences, as well as to objective elements in respect of radio and television broadcasting.

Of course, European legal systems were affected differently by the emergence of the new types of media. In these legal systems, not only the changing jurisdiction of their constitutional courts but the constitutional provisions themselves adapted to the presence of the new media. The first new Constitution containing new elements concerning freedom of expression was the 1949 Bonn Grundgesetz of the Federal Republic of Germany which put an end to its national-socialist past. The Fifth article of this Constitution regulates traditional freedom of opinion, the freedom of information, of the press, of art, of science, of research, and of teaching.

## The Hungarian Constitution and the Jurisdiction of the Constitutional Court

In Hungary the so called "Trilateral Roundtable Discussions" held from June to September 1989 with the participation of the State-party, various social organisations and the democratic opposition, set for itself the objective of drafting new legal regulations on printed and electronic media as a part of the so called "basic laws" of the democratic transition. However, the special subcommittee of experts charged with performing this task failed to reach any consensus regarding the content of such regulations, presumably because they could foresee the decisive character of the media's powers in the coming elections. As a result, in the legal regulations determining the transition to the new political system, freedom of expression and of the media were dealt with only in Article 61 of the thoroughly modified Constitution, which came into force on 23 October 1989. The new element of this Article was that the reference to socialism and the

interests of the people as a necessary condition for exercising basic rights disappeared from the text. Freedom of speech was replaced by the reference to the more broad concept of freedom of expression and to the communication rights was added the right to be acquainted with and to circulate information of public interest, so that the freedom of information which had constituted a part of the German Grundgesetz since 1949 was also expressly included. As a result of the so-called "Pact", which was an agreement between the largest governing party and the largest opposition party, the new Parliament has added to Article 61 of the Constitution the following paragraph : "The adoption of the Act concerning the supervision and appointment of the heads of the public service radio and television company, and news agency, the licensing of commercial television and radio companies, and further the prevention of a monopoly in the field of information requires the vote of two-thirds of the members of Parliament present".

But this law has not yet been passed by Parliament. Until it is passed, freedom of communication in the field of radio and television broadcasting is suspended since the awarding of licenses is denied by an intra-government decree which established a moratorium on frequencies. This decree is not a normative act. Although the new Parliament required the government in a resolution to submit a draft bill on the moratorium on frequencies in order to legalise this position, the draft was never submitted to Parliament. The moratorium on frequencies has nonetheless remained. This legal regulation, or rather the absence of it, made impossible the emergence of new radio and television broadcasting stations other than Hungarian Radio and Hungarian Television and as a result also made impossible freedom of expression in the area of the new media. At the same time, the 1986 Press Law addressed itself hardly at all to the legal status of the national public television and radio company which is in a monopolistic position. A decree of the government of 1974 on Hungarian Television and Radio remained in force and the sixth article of this decree prescribed State supervision of these institutions. The Constitutional Court ruled in June 1992 that this decree was unconstitutional but postponed nullifying the decree until the new media law could be passed, using the very doubtful argument that it is better to have unconstitutional governmental supervision than to not have any supervision at all. At the same time the reasoning of the decision contains very important statements on the desirability of a balanced electronic media and its independence from the State. The Constitutional Court of Germany also repeatedly mentiones this conceptual goal.

The judges of the Hungarian Constitutional Court deduced the freedom of television and radio broadcasting from the communicational "mother right" of freedom of expression in several steps. The first step was freedom of the press, which was already a constitutive part of freedom of expression. This means that freedom of the press should be guaranteed by the State, bearing in mind that the press is a means of extraordinary importance for the gathering of information necessary for the formation, expression and shaping of public and private opinion.

The task of guaranteeing freedom of expression of opinion and the freedom to gather information required additional measures in respect of television and radio, when compared to freedom of the print media. The reason behind this was, according to the reasoning of the decision, that the exercise of the fundamental rights of electronic media need to be reconciled with the "scarcity" of the technical conditions for the exercise thereof, i.e. with the limited number of available frequencies. According to the decision of the Court, this situation in the area of the electronic media was not likely to change within a reasonable period of time and, in contrast with the printed media, it did not allow for the unrestricted founding of television and radio companies. However, even in the area of television and radio broadcasting, special measures are reasonable in respect of national public television and radio companies which are, for the time being, in a monopolistic position. Regarding these, legislation should guarantee objective, comprehensive and balanced information by financial, procedural and organisational prescriptions.

Similar to their German colleagues in Karlsruhe, the Hungarian judges of the Constitutional Court did not link the specific guarantees of freedom of television and radio broadcasting to any particular or concrete type of organisation or to any particular legal form. The constitutional or unconstitutional character of organisational methods, which are created by the legislature within its discretion, is determined by their capacity to guarantee in principle the comprehensive, balanced and objective expression of all opinions existing in society and to provide the public with information of public interest. To fulfil these conditions, the would-be media law should relate to all television and radio broadcasting - that means national and regional public broadcasting and commercial broadcasting taken as a whole. The distribution of the burden between national public television and radio, on the one hand, and local and commercial broadcasting, on the other, is to be determined by the legislature within constitutional confines, in order to achieve the objective, comprehensive and balanced supply of information. Thus the Hungarian Constitution Court applied the so called "inner pluralistic" model recommended by the Third German Fernsehurteil to national public media, and the so called "external" pluralistic model to the whole of the electronic media.

An additional aspect of the freedom of public radio and television companies, which has also been outlined in decisions of the German Constitutional Court, is freedom from the State. To this the Hungarian decision added the notion of freedom from various social groups. The concrete method of regulation to be chosen by the legislature "should exclude the possibility that the organs of the State, or any other group of society, will have influence on the content of the programmes, thereby jeopardising the comprehensive, balanced, proportional and objective manner of presenting the existing opinions in society, and the impartiality of the provision of information". According to the judges of the Constitutional Court, "freedom from State organs" implies freedom not only from that government, which is mentioned in the decree of 1974, but also freedom from

the legislature. Those bodies representing society which were set up to provide a balanced character to information broadcasting on television and radio were excluded from the influence of the government and the legislature by the decision of the Constitutional Court. Also excluded was the decisive influence of political parties or other organisations pursuing interests similar to those of political parties. The unprecedented delay in the passing of the media law by Parliament resulted in a situation where the logic of the decision of the Constitutional Court concerning the 1974 governmental decree met with no response. Nonetheless, although the decision did not speed up political decision making, it will at least help legislators to opt for legal regulations which meet the requirements of constitutionality.

## The End of Liberalism ? Where to proceed ?

As we have seen, the appearance of new types of media even in democratic States governed by the rule of law compelled legislators and constitutional courts to abandon traditional liberal ways of regulating freedom of expression, at least in respect of the electronic media. The common feature of the laws and constitutional decisions on this issue is that they prescribe positive rules in order to ensure the balanced character of television and radio and at the same time also to ensure their freedom from the State. This rather widely adopted constitutional practice permits, or even more, requires legal intervention into the private realm of the formation of opinion, justifying itself by reference to the limited number of available frequencies, which makes such regulation necessary. However, it remains a question whether, with progress in technical developments, with the division of the airwaves so as to increase the number of frequencies and the increased use of satellite and cable transmissions, State regulation should not retreat into the area of the public media and apply exclusively in this field. In the remaining area of television and radio broadcasting, free rein might then be given to the free market of thoughts and opinions. It seems, at least at first sight, that the organisation of the electronic media along private market lines can achieve one of the goals of State regulation - independence from the state. The question to be answered is whether, in the field of television and radio broadcasting, which is much more effective than the printed media, the objective supply of information can be entrusted to the market, i.e. if it is enough in this area to apply the same a posteriori regulation as has applied to the print media.

Institutional guarantees could undoubtedly be justified, given that the modern media constitute an incomparably effective and powerful tool for the dissemination of information to the public and that they can reach everybody through the push of a button. Freedom of television and radio broadcasting encompasses the traditional right of protection against interference by the State, but it also contains a right to State regulation of some degree. In this respect, I propose to make a distinction between public and commercial electronic media.

It is obvious that public radio and television stations are established to provide information, entertainment and cultural programmes for the public, i.e. for the taxpayers (which often means also subscription fee payers). Deriving from this public goal, the public is entitled to expect from the media that they perform their task professionally and in a balanced manner. This requires the fulfilment of the diverse expectations of listeners and viewers, and also implies ideological and political neutrality, including independence from the State. In order to meet these requirements, institutional and procedural guarantees, worked out in legislation, are needed. In certain cases, these guarantees may restrict freedom of expression.

The situation is entirely different in the case of commercial television and radio companies. In the circumstances of the extended technical possibilities of electronic communication, it is not justified to influence the content of programmes in order to bring about either the "inner plurality" of a given station or the "external plurality" of commercial stations as a whole. Any lack of balance caused by the commercial stations may be corrected by the State only using the regulations applicable to the public stations. The only acceptable level of State regulation of the electronic media, therefore, should be the same as that justifiable in the area of the print media. This itself cannot be more than antimonopolistic regulation, because if the State does not guarantee freedom of competition, freedom of expression could be endangered. In the area of the printed and electronic media, any other regulation may not be more than is otherwise allowed in matters of freedom of speech generally.

## FREEDOM OF EXPRESSION IN ITALY

a. Statement by Prof. Cesare PINELLI, University of Macerata

In respect of freedom of expression in Italy, what kind of problems must be tackled ? I suggest that, in answer to this broad question, one can distinguish a first group of issues, which are deeply connected to the growth of every constitutional democracy, and a second group, which are more typically connected to Italian political and economic pluralism.

As for the first group, many Constitutions of the countries which until 1989 we described as Western European, in a political sense, were adopted prior to the development of the phenomenon of mass media. This means, for example, that broadcasting is not even mentioned in these Constitutions. As everybody knows, this silence does not affect freedom of expression through broadcasting. But it shows why constitutional law, whose development everywhere has been fundamentally tied to freedom of expression since the XVII century, must meet the challenges which arise from mass media communication systems.

First of all, the term "freedom of expression" cannot entirely cover the constitutional problems involved. For example, according to a Council of Europe Convention and to an EC Directive of the same year, content-based regulations are to a certain extent needed in order to protect children against violence. And this results, in turn, from the circumstance that television cannot be understood as a simple medium for the free expression of one's ideas.

Secondly, we know now that mass media communications often present problems of power, and of the definition of power, which are entirely outside the traditional conception of freedom of expression in many European countries.

This problem is strongly felt in Italy, but badly resolved.

Under Article 21 of the Italian Constitution of 1948, "everyone is entitled to express freely his thought, by writing, speech and any other means of expression". This is the most important of our provisions on freedom of expression.

Over the past half century, its enforcement, that is to say, the effective guarantee of freedom of expression, has met with enormous problems. In the field of broadcasting and, to a lesser extent, in that of the press, from time to time Parliament and the Constitutional Court have attempted to confront these difficulties, but neither of them has met with real success.

From the constitutional point of view, the Italian broadcasting system has never been subject to appropriate regulation. As stated above, this has not been due to the absence of an express reference to broadcasting in the Constitution, notwithstanding that many provisions are expressly devoted to freedom of the press.

For a long period, until 1974-75, the broadcasting system consisted of only a public service run by managers who were chosen by the government in power. But in 1974, the Constitutional Court stated that, in accordance with principles of pluralism, Parliament had to be charged with outlining the broad policies of the activities of the board, and had to have a voice in appointing its members.

This decision, and the law which was accordingly passed one year later, led very soon to a situation where the political parties became the masters of every single aspect of the broadcasting system, including the content and the shaping of the news.

In the meantime, the private sector grew up without any sort of regulation and this brought about the present situation, in which there are only two owners of the six largest channels in the country (Rai-public service and Fininvest-private enterprise).

I think this suffices to demonstrate why many constitutional scholars are now very worried, even from a democratic point of view. But one has to admit that the basis for their concern may be addressed in the general context of the values of a well-regulated market for the media sector. My personal view is that most of us, and even the Constitutional Court, have understood this only when it was too late, in the sense that the political powers and interests had become too strong in the interim to be really affected by regulation. This is why we call the law of 1990 a "photocopy law", although few people should be really amused by the metaphor.

## MASS MEDIA IN LITHUANIAN CONSTITUTIONAL PRACTICE

b. Statement by Dr. Kestutis LAPINSKAS, Judge at the Constitutional Court of Lithuania, Member of the European Commission for Democracy through Law

1. After restoration of the independence of the Lithuanian State on 11 March 1990, censorship of mass media and all other restrictions in the field of information were immediately abolished. The Provisional Basic Law of the Republic of Lithuania (which was in force from 11 March 1990 to November 1992) guaranteed for the citizens of Lithuania freedom of speech and of the press (Article 29) and the right to collect and disseminate information on all issues, with the exception of issues related to State secrets, as well as issues impairing the dignity and honour of the individual (Article 29). The Provisional Constitution simultaneously established that freedom of speech and of the press may not be used to promote racial and national enmity and anti-humanitarian views.

In the new Constitution of the Republic of Lithuania (which entered into force in November 1992), the above-mentioned rights and freedoms are expressed more exactly. Article 44 provides for two important prohibitions :

- censorship of mass media shall be prohibited ;
- nobody - including the State, political parties, political and public organisations or other institutions or persons may monopolise the means of mass media. Simultaneously, the above mentioned prohibitions have indirectly established freedom and independence of the mass media.

Freedom of the mass media has a very close connection with the right of individuals to have their own convictions and to freely express them. Individuals must not be hindered from seeking, obtaining or disseminating information or ideas. Therefore, freedom to express convictions, as well as to obtain and disseminate information, may not be restricted other than in a manner established by law and necessary for the safeguard of the health, honour and dignity, private life, or morals of individuals and for the protection of the constitutional order.

Freedom to express convictions or impart information shall be incompatible with criminal actions, the instigation of national, racial, religious or social hatred, violence, or discrimination, the dissemination of slander, or misinformation.

2. The Law on Press and other mass media adopted in the beginning of 1990 remains in force in Lithuania. This Law has proclaimed freedom of the press, prohibited censorship, established the principles of activity of mass media, the right to obtain information and listed information which could not be published or the publication of which was restricted. It provided for the procedure for the founding and registration of mass media, the order of suspension or termination of their activity, common questions concerning activity of mass media, the main rights and duties of journalists and the legal liability for impairing the Law on Press and Other Mass Media.

The restoration of freedom of the mass media in Lithuania was accompanied by a quick increase of the total number of agencies of mass media. In the period 1990-1994 (until 1 December) more than 2000 mass media agencies were registered in Lithuania. Nearly 400 of them had financial difficulties and therefore interrupted their activity. Thus, on 1 December 1994, there were approximately 1600 agencies functioning in Lithuania. Among them there were more than 480 newspapers, over 250 magazines, about 690 publishing houses, 170 radio and television studios, 29 video studios and 1 cinema studio. Publications of general nature about 140 - enjoy the greatest popularity ; in second place, are advertisement editions - nearly 80 ; there are 22 publications for children, 27 for youth and 16 for women. During 1994, from 20 to 30 new mass media agencies have been registered in Lithuania each month.

3. By way of implementing the Law on Press and Mass Media the Seimas approved the Statute on Radio and Television, and the Government set up the Board for Press Control. The Statute on Radio and Television was adopted by Parliament on 10 May 1990. In accordance with the Statute, Lithuanian Radio and Television was proclaimed as a State institution, accountable to Parliament. The Statute defines the main aims of this institution and the principles of the activity, among them the principle of political plurality of participation in radio and television programmes and the principle of non-participation of employees in political activities when in office. Lithuanian Radio and Television is also charged with announcing official reports of State authorities and reporting on their standpoint on serious problems of State and social life. The statute prescribes that Lithuanian Radio and Television shall manage the resources for arranging programmes and shall have preference on the usage of transmission equipment. Lithuanian Radio and Television shall be headed by the Board and General Director which are nominated by Parliament. The Board shall consider and resolve the main affairs concerning the activity of the Radio and Television ; shall approve the decisions of the Technical Committee for the Organization of

Competitions and Establishment of Results concerning the lease of the means for program transmission. The Board's decisions shall be implemented by the General Director.

On 17 March 1992, the Government established the Board for Press Control under the responsibility of the Ministry of Justice. Its main tasks are be :

- to supervise implementation of the Law on Press and Other Mass Media ;
- to discharge State policy in the field of activity of the mass media.

The Board for Press Control shall also register agencies of mass media according to the procedure established by law and issue a founding certificate ; supervise whether mass media agencies implement the provisions of the law concerning information which cannot be published or the publication of which is restricted ; issue methodical papers for the guidance of mass media agencies ; consider administrative disputes and impose administrative penalties and discharge other duties prescribed by law.

The Board for Press Control shall have the right to suspend or interrupt the activity of mass media agencies according to the procedure established by law and to publish this decision in the press. According to the Law on Press and Other Mass Media, decisions to suspend or interrupt the activity of mass media agencies as well as the refusal to register them, may be appealed against within 10 days in court.

4. The new legal regulation of the status and activities of mass media agencies has great importance for the restoration of a free and independent press and other mass media. Simultaneously, it has transformed the mass media into one of the mightiest instruments of democratisation in our changing society. The above laws, especially the Law on Press and Other Mass Media, are very often subjected to acute criticism. The Board of Press Control and the Radio and Television Board have met the post severe criticism. Usually the institutions are accused of reviving censorship. Quite a number of disputes have arisen on the issue concerning relations between the State Radio and Television and private radio and television studios. There have been several attempts to pass in the Seimas a new draft Law on mass media, but with no success as yet. During the last two years in Lithuania there have also been some constitutional cases for which the Constitutional Court has been asked to consider the conformity with the Constitution of some legal acts concerning mass media.

5. In July 1993 a group of Seimas members addressed a petition to the Constitutional Court challenging a provision of the law whereby in Lithuanian Radio and Television, national papers, while publishing or broadcasting reports on the Seimas sittings, shall also promulgate an official communique. The reports must be devoid of comments about the Seimas activity. The petitioner' argument

was that such a provision restricted the constitutional right to freely disseminate information and limited the right to free choice of information, guaranteed by the Constitution of the Republic of Lithuania : further that it constituted an attempt to legalise official censorship of some kind. It should be noted that the Seimas had nullified the legal norm in dispute on 12 October 1993, prior to the court hearing of the case. Therefore, the proceedings were dismissed. Instead of the nullified norm, the Seimas enacted the following provision : "Public mass media, while reporting on the Seimas sittings, shall also promulgate an official communiqué by the Seimas about the said sittings". The constitutionality of this norm has not been called into dispute by anyone.

On 24 May 1994 a group of Seimas members addressed a petition to the Constitutional Court challenging the constitutionality of the provisions of two legal acts regulating the activity of Radio and Television. The first provision in dispute was Article 7 of the Statute of Radio and Television which declares that "The Lithuanian Radio and Television shall manage the resources necessary for making programmes and shall use, by a right of priority, transmission facilities and the relay network." The petitioners considered that the establishment of such a priority right resulted in an exceptional monopolistic status of Lithuanian Radio and Television which contradicts part 4 of Article 46 of the Constitution which provides that "the law shall prohibit monopolisation of production and the market, and shall protect freedom of fair competition."

Taking into account that Lithuanian Radio and Television is a governmental institution which is commissioned to manage public resources necessary for making programmes and their broadcasting, the Government by its resolution established a competitive procedure for private stations to hire free equipment for radio and television broadcasting. A special Technical Committee for the Organisation of Competitions and Establishment of Results was formed. The Statute prescribes that the decisions of this Committee must be approved by the Board of Lithuanian Radio and Television. This provision was unconstitutional in the opinion of the petitioners (a group of Seimas members), because it again confirms the monopolistic status of Lithuanian Radio and Television. Furthermore, this also constitutes a violation of Article 25 (2) of the Constitution which declares that "individuals must not be hindered from seeking, obtaining, or disseminating information or ideas."

## THE CONSTITUTIONAL AND LEGISLATIVE GUARANTEES FOR THE FREEDOM OF THE MASS MEDIA IN RUSSIA

c. Statement by Prof. Nicolas V. VITRUK, President a.i. of the Russian Constitutional Court, Associate Member of the European Commission for Democracy through Law

The freedom of the mass media is an extremely important condition for individual liberty, acknowledging its supreme value in society and in the State. The freedom of the mass media provides the basis for the democratic institutions and a State of Law in Russia, enabling the civilised entry of the country into the international community, thereby acknowledging the universally recognised values of fundamental human rights and individual liberties.

It is well-known that under the totalitarian conditions that prevailed in the former USSR it was impossible even in formal terms to speak of the freedom of the mass media, due to the establishment of Marxist-Leninist ideology as the compulsory state ideology, and to the existence of a monopoly by the Party on information and the property of the mass media, and censorship in the mass media etc. Article 50 of the Constitution of the USSR and article 48 of the Constitution of the Russian Socialist Federative Republic only recognised the freedom of speech and that of the press "in accordance with the interests of the people and for the purposes of enhancing and extending the socialist system". The mass media were the mouthpiece for the dominating party and state élite, and a powerful means not only for repressing non-conformism and non-conformist activities, but also for restricting individual freedom and that of the civilian population as a whole.

With the transition from totalitarianism towards a new democracy in Russia, the status of the individual is significantly changing both in society and within the State, in terms of the freedom of opinion and religious conviction, as well as that of the press and of information in general, and major changes are taking place in the role of the mass media. This can be chiefly seen in the constitutional legislation currently applicable in Russia, in the amendments that were made in 1978 to the Constitution of the Russian Federation, and in the adoption of the Law of the Russian Federation dated 27 December 1991, "On the Mass Media"[3]. Article 43 of the Constitution of the Russian Federation stipulates that the retrieval, reception, production and broadcasting of information by the mass media, the founding, possession, manufacture and purchase of mass media supports, the storage and operation of technical devices and equipment, of raw materials and other materials designed to manufacture and distribute the production of the mass media, are not subject to any constraint, except for those restrictions provided for by the legislation of the Russian Federation pertaining to the mass media. Amongst the most important provisions guaranteeing the freedom of the mass media in the above-mentioned law are those concerning the ban on all forms of censorship (article 3) ; those guaranteeing the professional independence of editorial staff, of publishers, distributors and owners of publishing property (article 19) ; the right of citizens to acquire through the mass media genuine

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[3] *Congress of the People's Deputies of the Russian Federation and the Soviet Supreme of the Russian Federation, 1991, Bulletin N°7, article 300.*

information on the activities of State organisations and authorities, of social organisations and their public servants (article 38) ; the right of editorial staff to request information from any such body, and the duty of the latter to provide the information requested (article 39); the right of access to information (articles 43-45), the right to reply (article 46), the guarantee of wide-reaching rights for journalists (article 47), the right to appeal in court in cases of constraint of the freedom of the mass media (article 61), and the accountability for violations of the freedom of the press (article 58), as well as a large number of other such guarantees.

A new level of constitutional guarantees was reached when the current Constitution of the Russian Federation was adopted by referendum on 12 December 1993. The latter comprises not only articles directly ratifying the freedom of thought and speech, the freedom of the mass media, and the ban on censorship (article 29), but also contains numerous other constitutional provisions concerning information, as well as other human rights and individual liberties, and guarantees for their consideration and protection (articles 28, 31, 41, 42, 44, 46).

The Constitution of the Russian Federation stipulates and legally guarantees the rights and liberties of citizens, the protection of the State with regard to human rights and individual liberties within the Russian Federation, the prerogative for every individual to defend his or her rights and liberties by any legally accepted means (article 46), the judicial protection of individual rights and liberties, the right to appeal to the courts against decisions and actions (or lack of action) by State organisations, by local self-administration, social associations or civil servants ; and even when all the legal means of judicial protection existing within the State have been exhausted, in accordance with the international treaties ratified by the Russian Federation, the right of each individual to appeal to the international authorities protecting human rights and liberties (article 46) is equally guaranteed.

Above all, it should be emphasised that the Constitution of the Russian Federation ratifies the immediate and precedent application of the principles and standards of international law and the international treaties of the Russian Federation. Article 17 of the Constitution of the Russian Federation stipulates: "In the Russian Federation, human rights and individual liberties are recognised and guaranteed in accordance with the universally recognised principles and standards of international law and in compliance with the present Constitution". As far as the mass media are concerned, the legislative process in Russia has been directly affected by the instruments of international law on basic human rights and individual liberties, as well as by the final act of the Vienna meeting of the CSCE and the recommendations of the Information Forum which took place in London in 1989.

From this we may conclude that the Russian Constitution and current Russian legislation concerning the freedom of the mass media correspond to European and international standards. The Russian Federation will continue to strictly observe these standards when drafting new legislation concerning the mass media. This does not mean, however, that the process of developing and perfecting the judiciary system and other means of guaranteeing and protecting the freedom of the mass media, as well as the corresponding rights and freedoms of Russian citizens and other persons, and ultimately the rights of journalists, has ended in Russia. There remains an overall problem of immediate and crucial importance : how, in practical terms, to safeguard the freedom of the press as stipulated by the Constitution of the Russian Federation and other laws; in other words, how to continue the struggle for the freedom of the mass media.

Judicial guarantees are insufficient on their own. They operate within a global system of guarantees operating at material, matrimonial, political, spiritual, cultural, organisational and psychological levels, which either reinforce the judicial guarantees, thereby rendering them effective, or weaken them to the point of rendering them null and void. A distinction should be made amongst the judicial and constitutional provisions guaranteeing the freedom of the mass media, between the means which ensure the true freedom of the mass media, and the means which protect that freedom within the guarantee. It is the purpose of various institutions of the State to ensure and safeguard the freedom of the mass media. Of prime importance amongst these are the courts and the judiciary system to protect the freedom of thought, speech and information in the mass media. In operation since 1991 as part of the judiciary system of the Russian Federation, the Constitutional Court entertains special jurisdiction, as currently defined by article 125 of the Constitution of the Russian Federation and by the Federal Constitutional Law "On the Constitutional Court of the Russian Federation", which came into effect on 23 July 1994. The Constitutional Court of the Russian Federation has intervened during its course of practice in defence of the freedom of the mass media.

On 19 May 1993, the Constitutional Court of the Russian Federation examined and ruled on the constitutionality of the statutory order issued by the Soviet Supreme of the Russian Federation on 17 July 1992 against the newspaper "Izvestia", and on the individual appeal by members of the journalists' collective of the editorial staff of the newspaper against the above-mentioned order of the Soviet Supreme[4]. After the break-up of the USSR and the curtailment in 1991 of the publication of the Federal Parliament newspaper "Izvestia of the Soviets of the People's Deputies of the USSR", the journalists' collective independently and legally founded the independent newspaper "Izvestia" ; dissatisfied with this situation, the Soviet Supreme of the Russian Federation decided to launch its own

[4] *Congress of the People's Deputies of the Russian Federation and the Soviet Supreme of the Russian Federation, 1991, Bulletin N°31, article 1837.*

newspaper entitled "Izvestia of the Soviets of the People's Deputies of the USSR", on the same publishing basis.

In its ruling on the case, the Constitutional Court of the Russian Federation decided there were two sets of violations of the Constitution of the Russian Federation then in force.

Firstly, the Constitutional Court of the Russian Federation ruled that the Soviet Supreme, the representative of the legislative authorities, infringed the Constitution in usurping (for the purposes of founding its own newspaper) the powers of the higher authorities of the State executive (the President and the Council of ministers of the Russian Federation) over the management of State property (used by the journalists' collective and the Publishers of the "Izvestia" newspaper), and over the activities of the Ministry of the Press and information of the Russian Federation, by ordering the latter to take the necessary measures to register the newspaper, and to make the appropriate amendments to its articles of association for that purpose, and secondly, the Court ruled that the Soviet Supreme usurped the authority of the judiciary with regard to the settlement of disputes concerning the use of the aforementioned property, as well as with regard to the rights connected with the use of the titles of the newspaper, and to the way in which the newspaper was founded and registered.

The second set of violations of the Constitution noted by the Constitutional Court directly concerned the freedom of the mass media. Contrary to article 43 of the Constitution of the Russian Federation then in force, and to the Law of the Russian Federation "On mass media" dated 27 December 1991, it being recalled that the latter guaranteed the freedom of retrieval, reception, production and broadcasting of information, and only authorised limitations to such freedom where and when necessary in order to defend the constitutional system, and the moral values, health, rights and legitimate interests of other persons, the decision taken by the Soviet Supreme therefore also resulted in the forced transformation of the newspaper "Izvestia" from an independent publication into a publication of a political nature, thereby limiting its rights, and in contributing to exert pressure on the newspaper, made it difficult for the paper to exist as an independent mass medium.

The overall result was a restriction of the freedom of the mass media.

The Constitutional Court of the Russian Federation recognised that the statutory order of the Soviet Supreme of the Russian Federation on the newspaper "Izvestia" infringed several articles of the Constitution of the Russian Federation in force at that time, including a violation of article 43 which was specifically designed to safeguard the freedom of the press ; the Court therefore decided to reinstate the legal relations established on the basis of the above-mentioned statutory order of the Soviet Supreme of the Russian Federation as they existed

before the enforcement of the order in question. Since certain questions raised by the appeal brought before the Court by members of the "Izvestia" journalists' collective (such as the dispute over the authorised infringements of the rights of the publisher of a newspaper, over the violations of the professional rights of journalists etc.) fell within the scope of courts other than the Constitutional Court, it was decided to submit a memorandum to the Supreme Court of the Russian Federation, drawing its attention to the fact that immediate enforcement was necessary by the courts of article 63 of the Constitution of the Russian Federation, which guarantees the judicial protection of individual rights and liberties for all.

At this point, it is worthwhile underlining the major importance of the judiciary and constitutional guarantee on the freedom of the press. At issue is the limits that may be imposed on the freedom of mass media, as well as responsibilities of individual citizens, and the collective responsibilities of publishers and journalists. International law provides that the freedom to express one's opinions shall not infringe upon the rights of other persons. Paragraph three of article 19 of the International Treaty on civil and political rights stipulates that "the exercise [...] of these rights comprises specific duties and specific responsibilities". Paragraph two of article 10 of the European Convention on human rights and fundamental liberties stipulates that exercising the freedom of expression, "which comprises duties and responsibilities, may be subject to certain formalities, conditions, restrictions or sanctions provided for by the law, which form the measures necessary, in a democratic society, for national security, territorial integrity and public safety, for law and order and the prevention of crime, for the protection of public health and morals, for the protection of the reputation or rights of third parties, and to prevent the disclosure of confidential information or in order to guarantee the authority and impartiality of the judiciary".

In compliance with the norms of international law, the freedom of information in Russia is subject to certain constitutional limitations. It is prohibited to spread propaganda or incite hostility or social, racial, national or religious hatred; it is prohibited to spread propaganda promoting social, racial, national, religious or linguistic superiority; it is prohibited to disclose information about State secrets, a list of which is established by federal law (article 29, paragraphs 2 and 4). Exercising human rights and individual liberties must not infringe upon the rights and liberties of other persons (article 17, paragraph 3), such as the inviolable right to privacy (article 23, paragraph 1), in relation to which the gathering, storage, use and dissemination of private information is prohibited (article 24, paragraph 1).

The Law "On the mass media" contains provisions on the inadmissibility of violations of the freedom of the press in order to commit crimes, to disclose secrets protected by the law, to launch appeals to seize power, to promote change by force in the constitutional system, to arouse national intolerance or hatred on the basis of social or religious class, or to spread war propaganda etc. (article 4); the law also contains provisions restricting the dissemination of publications and

radio and television broadcasts of an erotic nature (article 37), of illicit recordings (article 50), and also contains provisions pertaining to the inadmissibility of violations of the rights of journalists (article 51) and of the freedom of the press (article 59), and to other rights.

Public opinion in Russia is increasingly alarmed by the situation in the mass media, in particular by the content of the news, the selection of news items and their interpretation. In certain mass media, freedom of information has occasionally resulted in anarchy and complete chaos. False information is spread, inciting social, ethnic and religious hatred, sanctions are not applied against those culpable of infringing individual rights and liberties when the freedom of the mass media is violated. In certain cases the public prosecutor takes no action, and does not respond to infringements of the Constitution or the Law. Examples of this type can be taken from the reports on the activity of the Court of Chamber on informational disputes with the President of the Russian Federation. This is an extremely serious problem, which requires separate discussion.

The issue of the freedom of the mass media has many theoretical and practical features. I hope they shall all be widely discussed, thereby contributing to the drafting of appropriate recommendations.

## IMPLEMENTATION OF CONSTITUTIONAL PROVISIONS REGARDING MASS MEDIA IN A PLURALIST DEMOCRACY

d. Statement by Mr Aleksey SIMONOV, Glasnost Defense Foundation, Moscow, Russian Federation

One important result of the Seminar in Cyprus is the following idea which could and should be implemented in a working project of one or more Committees of the Council of Europe : in April 1993 a London-based NGO called "Article XIX" published a book entitled "Press Law and Practice" containing a structurised depiction of laws and their implementation in 11 Western democracies including the United States of America, the United Kingdom, Germany, France, Canada, Australia etc... From Constitutional Provisions regarding mass media to specific legal frameworks for advertising or defamation - 22 separate items are included in the book. This structure gives the reader the opportunity to see both the whole picture of the legal situation regarding mass media in one democracy and to compare any part of it to others. This book provides a lead on these topics.

The legal situation in new democracies including the former Soviet Republics and former Socialist States is unclear and contradictory. The map of the area is also full of blank spots.

But the experience of one's neighbours is sometimes easier to understand, to adopt, to compare and to use. As the Seminar has shown, and it is not the first seminar which we have attended, the exchange of information on legal developments in the mass media field receives much attention and gives rise to enthusiastic discussion. But the members of the seminar often know the legal frameworks of Western media better than that of their next door neighbours.

So the idea is to adopt already existing experience and to publish a book covering the legal aspects of mass media with a view to emerging democracies. I would suggest that it should include 10 countries : Russia, Ukraine, Kazakhstan, one of the Baltic Republics, one of the Caucasian Republics, Czechoslovakia, Hungary, Poland, former Yugoslavia, and either Slovenia or Croatia.

The first step towards implementation should be a working session, where the European Commission for Democracy through Law should invite the potential authors of the book. The working session will work out the framework of the future book and the strategy of its publishing.

The book should be published in two (or three) languages : English, Russian and probably French. And the project could provide an additional grant for the countries who are interested in publishing this book in their own language. They will be given the copyright and the money for translation.

Glasnost Defense Foundation is ready to coordinate the publishing (translation from the original language of the authors, editing, marketing etc.) since they already have such experience. We are now publishing the Russian version of "Press Law and Practice". As the last chapter we are including the Russian Mass Media legal system, written by Professor Michael Fedotov - one of the authors of Russian Mass Media Law. Of course the project needs to be discussed more thoroughly but our experience shows that the general budget should not exceed 70.000 USD.

This is a practical result of our Nikosia Seminar and I hope that the European Commission for Democracy through Law and the other competent Council of Europe bodies will be as enthusiastic about it as the participants of this Seminar from the new democracies of Eastern Europe.

## FROM THE FREEDOM OF THE PRESS TO THE FREEDOM OF RADIO AND TELEVISION IN THE SWISS FEDERAL CONSTITUTION : THE LONG ROAD TO THE COMPLEXITY OF GUARANTEED PLURALISM IN THE MEDIA

e. Statement by Mr Michel ROSSINELLI, Lawyer, Dudan & Richard, Lausanne, Switzerland

## 1. Introduction

It was in 1848, at a time when the great liberal revolutions were stirring elsewhere in Europe, that Switzerland changed from a Confederation of States to a federal State, and adopted its first federal constitution. From the very beginning it guaranteed the freedom of the press, the latter being at that time the most satisfactory means of communication for the expression and exchange of political thought.

A classic freedom in every sense of the word, freedom of the press above all guarantees refrainment by the State from exercising right or privilege, so that each individual may transmit or receive information and ideas via paper supports. The model was not to be adopted for radio and television which, in Switzerland as in the other countries in western Europe, for a long time were to remain a state monopoly.

In this respect, the Swiss federal Constitution in its 1874 version comprises a rare feature in that, since 1984, under article 55 (b), it governs radio and television by instituting, in addition to the authority of the Federal State, a series of constitutional guarantees in favour of citizens and broadcasters, as well as duties (mandates) for broadcasters.

While article 55 (b) of the federal Constitution does not expressly guarantee the same liberty for radio and television as it does for the press, the issue of the freedom of these electronic media was at the heart of the debate which accompanied the drafting of, and subsequent voting by the people and cantons on that constitutional system.

The solution adopted in Switzerland is worth examining in that it would seem to illustrate the distance covered since the no doubt satisfying and spirited but over-simplistic approach of the old-fashioned liberals, who thought that in order to guarantee a freedom it was enough to demand that the State refrain from exercising right or privilege. For there is a breadth of conceptual development between the freedom of the press and the freedom of radio and television which, based on a simple subjective right of the individual requiring refrainment by the State, results in an institutional guarantee of freedom which not only warrants subjective rights, but also values and finalities - such as pluralism, the quality and impartiality of programmes, the diversity of the sources of information, the independence of the broadcasters - the observance of which most frequently requires intervention by the legislator.

## 2. Freedom of the press : the classic model

## 2.1 Definition

The text of article 55 of the federal Constitution of 1874 is exemplary in its concision, simply stating :

"The freedom of the press is guaranteed"

In every sense of the word, that freedom is classic in nature, since it guarantees individuals a realm of liberty in which the State must refrain from any intervention. The freedom of the press is the right for each and every one to create and disseminate the products of the press, as well as the right to receive the said products of the press in a free manner, that is, without prior authorisation or censorship on behalf of the State.

The means of expression protected by article 55 are first and foremost the products of the printed press : newspapers, periodicals such as weekly or monthly reviews and magazines etc., but also books, brochures, tracts and posters. The definition is much wider, however, since lithography, photography, typewriting and all the modern means of printing (laser printers etc.) are protected as soon as these processes are used to distribute multiple copies of words, signs or drawings. As a result, speeches recorded on magnetic tape, records, even letters, faxes and telegrams also have to be protected by the freedom of the press. In this respect a distinction may be made between a communication addressed to a number of addressees, and communication between two individuals - such as sending a letter or fax to a single person - which should be safeguarded more effectively by the freedom of expression or by personal freedom which, under Swiss constitutional law as interpreted by the federal Court, not only protects the physical freedom of individuals but also their privacy and other psychological values.

According to Swiss legal doctrine, freedom of the press is considered today as no more than a specific feature of the freedom of expression, and that no distinction should therefore be made with regard to the support used for that expression. It is quite obvious, however, that when the supports for expression are immaterial means such as radio waves, the constitutional protection is not the same since, as we shall see, the system established by article 55 (b) is quite different from that bestowed on the press by article 55 of the federal Constitution.

## 2.2. Limitations on the freedom of the press

It should be stated from the outset that individual liberties can never be seen as unlimited individual rights, whether in relation to other aspects of the law or to the State.

This can be easily seen in the relations between individuals, since it is quite obvious that one man's freedom stops where another man's starts. It is up to civil

and penal law to stipulate precise limits for the rights and responsibilities of each individual in so-called horizontal relationships. Demarcation of this type is obviously an extremely delicate affair, since it means balancing conflicting interests. For instance, when measures were introduced in 1983 into the Swiss Code of civil law to protect the legal status of individuals against media portrayal of facts concerning them, the federal legislator had to balance the interest of protecting the freedom of the media to inform, and the necessity of preventing a person's privacy from being directly impaired by misleading media portrayals of events in which he or she may be involved. The principle answer from the Swiss legislator to this conflict of interests was to grant a right of reply to persons whose privacy is directly affected in this manner by the media.

In vertical relations as well, that is, with reference to the State, freedoms are limited by the preservation of a certain number of fundamental values which are essential for protecting the existing institutions, and of the conditions vital for ensuring the serenity of the community.

In Switzerland, it has been admitted that only the safeguard of public law and order can impose a limit on the exercise of the freedom of the press. Traditionally, public law and order is defined as covering the following commonweal : public serenity, safety, order, health, and probity. In this way, only threats against the so-called commonweal might justify limitations on the freedom of the press.

One must admit that the Swiss political authorities and judiciary have more often been preoccupied with safeguarding the freedom of the press against restrictions of public order. In this way, the federal Court has ruled that preventive censorship by the State was inadmissible, and that an emergency intervention against an organ of the press could only be justified in order to counter a serious, direct and imminent threat to public law and order.

### 2.3. Assessment of the operation of the freedom of the press in vertical and horizontal relations : developments in the classic model

In general, it is possible to state that the freedom of the press, which has been part of the Swiss constitutional order for more than one hundred and fifty years, has guaranteed the independence of the paper media in relation to the State. In this way, in vertical relations, the classic model of the freedom of the press has operated both efficiently and with little difficulty in Switzerland.

The classic notion of the freedom of the press as a simple right to refrainment by the State from exercising right or privilege provides no protection against the horizontal dangers that threaten that liberty, that is to say, in basic terms, the risk of the organs of the press being concentrated in the hands of a small number ; which in turn means the loss of pluralism and diversity in the press in a given region, and even in a country as a whole.

The very existence of such a concentration of the press in many democratic countries, as well as the measures which have had to be taken in the States in question to try to control the phenomenon, has led constitutionalists to revise the classic, liberal model of the freedom of the press in order to integrate a more complex system, which guarantees not only subjective rights to distributors and to their public, but also a certain number of values which the State must protect by legislative intervention, the ultimate aim of which is the safeguard of freedom as an indispensable institution in a liberal, democratic State.

The analysis of liberty as an institution has been most extensively developed in federal Germany, both in doctrine and in the jurisprudence of the constitutional federal Court of the country. It is also present in the doctrine and the jurisprudence of many other countries in western Europe, and its most exemplary and effective concretisation has no doubt been in the freedom of radio and television over the last few decades.

## 3. The complex model of the freedom of radio and television: freedom as a subjective right and an institution

### 3.1. From monopoly to freedom in radio and television

In Switzerland as elsewhere in Europe, radio and then television were controlled by a state monopoly which nobody dreamed of contesting. The SSR (the Swiss broadcasting company) was granted a concession as a public utility by the Confederation when the latter was only technically competent in radio broadcasting, and in no way sufficiently competent to control radio and television programmes, which it nonetheless did from the outset, and without too much afterthought !

It was only in 1984 that the Swiss constituents (people and cantons) accepted, after refusing on two previous occasions, to grant the Confederation the right to legislate on radio and television.

Article 55 (b), which was introduced on that occasion into the federal Constitution, is complex and subject to different interpretations in doctrine. Some commentators have estimated that the absence of an explicit guarantee of the freedom of radio and television in that constitutional provision meant that such a freedom was not guaranteed in the Swiss legal system. On the other hand, other commentators have considered that the effect of the new constitutional standard was to render articulate and reinforce the freedom of radio and television hitherto implicitly guaranteed. In this respect, it is worthwhile indicating that the Swiss Constitution does not contain a catalogue of exhaustive provisions protecting the fundamental rights of citizens, just as most of the other constitutions adopted in the twentieth century. Freedoms as basic as personal liberty or the freedom of

speech are not even mentioned in the text of the Constitution. This is why, in an act of creative and audacious jurisprudence which met with remarkably wide approval, the federal Court consecrated as unwritten constitutional rights liberties which, in the general opinion, ought to be protected by the federal judiciary. As a result, the fact that a liberty is not explicitly consecrated in the text of the federal Constitution does not infer therefore that it is not guaranteed.

It is true, however, that the freedom of radio and television is deliberately not guaranteed in explicit terms, in order to make a distinction with the freedom of the press. Article 55 (b) does not guarantee a subjective right for broadcasters to obtain a permit to transmit, and we shall see that the legislator, by concretising this constitutional standard, has chosen the concessionary system for the broadcasting of radio and television programmes, thereby leaving applicants for concessions without any legal course of appeal against an eventual refusal from the administration.

### 3.2. Article 55 (b) of the federal Constitution

The text of this constitutional provision is as follows :

a) Legislation concerning radio and television, as well as other forms of public broadcasting of productions and information via telecommunication techniques is the authority of the Confederation.

b) Radio and television contribute to the cultural development of their audience and viewers, to the free formation of the opinion and to their entertainment. The two media take into account the specific nature of the country and the requirements of the cantons. They faithfully portray events, and fairly represent the diversity of opinions.

c) The independence of radio and television as well as the freedom with which programmes are designed are guaranteed within the limits stipulated in paragraph 2e.

d) The task and situation of the other means of communication, particularly that of the press, will be taken into account.

e) The Confederation hereby creates an independent authority whose role is the examination of complaints.

### 3.3. The guarantees for the freedom of radio and television in article 55 (b) of the federal Constitution

The first paragraph of the article in question simply institutes the authority of the Confederation in the area, and therefore makes no contribution to the discussion on the freedom of radio and television.

On the other hand, the second paragraph would seem to concretise the freedom of communication in its institutional dimension, since it tends to guarantee pluralism

in favour of radio audiences and TV viewers, who have the right to diversified information of quality, which faithfully portrays events. These rights of the target public of course represent duties for the distributors, and therefore imply a certain restriction on the subjective rights of the broadcasters. This restriction, however, is the converse of the right to transmit granted only to a small number of broadcasters, for reasons which are still technical on occasion, but which are above all economic and increasingly so, in that a market such as Switzerland is too small to enable the economic viability of having too many private broadcasters.

When it is possible, for example in local broadcasting, to authorise a large number of broadcasters, pluralism can be achieved no longer internally, but externally. This means that pluralism is obtained by having a large number of broadcasters producing a variety of programmes, and no longer by having pluralism within a few radio and television channels broadcasting nation-wide.

This therefore means that the more independent broadcasters there are, the closer the model for radio and television can be to that of the press.

Paragraph three guarantees the freedom of broadcasters within the limits of the obligations of pluralism imposed on them in a system of limited competition. This liberty is a truly subjective right of constitutional nature, which prohibits the State from interfering with the independence of broadcasters and their autonomy in the production of programmes.

Finally, paragraph five established an innovative system, since it enables citizens to complain about a programme which does not comply with the requirements of pluralism and the exactitude of information that each broadcaster is obliged to observe. This multi-level procedure is governed by the federal Law on radio and television dated 21 June 1991.

### 3.4. The federal Law on radio and television, dated 21 June 1991

With this federal law we may say that the freedom of radio and television is governed in a classic manner in Switzerland today, since that freedom is limited on a formal legal basis on the grounds of public interest, including the upholding of pluralism, the supply of information of quality and the development of a diversified audio-visual environment which is economically viable.

The fact that the concessionary system was chosen in order for broadcasting rights to be granted no doubt leads one to suppose that the freedom of radio and television is still only partially guaranteed in Switzerland. Indeed, if for technical and economic reasons, it is admissible that not everyone can be allowed to freely broadcast programmes at will, it should be clearly stated that the system of authorisation with a right to appeal against negative decisions from the

administration - on grounds such as the inequality of treatment, the absence of public interest justifying the refusal, or infringements of the proportionality principle - would quite clearly be much more in harmony with the concept of the freedom of radio and television.

The fact that concessions are delivered by the federal Council, i.e. the federal executive, may make foreign jurists shudder. In the Swiss government of concordance, however, which combines the main political forces of the country in the executive, the risk of decisions being taken based on purely partisan points of view would seem small. In addition, as a general rule, concessions are granted further to a public tender, which fosters greater transparency in the choices made by the executive.

The model chosen by the federal legislator is that of a system of competition at local and international level. On the other hand, at the national level or, more precisely, at the linguistic regional level, the SSR was granted a special status since other broadcasters can only obtain a concession at the national level or at the linguistic regional level if their broadcasting does not prevent the SSR from fulfilling its specific assignment ; amongst other features, this comprises the broadcasting of radio and television programmes in each of the national languages and taking into account the specifics of the country and the requirements of the cantons.

The SSR must also foster Swiss productions and contribute to the free formation of public opinion, particularly by adopting a policy of providing sound information giving priority to events of national interest or to events concerning the linguistic region in question.

This specific assignment of the SSR, as laid down in the federal law of 1991 which recognises the right of the SSR to obtain a concession, reveals the concern of the legislator in a small country split into four linguistic regions to foster national cohesion by offering citizens programmes which inform them about the specific realities of their country. This ultimate concern for the public interest would seem to be present in every small country, all of which fear the attractiveness of the programmes broadcast by their larger neighbours, since there is no common measure between the financial resources available for radio and television when a broadcasting company targets, for instance, a potential viewing audience of 50 million, or as in the case of French-speaking Switzerland, of only one million viewers.

Political, financial and technical constraints such as these are the reasons behind the decision taken by the legislator to give precedence to one broadcaster with a specific assignment. It is generally admitted that the Swiss market is too small to enable the economic survival of several broadcasters on a national scale or on that of the linguistic regions.

### 3.5. The guarantees for the freedom of radio and television in the federal law

#### 3.5.1. Freedom of broadcasters

The freedom of broadcasters is guaranteed by the federal Law of 1991. Companies can freely design their programmes and are responsible for them. In principle, unless otherwise specified by another provision in a federal law, broadcasting companies are bound by no instruction from the federal, canton or municipal authorities and none can invoke the federal law of 1991 to demand that a broadcaster transmit a given programme or item of information.

Against this background, radio and television have a common mission to achieve in terms of the free formation of the opinions of its radio audience and TV viewers. As has been indicated above, this diversity and pluralism can result from a situation of external pluralism or, when only a few broadcasters has been authorised, by their accepting the responsibility of ensuring pluralism and diversity in their own programmes.

In this way, while the freedom of radio and television in Switzerland does not guarantee a certain right to obtain an authorisation to broadcast, once the latter has been granted in the form of a concession, the broadcasting company is guaranteed freedom of action, the scope of which must depend only on the scope of the external pluralism achieved in a competitive system.

#### 3.5.2. Freedom of recipients

Two principle features of the freedom of recipients of radio and television programmes are explicitly mentioned in the federal law of 1991: the freedom to receive and the right to complain about an infringement by a broadcaster of the principles underlying the production of programmes.

Article 52 of the law guarantees the freedom of reception in the following terms:

Each individual is free to receive any Swiss or foreign programme which is addressed to the general public.

This freedom entails the right to receive information and opinions without intervention by the authorities, and the courts - particularly the administrative courts - have had the occasion to point out that freedom also includes the means to tune into programmes using parabolic antennae. While it may be quite possible on aesthetic grounds to prohibit the installation of parabolic antennae in an area worthy of protective measures, on the grounds of proportionality that ban can only be limited to a portion of the territory, such as a site or district of historic importance, and in no way may be applied to whole areas of the territory.

In addition to the right to receive programmes, which is quite naturally an essential feature of the subjective rights of recipients entailed by the freedom of radio and television, the law of 1991 has set up a much rarer system based on paragraph five of article 55 (b) of the federal Constitution, which enables individuals to lodge complaints about a radio or television programme.

The procedure begins by registering the complaint with a mediation service, which must be set up by every broadcaster. If settlement is not obtained at this level, any natural person may lodge the complaint with the independent broadcasting authority, subject to the condition that the programme in question personally involves the plaintiff, or that at least twenty people support the complaint. If the broadcasting authority admits an infringement has taken place, it requests the broadcasting company to take all the requisite measures to remedy the infringement and exclude its repetition. This stringent system of supervising broadcasting companies does not appear to have been misused by the citizens, nor to have given rise to "liberticide" decisions on behalf of the broadcasting authority, which was chaired, amongst others, by a journalist and by a professor of constitutional law who is also a specialist in fundamental rights. Since an appeal has been lodged with the federal Court, however, against rulings by the broadcasting authority, certain decisions of principle have occasionally appeared to be somewhat lax on behalf of the broadcasters, who feel that the detailed scrutiny of compliance with pluralism in the context of a legal procedure is far removed from the real working conditions of journalists, who have to evaluate that requirement in the heat of the moment as well as quickly supply information.

This being said, procedures of this type are still the exception to the rule: for French-speaking Swiss radio and television, since the entry into effect of the law two and half years ago, 31 complaints have been lodged, 23 of which have been settled by the mediator (3 claims are currently outstanding), and 5 complaints only have been forwarded to the independent broadcasting authority.

## 4. Conclusion

From the freedom of the press to the freedom of radio and television, there is not only a change from a simple structure to one which is complex, but also the switch from a State as a keeper of law and order to a social State concerned with providing citizens with services, and therefore to a State which is much more interventionist in the daily lives of citizens.

The danger, of course, would be to give up the basic guarantees resulting from the conventional subjective and individualistic concept of freedom, in exchange for a concept which would only consider freedom in terms of obligations for the legislator or, in other terms, as mandates for the State.

In Switzerland, under the current situation, the freedom of radio and television gives precedence to the rights of the recipients of that freedom, and to its institutional dimension. Nothing in the future, however, above all if a system of external competition can be set up, need prevent improvements being made to the guarantees governing the subjective rights of broadcasters, in particular by allowing the judiciary to check the validity of decisions taken to grant broadcasting authorisations.

## FREEDOM OF SPEECH IN SPAIN

f. Statement by Prof. J. J. SOLOZABAL ECHAVARRIA, Universidad Autonoma, Madrid

It is easier to explain the nucleus of the Constitutional Court's doctrine on freedom of speech from the perspective of a double distinction. In the first place, there is a distinction, whose logic is assumed and integrated into Article 20(1)(a) and 20(1)(d) of the Constitution in spite of the fact that at times it is not easy to differentiate one type from the other, between freedom of speech or the right to freely express ideas and opinions, on the one hand, and the right of information or the freedom to transmit events or news, on the other. Information is normally seen from a valued, ideological perspective and the ideological category normally accompanied by substantiating facts. But I insist that in the constitutional court it is understood, as a principle, that it is possible to transpose any concrete claim deriving from freedom of speech in the broad sense to a case of freedom of ideas with the right to information. The second distinction of importance is between what is an affair of public importance (i.e. political speech) and what is solely private material, in terms of either the nature of the speaker or of the object of discussion.

The overall problem of political speech is very important and refers concretely, first, to the determination of limits in circumstances where the distinction between the social and the political is very difficult and could lead to the acceptance, for example, of non-political public figures and, in the second place, refers to possible justifications for such limits. This last element demands that a balance be struck between competing interests. On these questions, we cannot go into more details here, nor into an important question which would serve to illustrate the different facets of this problem, namely the weighing of free speech against the reputation and honour or the right to privacy of those concerned.

The distinction is of prime importance, because in cases of public interest there will result a greater extension of the constitutional protection, of freedom of speech, weighed against the demands of respect for the reputation or privacy of others.

This double distinction between information and opinion, and whether the question is of public importance or not, is of great importance for understanding the doctrine of the limits of freedom of speech and, similarly, for understanding the manner in which conflicting claims to freedom of speech and to other rights and freedoms protected by law are weighed the one against the other.

As is well-known the essential condition that information be true in order to enjoy constitutional protection is based on the understanding of truth as an intrinsic limitation on the right to provide information and not on the basis of a mandatory rule of pluralism or as an institutional guarantee that attempts at the truth will be protected. In this respect Spanish Law was interpreted in a misplaced manner - as can be seen in the important Decision 6/1988 of 21 February in the case Filtraciones a "El Pais". The Constitutional Court characterised freedom of information as the right for all to communicate true events and true conduct extending to circumstances where errors might have resulted, as long as its accuracy was checked with reasonable care.

In this way, our jurisprudence aligns itself with those who in cases of public importance or political speech concede constitutional protection to erroneous information communicated in good faith and without negligence.

For this, the constitutional requirement of the truth supposes that the informant has - if he wants to place himself under the protection of Article 20(1)(d) - a special obligation to report the truth of events discovered through opportune investigations and using the diligence required of a professional. It could be that in spite of this the material is erroneous, and this can obviously not be totally excluded. Truthful information as insisted upon in Decision 105/1990 means therefore that information is checked according to the canons of journalistic professional standards, and does not contain inventions, rumours or mere slander.

This makes it clear that the constitutional court, at least when it is dealing with a public affair where free speech conflicts with the reputation of another person, only leaves constitutionally unprotected such lies or false information as could not have been discovered by the exercise of due professional competence. On the other hand, the truth does not operate as a limitation on the freedom to express one's opinions, as these cannot be similarly measured against reality. In this case, the limiting consideration is whether the words constitute an insult or a seriously injurious expression whose use is moreover gratuitous in the communication of an opinion or in the context of an open debate.

c. Summary of discussion

Mr Papadopoulos, Chairman of the Council of Europe's Steering Committee on the Mass Media, informed the participants about the results of the 4th European Ministerial Conference on Mass Media Policy which had just been held in Prague on 7-8 December 1994. The Ministers stressed that freedom of expression, including the freedom of the media, is one of the fundamental conditions of a genuine democratic society, and that respect of the freedom of the media in accordance with Article 10 of the European Convention on Human Rights is one of the decisive criteria for assessing applications for membership of the Council of Europe. In order to enable Central and Eastern European countries to meet these standards, the Ministers decided to intensify their support for the democratic reform of the media in this area. The Ministers adopted a number of resolutions, among them a resolution on the future of public service broadcasting in which participating States undertake to guarantee the independence of public service broadcasters against political and economic interference and a resolution on journalistic freedoms and human rights. The rights of journalists have of course to be balanced against the rights of others, but in case of doubt priority has to be given to a defence of the freedom of journalists. Self-regulation is to be preferred to legislative interference. Under the resolution adopted, any interference by public authorities with the practice of journalism must :

a. be foreseen in the complete and exhaustive list of restrictions set out in paragraph 2 of Article 10 of the European Convention on Human Rights ;
b be necessary in a democratic society, and reply to pressing social needs ;
c. be laid down by law and formulated in clear, precise terms ;
d. be narrowly interpreted ;
e. be proportional to the aim pursued.

The Committee of Ministers of the Council of Europe recently adopted Recommendation No. R (94) 13 on measures to promote media transparency, containing guidelines intended to guarantee and promote media transparency.

Ms Gorgiladze drew attention to the need for journalists to take into account how their reporting was understood by the general public. She also recalled their personal responsibility to ensure objective reporting.

Mr Toledano Laredo said that it had already been stressed how difficult the transition from the docile citizen to the informed citizen was in the countries of Central and Eastern Europe. The first step was to set up the appropriate legal instruments for guaranteeing the freedom of the press, but even more difficult than establishing the rules was applying them in practice. In this context he was intrigued by the Court Chamber on Informational Disputes established under the authority of the President of Russia. He would like to have more information on this body from Professor Vengerov, in particular as to how its independence was assured bearing in mind that it had been established by the President.

Not only countries in transition but all countries had many problems with freedom of the press. One important issue was the protection of privacy. In France, for example, for the first time a photo of President Mitterand's illegitimate daughter had been published by the Press, an example of conduct which until now had been very unusual in France but quite common in the United States. In Italy, the audiovisual sector did not yet have appropriate regulation. Then there was the problem of subliminal images to be discussed. In general, self-regulation by journalists is preferable to legislative interference. Why not have a code of ethics for journalists, as is the case for doctors and lawyers ?

Mr Simonov said that in practice the conditions for media freedom were not as idyllic in Russia as they had been described during the discussions concerning Switzerland or Spain. He wanted to give three examples of this :

1. In a recent survey of 1800 journalists, 25 % had stated that they suffered pressure from civil servants or the State power in general.

2. On 24-25 November, two Turkmen journalists working in Moscow for Radio Liberty had been arrested with a view to extradition to Turkmenistan. The legal basis of the arrest had already been the Minsk Agreements, but Turkmenistan was not even a party to the Minsk Agreements.

3. All information on Chechnya was now controlled by a provisional information centre, working without any rules and arbitrarily giving or refusing accreditation to journalists.

Mr Vengerov said that the Court Chamber on Information Disputes established by the President of Russia was a very complicated body. Even if established by the President, it was completely independent from him. The President was the Head of State and not the head of the Executive and he had established the Court Chamber in his capacity as guarantor of the constitutional order.

The Court Chamber was a court. It was composed of 7 judges including 4 lawyers and 3 journalists, and it followed legal procedures. For example, it had the possibility to call witnesses. If journalists violated journalistic ethics, the Court Chamber could point to a violation of deontological principles. With respect to the administration, it had more powers and could discharge and dismiss State officials who had violated freedom of speech. Recently the Court Chamber had fired the Deputy Head of Administration for the Far East. The Court Chamber could take up cases on its own initiative, or following complaints by journalists or by public bodies. For example the region of North Ossetia had complained that the newspaper "Izvestia" in its reporting was very partial towards another region of the North Caucasus, Ingushetia. The Women's Group in the Russian Duma had

complained that there was no protection against offensive remarks referring not to individual deputies but to groups of deputies.

The Court Chamber co-operated with Mr Simonov's Glasnost Defense Foundation. Recently, a joint warning against violations of freedom of information had been issued by Glasnost Defense Foundation and the Court Chamber.

The rapporteur, Mr Halmai, said that the problems of the countries of Central and Eastern Europe could obviously not be solved by the law alone. However, there was no alternative to enforcing the external and internal guarantees of media freedom through the law. There were internal guarantees, like the judicial review system, in particular through the Constitutional Court ; in the discussion the examples of Lithuania, Russia and Hungary had been illustrated. Then there were the external controls, in particular the European Commission and the European Court of Human Rights. The Court had made some important decisions on the limits on freedom of expression among which the Castells case and the Lingens case were of particular interest. These limits might sometimes appear very wide, but he was of the view that future limits on freedom of expression would be wider in the countries of Central and Eastern Europe.

## Third session

## LEGISLATIVE GUARANTEES OF THE PLURALITY OF INFORMATION SOURCES IN THE FACE OF MEDIA CONCENTRATION

A. Report by Statements by Mr Karol JAKUBOWICZ, Institute of Journalism, University of Warsaw, Chief Expert, National Broadcasting Council of Poland

B. Statement by Mr Genc TIRANA, Secretary of the Association of Professional Journalists of Albania

C. Summary of Discussion

**Legislative guarantees of a plurality of information sources**

a. Report by Mr Karol JAKUBOWICZ, Institute of Journalism, University of Warsaw Chief Expert, National Broadcasting Council of Poland

## 1. Background

Article 10 of the European Convention of Human Rights states that "Everyone has the right to freedom of expression. This shall include the right to ... impart information and ideas without interference by public authority and regardless of frontiers". In terms of society-wide communication we must, of course, recognize freedom of the press as a basic prerequisite of a plurality of information sources. At the very least, therefore, legislative provisions in this regard must create a legal framework providing for freedom of expression and of the press, based for example on Article 10 of the European Convention of Human Rights.

In line with this article, resolution No 2 "Journalistic Freedoms and Human Rights", adopted by the 4th Ministerial Conference on Mass Media Policy, organised by the Council of Europe in Prague (7-8 December 1994) calls for :

- unrestricted access to the journalistic profession ;
- genuine editorial independence vis-a-vis political power and pressures exerted by private interest groups of by public authorities ;
- and restriction of any interference by public authorities with the practice of journalism only to cases foreseen in Article 10, on the additional condition that they (i) are necessary in a democratic society, (ii) reply to a pressing social need, (iii) are laid down by law, (iv) are narrowly interpreted, and (v) are proportional to the aim pursued.

It is accepted that a democratic social system must involve the existence of a plurality of independent and autonomous media which reflect a diversity of opinions and ideas and meet the interests and expectations of the public. The Committee of Experts on Media Concentrations and Pluralism operating under the auspices of the Council of Europe has defined pluralism as the scope for a wide range of social, political and cultural values, opinions, information and interests which find expression through the mass media.

This concept of a plurality of information sources thus involves :

- pluriformity : the existence of different media with different ownership, goals and legal structures, and
- pluralism of content, involving the media's obligation to reflect and provide facilities for the expression of different points of view (political and otherwise) including critical and oppositional ones.

## 2. Three models of media plurality

In line with the above-mention resolution No 2 of the Prague Ministerial Conference, any legislative guarantees of a plurality of information sources - which do, after all, constitute a case of interference by public authorities with

absolute freedom of the press[5] - can be justified only by being described as necessary in a democratic society[6].

However, there are many who would challenge the view that such guarantees are indeed necessary and justified. It is argued that as a "free marketplace of ideas", the media should be subject to no regulation. A corollary argument is that the media should be governed by the same rules as all other businesses and no special regulations should be applied. To this is often added the view that in any case pluralism is a natural result of economic and technical processes and that therefore no interference by public authorities is required to safeguard it.

Thus, we can distinguish three basic models for delivering media pluriformity and diversity of media content : the pure market model ; the new media model ; and a public policy model which assumes some degree of interventionism into the operation of the media.

We will begin with the models based on the assumption that no special action to ensure plurality is necessary.

The Pure Market Model

This is based on the premise that the free operation of supply and demand provides access to the media for all "voices" which can pay for it, as well as ensure a supply of content relevant to all consumers. This advertising-based pure market model is said to contribute to diversity by seeking to match the media content to the composition of the given consumer market. This results in market segmentation, with different media seeking to appeal to various groups, because advertising messages must be tailored as much as possible to the given audience and must match its "demographics". Since media distribution and content patterns are inclined to follow lines of income and of locality, advertisers can choose vehicles for their messages in order to reach diversified target groups in a way which suits their own needs. Since socio-economic variation also often correlates

5 *Some view such interventionism and public policy designed to ensure pluralism as an ..... restriction on freedom of expression. The European Commission's Green Paper on Pluralism and Media Concentration in the Internal Market calls pluralism a "concept whose purpose is to limit in certain cases the scope of the principle of freedom of expression with a view to guaranteeing diversity of information for the public". It may be necessary, in certain cases, to limit application of the principle of freedom of expression - the Green Paper says - because it would result in preventing another beneficiary of that freedom from using it. "Thus it is possible in the name of pluralism to refuse a broadcasting licence or permission for the takeover of a newspaper, a monolithic corporate structure, a holding in a media company, etc." (pp. 15-17).*

6 *Views on what is necessary in a democratic society may change with time. This is shown by the fate of the American Fairness Doctrine, introduced at one time to ensure internal pluralism in broadcast media content and then eliminated on a wave of deregulation under Reagan as unwarranted interference into the freedom of the broadcaster.*

with political differentiation, the advertising market variant has some potential for meeting the main requirements of political diversity.

This is basically the model of external pluralism (also known as horizontal pluralism), in which diversity of content is provided by separate media, existing alongside one another. This model accordingly excels in producing numerical pluralism, i.e. a great number of newspapers, radio and television stations, satellite and cable channels, etc., provided of course that the market can sustain them.

The pure market model naturally favours concentration of capital and ownership in the media (see Appendix for a definition and a list of types of such concentration). At a time of free trade and free movement of capital (as within the European Community, for example) and globalisation of media operations, it is argued (and not without justification) that media concentrations may be needed to ensure the emergence of financially strong companies able to take part in international competition and prevent the domestic market from being taken over by foreign media.

Large media groups may promote pluralism simply as a business strategy, i.e. by diversifying their media outlets and establishing new newspapers, radio and television channels etc. to reach various audience groups (e.g. by creating within one conglomerate newspapers representing quite different orientations in order to achieve greater profits by serving diverse publics). Such a strategy can be aided, within a larger concern by cross-subsidizing low-profit media which would not otherwise be able to survive alone in the marketplace. Also, they have the capital, management, and research and development capabilities to allow them to overcome high barriers to market entry and establish new media outlets.

### The New Media Model

This model is based on the view that the profusion of channels created by new technologies - cable television, satellite television (now boosted by signal compression) - encourages senders to seek profitability by identifying market niches and serving audiences neglected by other media. This profusion of thematic, narrow-cast, specialized channels has been said to promote the birth of "personal media", allowing viewers to select content precisely attuned to their needs, tastes and interests.

However, studies show that some minority audiences which do not constitute an attractive advertising target are still neglected by the new media. To this must be added two other consequences of new media operations which militate against pluralism in society :

a. Where the receivers do take advantage of the profusion of choice offered by the new media, they fragment the audience and promote non-communication among various groups which may live in diverse, self-contained symbolic universes ;

b. Much more common, however, is a tendency of viewers to use a profusion of choices in order to screen out unfamiliar content and stay on safe, familiar territory, so the end result may be superficially varied but politically and culturally homogeneous in content.

Today, with the coming of information superhighways, Video on Demand and other new technologies, both types of their use will be facilitated.

The Public-policy Model

The above two models are seen by many as inadequate for the purpose of safeguarding plurality of information sources. To the pure market model of media pluralism, a number of fundamental objections are raised :

a. Media forming part of larger groups are not independent and autonomous in their editorial policy, but are controlled by the mother company which in this situation could be described as the real "sender", with the other media (especially television) serving to a large extent as distribution channels for content produced or determined elsewhere. This may result in a reduction in the number of information sources and in uniformity of content.

b. The pure market model produces freedom of the press for its owners, denying this freedom to disadvantaged individuals, groups and segments of society which cannot afford to establish their own media and do not constitute an attractive enough advertising market for someone else to establish media catering to their needs. Domination of a market by some companies or groups may in general exclude new independent entrants or weaker competitors from it.

c. The pure market model does not really produce representative socio-political-cultural diversity including critical and oppositional voices. Rather, the predominant trend will be towards a superficial variety of the same politically safe contents ("corporate speech"), differently packaged for different groups of consumers. Advertising as the main or only source of funding reduces the supply of "minority interest" programmes of aesthetically and intellectually challenging themes, and of politically controversial material, because these fail to achieve top audiences.

d. Media concentrations may make small cultural entities ("small" countries, regions) dependent on the strength of major media groups, some of them foreign.

e. Considerations of pluralism apart, media concentrations give individuals or groups in control of large media conglomerates extensive power to influence or manipulate public opinion, including the power to withhold information which is not in the interests of the owners.

In Central and Eastern Europe, the advertising-driven process of media pluralisation will take a long time to work, especially in the broadcasting sector where :

- small and relatively poor markets cannot sustain many specialised broadcasting outlets ;
- commercial broadcasting is only beginning, which means that it will take a long time for the new companies to accumulate capital enabling them, should they want to do so, to introduce narrow-cast channels which may be financed while slowly becoming established ;
- minorities are in many cases either too small or too poor for commercial broadcasters to be interested in setting up media for them.

3. The market-cum-public policy model

These and other arguments are used to justify the application of the public policy model which assumes supplementing the market model by means of public intervention into its operation so as to promote pluralism. Clearly, this does not mean public ownership and control of all the media, but measures designed to correct some deficiencies of the pure market model and modify its functioning to some extent. It is based on a recognition not only of freedom of speech, but also of the need - and indeed right - of all social groups to communicate. Intervention into the operation of the media so as to safeguard the right to communicate is seen as not only necessary in a democratic society but also necessary for the very functioning of democracy. This in turn is seen as implying an obligation on the part of public authorities to create at least minimum legal conditions for the exercise of this right.

In Europe, the fundamental feature of the public policy model in the area of broadcasting is the preservation of the dual system, combining commercial stations with legally mandated and protected public service broadcasting. Those are under an obligation to operate on the basis of internal pluralism (also known as vertical pluralism), in which there should be pluralism of content within one channel or one media organisation.

Apart from that, this intervention takes the form of a wide variety of other legal and administrative measures designed to regulate the desired features of media ownership.

It is interesting to note that a 1982 review of European press law (Statutory Regulation and Self-Regulation of the Press, Mass Media Files No 2, Council of Europe, Strasbourg) provides no indication that constitutional or legislative systems of press regulation existing at that time dealt with the question of media ownership or concentration[7]. At that time, broadcasting was still a State monopoly in most Western European countries, so market-driven media concentrations encompassed only the print media. Clearly, this "monomedia concentration" was not considered a major issue. A similar review published in 1992 (Press Law and Practice : A Comparative Study of Press Freedom in European and Other Democracies, Article 19, London) shows that the issue is dealt with in the legislation of a number of countries, either in media laws or in some other legislation[8].

The difference between the two periods springs from the fact that in Western Europe and elsewhere the early 1980s saw a process of liberalisation, demonopolisation and "deregulation" in broadcasting, setting the stage for multimedia concentrations, encompassing both the print and broadcast media. It is the concerns raised by this process which most likely account for the spate of new legislation on media ownership in the second half of the 1980s.

Below we review some provisions in national laws and regulations designed to ensure a plurality of information sources in a number of ways : by promoting internal pluralism (pluralism of content within one medium) ; external pluralism (many different media speaking with different voices) ; by curbing concentrations ; and by enhancing transparency of the media market.

You could say that internal pluralism is the only case of real pluralism because it exposes the whole audience to diverse content, and so promotes communication among different groups. External pluralism creates mainly communication within groups, with the groups talking to themselves, but not to one another.

Let us note here that some countries have adopted no policies to promote media plurality or curb media concentrations. Where such measures are applied, they are selected and designed in a manner dictated by the conditions prevailing in the particular country. What follows is a list of options (illustrated by selected examples) from among which the solutions best suited to particular countries may be chosen.

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[7] *In fact, such provisions existed in the legislation of some countries. They were introduced in the U.K. in 1973 and in Ireland in 1978. In most cases, however, regulation of ownership was indeed introduced in the 1980s.*

[8] *These provisions must differ from those in anti-monopoly laws. Media concentrations are a special case : various media may appear to be quite different, but operate in the same field (provision of information and definitions of reality).*

A. Internal Pluralism : Rules on access to possibilities of communicating

These include :

- producer access, e.g. the obligation imposed in the "Television Without Frontiers" Directive of 1989 that broadcasters devote at least 10 per cent of air time or 10 per cent of their production budget to programmes produced by independent producers, or the American prime time access rule, providing for preferred opportunities to gain access to broadcast time in prime time ;
- access by political parties or candidates ; different forms of "free expression" ;
- access by specific minority groups (on cable television) ;
- conditional access, e.g. the American Fairness Doctrine (no longer observed), obliging the broadcaster, when views on a controversial question of public importance are expressed in his programming, to air views of other sides on the same issue ;
- public access channels (on cable television).

B. External Pluralism

a) Methods of facilitating market entry for potential new communicators and media and of lowering financial barriers to media operators

In a technique described as "ownership access", the Federal Communications Commission of the US adopted in the 1970s a policy that provided tax incentives and advantages in comparative hearings that would result in the transfer of some existing radio and television licences to minority owners or businesses controlled by members of minority groups.

Lowering financial barriers involves the introduction of lower postal tariffs, lower VAT (e.g. on subscription and single-copy sales) or tax exemptions for the media (e.g. lower tax on advertising), reduced telephone rates, etc.

b) Provisions to modify market competition to protect weaker media organisations and to ensure their continued existence

One particularly well-known example is the Swedish system of supporting the printed press by measures which help cut their costs, such as exemptions from VAT ; preferential tax rates with regard to advertising revenue (smaller publications are exempt from tax on advertising revenue under a certain threshold) ; government communications and advertisements are published in all newspapers (paid for out of the proceeds of a tax on advertising revenue) ; preferential postal rates ; prohibition or limitation on advertising on radio and television in order to protect the printed press ; subsidies designed to safeguard newspaper plurality by

offering direct subsidies to "low-coverage" newspapers, i.e. those with not more than 50 % coverage in their place of issue (provided they have more than 200 subscribers) ; support for the establishment of new publications ; development support - especially for press undertakings in sparsely populated areas, even if they are in a monopoly position ; modernisation support in the form of credits and support for joint distribution, printing and advertising networks of newspapers.

This category also covers French associative radio which can receive subsidies from a special fund if it declares non-commercial programme goals and undertakes to derive less than 20 per cent of its budget from advertising.

C. Provisions to Restrict Media Concentration

These include :

a) Restrictions on multiple ownership in the same medium : in order to prevent a situation in which a single business controls or influences several media of the same category (newspapers, radio, television), certain national laws prohibit the cumulation of radio or television broadcasting licences, holdings in other broadcasting companies[9], or circulation in excess of a certain market share for all daily newspapers, or require that prior consent is obtained before a particular circulation figure is exceeded.

b) Restriction on multiple ownership across several media : in order to prevent the same operator from controlling or influencing several media of different types, certain national laws prohibit the possibility of owning a broadcasting licence or acquiring holdings in a broadcasting company if the applicant exceeds a certain press circulation figure[10]. These restrictions also exist between television and radio in some countries[11].

c) Restriction to a fixed maximum level of the first holding in a broadcasting company : some laws restrict the maximum stake of one shareholder in a television or radio broadcasting company or prevent any operator from having a decisive influence. This type of provision seeks to dilute the influence that a majority shareholder could have and to promote a

[9] *In Norway, media sector companies may not hold a local radio broadcasting licence, nor own more than 49 % of a local radio broadcasting body.*

[10] *For example, in Italy, it is forbidden to own a nationwide TV channel if the company also publishes or controls daily newspapers with a circulation exceeding 16 % of the total circulation of daily newspapers in the country ; it is forbidden to own more than one nationwide TV channel if the company also publishes daily newspapers with a circulation exceeding 8 % of the total or more than two nationwide TV channels if the company publishes daily newspapers whose circulation is less than 8 %.*

[11] *In Belgium, a natural or legal person holding more than 24 % of the capital of a French Community private TV service, either directly or indirectly, may not hold more than 24 % of the capital of more than 5 private radio services.*

diversity of shareholders which could be reflected at the programming level by a diversity of programme content.

d) An obligation of merging media companies to report to anti-monopoly bodies : for example, the Austrian Parliament passed in 1993 a Cartels (Merger) Act which requires merged media companies to register with the Cartel Tribunal if their joint turnover is greater than 17.5 million Austrian Schillings (with other companies the threshold is 3.5 billion). The Cartel Tribunal will issue a clearance provided it can be established that there is no abuse of a dominant market position as a result of the merger, nor a threat to the variety of opinions reaching the public.

D. Ensuring Transparency of the Media Market

The laws of many countries lay down requirements regarding the identification of all operators involved in media operations[12]. "Guidelines on Media Transparency" developed within the Council of Europe recommend that member states introduce into their law provisions obliging media undertakings to provide information on, among other things,

i) the identity of persons or authorities participating in the structure which operates a broadcasting service or a newspaper ;

ii) information on the nature and extent of the interests held by the above persons or bodies in other media enterprises ;

iii) information concerning persons or bodies other than those directly involved in the structure who are likely to exercise a significant influence over the editorial or programming policy.

4. Concluding Remarks

We are today witness to new processes which put a somewhat different complexion on the issue of media concentration.

First of all, technological change involved in the movement to digital systems in communications means that traditional divisions among the different media are fast disappearing and that the various sectors of the communications industry are converging. Once all forms of information can be stored, transmitted and displayed using the same digital language and technology, the institutional divisions between the "old" and "new" media, between the publishing industry,

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[12] *In many cases, shares in broadcasting (especially television) companies must be nominative ; share transfers above a certain level (in Italy : over 10 %, or over 2 % in listed companies) must be notified or cannot be effected without official consent.*

the telephone business, the film and television industries, the music business, or cable networks, become increasingly irrelevant. Thus, digital convergence is a powerful new impetus towards greater concentration of media ownership, as companies position themselves to best take advantage of the new multi-media landscape.

Secondly, disparities in anti-concentration policies and in market sizes result in a situation when regions seeking to protect plurality in national or regional markets face other regions which allow the emergence, and can sustain, mega-companies capable of operating globally and dominating the markets where anti-concentrations regulations apply.

This has led to a change of policy in this area in a number of countries, leading to a liberalisation of hitherto existing constraints on media concentrations [13] (e.g. the U.K. where even the BBC has been told to "Serve the Nation and Compete Worldwide").

With globalisation, the frame of reference in which these matters are considered may thus have to be revised. The national framework may no longer be adequate. Regional or continental regulatory regimes (see Appendix for a summary of the debate within the European Union concerning possible international regulation of media concentrations) may be needed to deal with the challenges posed by the processes unfolding today.

## APPENDIX

### Definition and Types of Media Concentrations

The EEC Council Regulation of 21 December 1989 on the control of concentrations between undertaking provides that a concentration occurs when "a) two ore more previously independent undertaking merge, or b) when one or more persons already controlling at least one undertaking, or one more undertakings, acquire, whether by purchase of securities or assets, by contract or by any other means, direct or indirect control of the whole or parts of one or more other undertakings".

Media undertakings seek advantages by cooperating and concluding cooperation agreements which cover combined buying and selling, exclusivity, joint ventures, non-competition agreements, specialisation, etc. While this does not involve loss of legal control by particular undertakings, it can give them a strong influence on the market, which amounts to a concentration of market power.

A concentration as such is characterised by a decrease of the power of autonomy or legal control over a company. That results mainly from **concentration of the industry**. Another concept is

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13 *One exception is Italy, where for reasons clearly prompted by the political situation the Constitutional Tribunal has just ruled that the existing law allowing one owner to control three television channels is unconstitutional, because it limits freedom of speech. With the broadcasting law scheduled to be revised in 1996, this ruling may affect its provisions in this regard.*

the **concentration of the media market**, defined as a situation which occurs when only one or a handful of media companies operate in any market as a result of various possible processes : acquisitions, mergers, deals with other companies or even the disappearance of competitors. A low concentration indicates a state of (full) competition and a high concentration, a situation of (near) monopoly, including duopoly or a dominant market leader.

Concentration of the industry takes a number of forms which are listed below.

1. **Merger**, a process in which either an undertaking is absorbed by another undertaking, or two or more undertakings unite to form a single undertaking.

2. **Integration** - all forms of more or less far-reaching combination of power and control over the activities of an undertaking or a group of undertakings. Integration may occur in two different forms :

- **horizontal integration** : a situation in which an undertaking or a group of undertakings, controls, at executive level, several production units of one and the same activity (e.g. an undertaking controlling several printing businesses, or several titles, or several advertising agencies, etc. In a press group, for example, horizontal integration makes it possible to realise economies of scale resulting from different operations (e.g. operations to control advertising, to combine editorial segments that are common to many titles, joint printing, distribution or promotion, etc.) ;

- **vertical integration** : a situation in which an undertaking or a group of undertakings controls the different phases of a production process (e.g. a press undertaking controlling newsprint, the actual publishing, the printing and the distribution). This can be a case of **upstream integration**, when an undertaking merges with others constituting a source of the product, or **downstream concentration**, when the merger is with undertakings involved in the sale or distribution of the product.

3. **Multimedia integration** : a situation in which an undertaking or a group of undertakings controls different media (e.g. participation of press undertakings in the capital of radio or television broadcasters) - also known as cross-media ownership ;

4. **Multisectoral integration** : a situation in which an undertaking or a group of undertakings controls one or several different media and is active at the same time in one or more other economic sectors (e.g. an undertaking active at the same time in the building industry, the distribution domain and the media domain) ;

5. **International integration** : a situation in which the activities or an undertaking or a group of undertakings extend to two or more countries.

In general, there are three major types of transnational media mergers, each driven by a different motivation :

- **cross-media empire building** - is the merger of companies that own different types of media - book publishing, tv, radio, newspapers, magazines, record companies. Such mergers create potential synergies through expanding the markets an advertiser can reach through a single advertising package purchase, and/or expanding the potential distribution possibilities for a single creative product ;

- **hardware-software marriages** (e.g. Sony's buy-out of Columbia Pictures and CBS Records to provide software produced in the standard of the hardware ;

- **concentrated, industry-specific deals** - purchase by a media company of similar media outlets in another country.

**Internationalisation** of the media, which results in part from international integration, takes place at many different levels of media systems :

- at the organisational level (i.e. the creation of international media ; transnational ownership of media systems) ;

- at the content level (i.e. the trade in media content leading to the prominent presence of foreign content in national media ; the practice of co-productions) ;

- at a funding level (the importance of advertising revenue internationally ; the movement of capital across frontiers) ;

- at the regulatory level (i.e. the involvement of supranational bodies, such as the European Community, in defining international regulatory standards ; adoption of international or foreign standards in national legislation) ;

- at the reception level (exposure of the national audience to foreign or international media).

Debate on Possible Regulation of Media Concentrations
Within the European Union

The Green Paper of the Commission of the European Communities Pluralism and Media Concentration in the Internal Market <COM(92) 480 final, December 1992> presented the following options regarding possible action by the Union :

i) Take no action at all ;

ii) Enhance transparency by passing an instrument to achieve greater disclosure of information on media ownership and control in the Community, so as to improve knowledge of the level of media concentration ;

iii) Adopt a Council directive or regulation to harmonise laws on media ownership in the Community.

In September 1993, the Economic and Social Committee of the European Communities adopted an "Opinion on the Commission Green Paper on pluralism and media concentration in the internal market (93/C 304/07). In it, the Committee rejected the first option and found that action proposed under the second option would be inadequate. It expressed the view that ownership restrictions limiting media concentrations are not necessarily incompatible with Community law because they guarantee or safeguard pluralism and that "the safeguarding of pluralism and freedom of opinion in programmes essentially depends on rules designed to prevent media concentration processes which could lead to monopoly-type mergers". Therefore, it came to the conclusion that rules on national and transnational media companies which achieved monopoly-type dominance of broad sectors in certain countries "are considered by the Committee to be necessary". On this basis, it made the following proposals :

"- In view of the existence of international multi-media corporations, ownership restrictions must also be introduced in respect of the press.
- Neither media nor non-media enterprises must be allowed to dominate the market in several media sectors (television, radio, press) in one or more national markets : similarly, no such enterprise that already controls a national media sector must be allowed to extend its market dominance.
- Media or non-media companies already dominating the market in one national media sector should not be allowed to acquire a majority holding in media companies elsewhere in the Community.
- Before a media company that is already active in one media sector is allowed to operate in another media sector, all its holding and cross-ownership arrangements must be disclosed in full."

On this basis, it called for the introduction of legal provisions to harmonise national restrictions on media holdings by means of a directive.

In January 1994, the European Parliament adopted Resolution A3-0435/93 on the Commission Green paper "Pluralism and media concentration in the internal market" in which it, too, called on the Commission to "submit a proposal for a directive firstly harmonising national restrictions on media concentration and secondly enabling the Community in the event of concentration which endangers pluralism on a European scale". In the European Parliament's view, such a directive :

- should cover the entire media sector, including the print media ;
- must not be based on the issue of formal ownership alone, but also make possible investigation of a "dominant influence";
- should exclude certain groups/companies (e.g. advertising agencies) from participation in particular media sectors ;
- should provide for strict application of the law on competition to cross-ownership involving programme suppliers and broadcasters ;
- enforce the principle of absolute transparency of ownership.

In October 1994, the European Commission published a communication Follow-up to the Consultation Process Relating to the Green Paper "Pluralism and Media Concentration in the Internal Market - An Assessment of the Need for Community Action" <COM(94)353 final>. The Commission acknowledges the need for adopting Community rules on media ownership, ending disparities between national rules concerning the media and ending legal uncertainty caused thereby which restricts the exercise of the freedom of establishment and the free movement of media services, as well as distortions of competition created by differences in the levels of restriction applied in particular countries. However, it decided to launch a second round of consultations on the subject before taking a final decision on the matter.

On 27 October 1994, the European Parliament adopted a resolution on concentration of the media and pluralism in which it expressed its "disappointment at the fact that in its above mentioned communication to Parliament and the Council, the Commission still fails to acknowledge the need for a Community directive on media concentration". In its resolution, the European Parliament "calls on the Commission to respect the undertakings it has made to Parliament to draw up, as soon as possible, a proposal for a directive on pluralism and media concentration in the internal market", expresses its view that "the Commission's proposal should seek to put an end to the distortion of the media caused by excessive concentration" and reaffirms the conviction expressed in earlier documents that such action is needed to "harmonise

national legislation on the media at a high level with the objective of creating and maintaining a diverse and pluralistic forum of opinion in the media which is in the interest of Europe's citizens."

## THE SITUATION OF THE MEDIA IN ALBANIA

b. Statement by Mr Genc TIRANA, Secretary of the Association of Professional Journalists of Albania

When talking about legislative guarantees of information in post- totalitarian societies, the historical context of this period of transition and the atrophy of the mentality of the people under the pressure of a long period of dictatorship can not be neglected. These factors, which have been and are still present in Albania, have strongly affected the creation, or absence, of an equal climate for all subjects of media information.

In Albania, the pluralist press is a brand - new as the pluralist system which was established at the beginning of years 1990 and 91. We say only "pluralist press", because the plurality which exists in Albanian society has not yet been reflected to any real proportion in the system of radio and television which is a state monopoly.

"Rilindja Demokratike" (Democratic revival) was the first opposition newspaper in Albania after the second world war. It was founded on 5 January 1991 by some Albanian intellectuals, and served as an informative source for the Democratic Party, which was the first Party in opposition to the communist system. It was immediately followed by many other newspapers of the opposition political parties. After the election of March 1992, when some of the opposition parties came to power, an extreme politicisation came about of the Albanian media. This was the result of the same mentality maintained by the political groups from the past, to keep information under complete control. The parties' journals were even conceived as propagandistic and as indoctrinate leaflets used by the political groups or their leaders, as weapons in the struggle for power.

It is natural that some Albanian intellectuals and journalists cannot agree on how information is transmitted in black and white.

With a wide variety of forms, the up-to-date journalists, who have been less infected by the old school and who have quickly assimilated the concepts of a free press and the rights of the people to inform and be informed, brought about the formation of an alternative media in Albania which has at its basis some independent and private papers.

Day after day, private papers like Koha Jone, Dita Informacion, Populli Po, Gazeta Shqiptare, Hosteni (our Time, Daily information, People yes, Albanian

journal), etc. are attracting many new readers. This means that there exists objectively the premises and grounds for the cultivation of a genuine independent press to guarantee real equality and pluralist information. Such as mentioned above, the conditions for the cultivation of this media objectively exist, but we are also obliged to accept that a subjective component exists in Albania which prejudices the freedom of the press.

This subjective component is presently identifiable in the legislative power, which in our view has limited the breathing space of the free press. Unhappily, this limitation is sanctioned in the press law that the Albanian Parliament approved a year ago.

It is not yet very clear if the law was adapted from a press law of the German Land "Westphalia", or whether it was a creation of Albanian red tape, but for the independent and opposition journalists who criticize power in Albania, it is clear that they are threatened at any moment with imprisonment in cases where it is judged they have revealed State secrets.

In dozens cases in Albania and abroad the Association of the Professional Journalists has raised its voice, protesting in particular against paragraphs 4, 19 and 23 of the press law which threaten the freedom of the press in Albania. The same protests have been made by the majority of Albanian journals, criticizing the law on many occasions.

Shortly, I would like to express our view that this law limits the plurality of information from the fact that :

1. Journalists can be imprisoned, for publishing a State secret. On the other hand, there is a vacuum in the Albanian legislation concerning the matter of what is and must be a State secret. For two months this year, a trial was held against two journalists of the newspaper "Koha jone" Aleksander Frangaj and Martin Leka, who were accused of publishing a State secret. From the accusation, it was not clear if a regulation of the Defense Ministry was a State secret. Nevertheless, the journalists were sent to prison and afterwards the President of the Republic interfered to release them from prison. As long as the matter of defining what is a State secret is left aside, this press law will be a significant threat to Albanian journalists.

Under this threat, journalists will naturally be restrained, and the impartial provision of information will be affected. The existence of this paragraph in the press law greatly limits information and strikes only these journalists who write against the government and statesmen. From the tens of journalists who have been punished or convicted by the organs of justice, for allegedly violating the duties of their profession, there is not one who has been working for the periodicals of State and the party in power.

2. Newspapers would be obliged to go bankrupt as the result of the size of fines which can be applied by the organs of justice. According to this law, in cases when these organs so judge that the information published is not true, the paper is obliged to pay up to US 8.000. To put this amount in perspective, it is enough to point out that the monthly salary of Albanian journalists does not exceed US 100.

3. According to this press law, Albanian state institutions generally do not have any kind of obligation to give information to journalists. So Albanian journalists always remain Lilliputians in front of the huge gates of the State. In many cases, this deafness in the reason for many accuracies in the press, because journalists, not having official information, are obliged to make analyses or interpretations based up on partial information on different issues.

Lately another inequality in Albanian freedom information, often called economic censorship, has become evident. This results from shocking number of taxes that are becoming a great burden to Albanian papers. There are four main taxes which affect printed media in Albania :

a) a circulation tax of 15 % imposed on all copes printed (irrespective of whether or not they are sold),
b) a newsprint tax of 25 %. Newsprint is not currently manufactured in Albania. It is considered as coming within the category commercial imported goods (12 tones of newsprint costs US 5.000),
c) a advertising tax of 15 % on all advertising revenue,
d) a profit tax of 15 % - this is not often due !

In addition of these taxes, which certainly do not create an environment of economic incentives for the printed media, there are a number of ways in which government media are favoured.

The government press - now five papers - is printed free of charge (at the IMF plant). Advertising for state enterprises goes to the government media - even though this is not the media with the highest readership. It is estimated that the national Privatization Agency has spent US 106.000 on advertising and that a similar sum has been spent by the National Construction Agency.

At this moment, therefore, if by freedom of the press we mean the free and informed competition among all means of information, we are obliged to conclude that this freedom is not complete in Albania. With all the limitations mentioned above, for the printed press above all, we would say that alternatives are nevertheless still open. But it is quite the opposite with Radio television Broadcasting.

Even now, in Albania, there is only one Radio television enterprise, which is State owned. As long as the State has its monopoly over the electronic media, then no other body, political or private, will be able to inform or provide other alternatives to the public. Because of the mountainous terrain and the poor situation of the press distribution companies, approximately 60 % of the population have no access to the written press and get their information only from Radio television broadcasting.

Dear colleagues,

This is only one general view of the legislative position in Albania, linked with the concern to create informative open spaces, which we wish to be extended.

Thank you for your attention and I am ready to answer your questions.

c. Summary of discussion

The problem of fragmentation of society through new electronic media was addressed by Ms Starinck. She referred to a journalistic experiment in Boulder, Colorado, where journalists had created a flat screen that would have the appearance of a newspaper but in addition give any specific information the reader might require. Using this screen, every reader would have access to the information he or she was interested in. On the other hand, readers would no longer be confronted with the same information, and the link of common information received by all readers would thus be lost. The introduction of such media might lead to the disappearance of newspapers and their role of linking readers by sharing common information.

Mr Halmai stressed that prevention of concentrations had to take place only in the public sector. In the commercial field, however, the state should not intervene at all, even if media concentrations were taking place.

Mr Jakubowicz underlined that it was not his intention to prevent private media from operating, but areas of intervention would still have to be chosen. In respect of all other areas, private media was free to operate.

Mr Rossinelli provided information about media concentrations in Switzerland, where concentrations in the media sector are controlled by the Cartel Commission. Information was distributed mainly at national level and at the level of the cantons, the small size of which made it economically particularly difficult to have a greater number of newspapers in one canton.

Even where media concentrations existed, this situation would not necessarily entail negative consequences for media plurality. In certain regions, e.g. Bale, one

daily newspaper existed. This monopoly position gave the newspaper a strong position vis a vis companies that wanted to advertise. The newspaper was thus able to criticise companies that were advertisers because they would, even after such criticism, continue to advertise in this one newspaper. In another case one newspaper controlled the distribution system for all the newspapers without, however, exploiting this position through better placement of its own newspaper. Within one major Swiss publishing house newspapers with different, even opposing, political tendencies existed. This publisher, whose main interest was receiving financial revenues, would not intervene to influence the political orientation of his newspapers.

The position of Swiss journalists being quite a strong one, in one case journalists who publicly criticised their own publisher faced no negative consequences.

Mr Ci_ak raised the point of national minorities, which often had no access to mass media. In order to prevent a split in societies, it was necessary to open national mass media to minorities.

Mr Solozabal Echavarria underlined the necessity to ensure plurality especially in public TV. Laws were necessary to delimit freedom of expression, but were unable to define it.

Mr Papadopoulos stressed that, in Cyprus, a Turkish radio station was operating and that Turkish news were broadcast on TV. When Turkish Cypriot politicians came to Cyprus, they were free to express their opinions in the mass media.

According to Mr Pinelli the Italian case showed that not only public but also private media power had to be curbed in order to tackle power concentrations.

Mr Sakajeva informed the seminar that a new TV statute would soon permit private TV in Albania. A regional radio channel broadcasted for the Greek minority. Albanians in Kosovo, however, were deprived of any media.

The limits of journalistic freedom exclude, according to Mr Vengerov, fascism and the fomenting of social and national differences. In Russia newspapers are given only very little subsidies, distributed by a special commission. A law on a national foundation for mass media was not approved by the upper chamber of Parliament.

Mr Slivnik favoured a mixture of private and public media. While private media especially in small countries faced economic difficulties, public media always encountered the problem of who would be allowed to control the media.

Romania had, according to Mr Gavrilescu, laid down freedom of expression not only in its Constitution but also in specific laws - e.g. the law on the audiovisual

sector. A press law had, however, not yet been enacted by Parliament. As concerns minorities, there were 70 newspapers for Hungarians in Romania, and radio as well as TV broadcasts in their language existed.

It is market forces which ensure plurality, according to Mr Rossinelli. A media monopoly is therefore not acceptable. Although it might be necessary to introduce quotas to ensure European cultural production, any control of the contents of the press was not permissible. General civil and criminal laws were sufficient to prevent abuse of the media.

Mr Drouot explained media legislation in France, where restrictions concerning violence, the dignity of women, etc, were even more stringent for public than for private media. Ethnic and religious communities were allowed to operate radio stations. Only during election time were strict rules in force on the equal representation of political parties.

Ms Natcheva reported that the press sector in Bulgaria flourished although there was no press law. In the audiovisual sector, however, such a law would be necessary.

The rapporteur, Mr Jakubowicz concluded that a legal framework was needed for the mass media based on Art. 10 ECHR. There was, however, no single way for achieving such regulation. While in some countries controls on media concentrations had to be tightened, they could be relaxed in others while maintaining a common philosophy.

Mass media was not just a business, but touched on very sensitive issues in public life. State intervention could always be only a corrective. It was up to each country to choose the media system it wanted. International rules did not require a choice for a specific media system.

Media was becoming global and local at the same time. This might lead to media for local interests including minorities and minority culture.

Nations were created by the media ; it was only media which gave people the idea of belonging together. Editors and journalists created bonds. Nowadays, to the contrary, it was the receiver who made the choice on which information to receive which might lead to the fragmentation of societies. From this fragmentation, new, worldwide communities might be created that linked people that had seen, for example, the same TV presentation.

## Fourth session

**The legislative framework of access to an dissemination of official information**

A. Report by Mr Arthur F. PLUNKETT,
Barrister-at-Law, Deputy Senior Legal Assistant, Office of the Attorney General, Dublin

B. Statements by :

a. Prof. Paul LEWALLE, Professeur ordinaire at the University of Liège

b. Ms Marita LILJESTRÖM, Judge, Supreme Administrative Court of Finland

c. Ms Ioanna KIKI, Lecturer, Panteios University, Athens

C. Summary of Discussion

## THE LEGISLATIVE FRAMEWORK OF ACCESS TO AND DISSEMINATION OF OFFICIAL INFORMATION[14]

A. Report by Mr Arthur F. PLUNKETT, Barrister-at-Law, Deputy Senior Legal Assistant, Office of the Attorney General, Dublin

### Introduction

1. In the first three sessions of this "Round Table" the political and constitutional issues regarding the mass media in a pluralist democracy have been addressed. My contribution, by contrast, is directed to a more specifically legal topic of the legislative framework of access to and dissemination of official information.

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[14] *The choice of matter contained in this paper and any opinions expressed therein are entirely those of the author and should not be construed as reflecting the position or the views of any other person or authority. The author has endeavoured to verify, where possible by reference to the texts of the relevant statutes, the accuracy of material concerning the laws of countries other than his own; any shortcomings in this regard are regretted.*

2. I propose to address this topic by, first, describing the traditional British regime of official secrecy which was inherited by Ireland in 1922 and was given, if anything, a new and more rigid form in 1963 by the Official Secrets Act of that year, and by describing the principal features of that regime and the pressures to which it has been subjected by the growth of the political movement for freedom of information. I then turn to the classic Swedish model which proceeds from the premise of free access for everyone to all public documents subject only to specific and limited exceptions - that is to say, precisely the opposite to that upon which the English system is based. I then refer briefly to some of the models of freedom of information, based on the same basic principle as that which applies in Sweden, which have been adopted in other countries. Finally, I endeavour to address some of the issues and problems which arise in legislating for freedom of information along the general lines of the Swedish model, in particular for a country which, like Ireland, envisages changing over from the traditional, restrictive regime which at present exists under the Official Secrets Act, 1963, to a regime based on the principle of freedom of access to and dissemination of official information.

3. I leave out of account the subject of personal data protection, as this, though closely related to the main subject, is essentially a topic of its own.

The traditional british system

4. Many, and perhaps all, of you will be familiar with the popular and very clever BBC television series "Yes, Minister!". In one of the episodes of that series, Sir Humphrey Appleby, the civil service head of the Ministry for Administrative Affairs, makes the following comment on the desirability of open government :

> "Open government is a contradiction in terms. You can have openness or you can have government.".

It can be said that this view underlies the traditional British system of official secrecy. In Ireland, this is now given effect by the Official Secrets Act, 1963 which replaced the Official Secrets Acts, 1911 and 1920, which had been carried forward into Irish law upon Ireland's independence in 1922.

5. Under the 1963 Act, "official information" includes any document or information which is secret or confidential or is expressed (or is certified by a Minister) to be either, and which is or has been in the possession, custody or control of a holder of a public office, or to which he has or had access by virtue of his office. The principal prohibition of the disclosure of official information is contained in section 4. This prohibits any person from communicating official information to any other person unless the communication is authorised or is carried out in the course of and in accordance with the duties of the communicator

as the holder of a public office, or unless it is his duty in the interest of the State to communicate it. The function of authorising a communication is vested in the competent Minister or State authority or some other person authorised in that behalf by a Minister or a State authority.

6. Besides prohibiting the disclosure of information which is "expressed to be" secret or confidential, or is certified by a Minister to be so, the Act prohibits the disclosure of information which is secret or confidential. In principle, this latter category of information (that which is secret or confidential) would seem to imply that in certain circumstances there is a role for the courts, in a prosecution for unlawful disclosure under the Act, in adjudicating on the question whether particular information is in fact secret or confidential. Nevertheless, there is no doubt that the 1963 Act, and the earlier legislation which preceded it, have created an ethos in the Irish civil service that the disclosure of government-held information is contrary to the Act and is prohibited unless it is either expressly authorised or is otherwise carried out in the course of and in accordance with the duties of the civil servant in the interest of the State.

7. The principal exceptions to the rule of official secrecy contained in the 1963 Act have been created by the courts in the context of the administration of justice in legal proceedings before them. However, it has to be recognised that these exceptions are not directed to the role of the media in a democratic society, nor are they directed to satisfying, even in part, any constitutional or political principle of freedom of access to official information. Nonetheless, the role of the courts has created important inroads into the absolute secrecy of official information in Ireland, especially in the last 25 years. Thus, the power of a Minister or of the Government on the basis of a certificate of secrecy or confidentiality to claim absolute privilege for official information (whether in documentary form or otherwise) in court proceedings no longer exists in Ireland : it is a matter for the court to weigh the legitimate concerns of the confidentiality of Government-held information in the interests of the public service, on the one hand, against the interests of the due administration of justice, on the other hand, and to decide which of these interests is to prevail in the particular case. See Murphy v Dublin Corporation (1972 I.R. 215) recently affirmed in Ambiorix v Minister for the Environment (No. 1), (1992 I.R. 277). It has to be stated that in exercising their jurisdiction in this respect, the Irish courts have not deferred unduly to the views of Ministers that particular documents or particular information were confidential and ought not to be disclosed.

8. The jurisdiction of the courts in Ireland in this regard extends not only to all information and documentation in the hands of Government Departments and Offices but also even to the papers, documents and memoranda of the Government itself. Thus, there is no absolute executive privilege in Ireland either for the Ministerial memoranda which are submitted to Government by Ministers

for the purposes of enabling the Government to take its decisions, or for the decisions themselves.

9. On the other hand, a recent Supreme Court judgement has created an important qualifications of this rule. Some years ago a judicial tribunal was established by Parliament to enquire (inter alia) into the actions of Government arising from certain allegations concerning the beef processing industry. In the course of the hearings before the tribunal a question was put to a former Government Minister as to what had been said between Ministers on a certain matter at a Cabinet meeting which the witness had attended in his ministerial capacity. In legal proceedings concerning the admissibility of this question, the Supreme Court ruled that verbal discussions between Ministers in Cabinet, intended to lead to Government decisions (including, presumably, any written records of such discussions), are absolutely privileged, and that their disclosure may not be compelled or even permitted under any circumstances, because to do so would prejudice the operation of the principle, which is expressly recognised in the Constitution of Ireland, of collective ministerial responsibility for decisions of the Government <Attorney General v Hamilton (No. 1), 1993(2) IR 250>[15].

10. The only categories of documents which have, in effect, been recognised by the courts as enjoying absolute privilege are those covered by the privilege of professional legal advice by a lawyer to his client, and, in the context of litigation, documents in the possession of a party which have come into existence in contemplation of and for the purposes of contesting litigation. Even then the courts are empowered, if they consider it necessary to do so, to examine the documents for the purpose of deciding whether they have been correctly categorised for the purposes of the relevant claim of privilege.

11. A further limitation of the absoluteness of the official secrecy rule in the 1963 Act is to be found under the heading of Parliamentary Questions. However, since the person who answers a Parliamentary Question is invariably a Government Minister, it may be stated that whatever answer the Minister may give must, in any event, be regarded as "authorised" for the purposes of the 1963 Act. The Parliamentary Question could, at least in principle, be a highly effective way of penetrating official secrecy. However, a recent comment of a senior British civil servant, to the effect that the answer to a Parliamentary Question is not so much a vehicle for conveying official information as a type of art form, illustrates the inadequacies in practice of the Parliamentary Question as a means of getting at facts which are awkward or embarrassing for the Government. Indeed, in the course of the judicial enquiry into the beef processing industry in Ireland, referred

[15] *It may also be of interest to note that the constitutional privilege of members of the Oireachtas (Parliament) in respect of parliamentary utterances has been held, again in proceedings arising from the "beef tribunal", to bestow on such members the privilege to refuse to disclose in court or in other proceedings outside parliament the sources of any information on which such utterances are based (Attorney General v Hamilton (No. 2), 1993 (3) I.R. 227, 256).*

to above, the High Court Judge who conducted the enquiry remarked that if questions which had been asked in the Dail (the Lower House of the Oireachtas, the parliament of Ireland) had been answered in the way that they had been answered at the enquiry, there would have been no necessity for the enquiry and much money and time would have been saved.

12. A further exception to the general rule of official secrecy is that created by the National Archives Act, 1986. Since this Act operates, however, only on the basis of the automatic disclosure (subject to some limitations) of Government papers after a period of 30 years from their coming into existence has elapsed, it does not seem to be of much relevance to the present topic.

13. It is to be understood from the foregoing that under the system as it currently operates in Ireland, there would appear to be no protection from liability for prosecution under the Official Secrets Act, 1963, or from liability for official sanctions under the disciplinary rules applying to the civil service, for so-called "whistleblowers". Civil servants who disclose to third parties without authorisation official information in the belief that such third persons or the general public have a right to be informed of some matter of which the Government or competent Minister would not wish them to be informed, do so at their peril. However, in the extreme case (where, for example, the Minister or the Government was deliberately breaking the law) it is not clear whether the courts would permit the imposition of criminal penalties under the 1963 Act, or of disciplinary sanctions, on the civil servant who had "blown the whistle". Such a case has not yet come before the Irish courts.

14. It follows from what has just been stated that journalists who receive from public servants unauthorised official information are also subject to prosecution under the 1963 Act. Furthermore, journalists giving evidence in legal proceedings are not permitted to refuse to disclose their sources of information.

15. There is now mounting pressure for change in Ireland in the sphere of official secrecy. Indeed, this has also occurred in the United Kingdom where governmental attempts to enforce the rules of official secrecy have encountered major difficulties of a practical nature such as occurred, for example, in the course of the "Spycatcher" litigation, and in the unsuccessful prosecution of Mr. Clive Ponting for leaking information concerning the sinking of the "Belgrano". Partly as a result of these events there have been important amendments to legislation in the United Kingdom though these have been criticised by the proponents of freedom of information for not going far enough.

16. In Ireland, the judicial enquiry into the beef processing industry, referred to above, has proved something of a catalyst. The evidence at the enquiry itself opened to the public gaze, for the first time, the workings of Government in a sphere of major economic importance. It highlighted the inadequacy of the

Parliamentary Question as a means of getting at sensitive Government information. The ruling concerning the confidentiality of discussions at Cabinet delivered by the Supreme Court in the course of the enquiry, though it is reflected in the systems of many other democratic countries, has resulted in calls for a referendum to amend the Constitution so as, in effect, to reverse the judgment. Many are now convinced that the time has come in Ireland to abandon the old system of official secrecy and to move to a system of free access to and dissemination of official information. The Government which recently fell in Ireland had in its programme a commitment to such a change and this has been maintained by its successor.

17. Pressures for open Government have also been evident in the international sphere for some time. Article 10 of the European Convention on Human Rights, although it does not by its terms require freedom of access to or dissemination of official information, has been interpreted by the European Court of Human Rights as prohibiting penalties against the press for publishing information and opinions concerning matters of public interest except in the narrowest of circumstances. Prior to this, the Committee of Ministers of the Council of Europe had adopted its Recommendation No. R(81)19 of 25 November, 1981. That Recommendation calls on Member States to be guided in their law and practice by the principle that everyone has the right to obtain, on request, information held by the public authorities other than the legislative and judicial authorities. Access to such information should not be refused on the grounds that the requesting person has not a specific interest in the subject matter. These principles are to be subject to such limitations and restrictions as are necessary in a democratic society for the protection of legitimate public interests (of which a non-exhaustive list of examples is provided). The Recommendation also envisages, however, that the principles may be modified or excluded by a Member State in the interests of the requirements of "good and efficient administration" provided that "every endeavour should nevertheless be made to achieve the highest possible degree of access to information". In the European Union, steps have been taken pursuant to the Maastricht Treaty to allow public access to the documents of the Council of the European Union and the Commission, and in specified field of the environment.

The alternative approach : open government - the swedish model

18. Sweden adopted the principle of freedom of access for all persons to official documents over 200 years ago. In 1766, during a prolonged period of parliamentary rule in that country lasting from 1718 to 1772, the first Swedish Freedom of the Press Act was enacted. This provided for free access for everyone to documents in all public offices and this principle has been maintained and applied in Sweden ever since. The current legislation is contained in the Freedom of the Press Act, 1949 as amended. Under it, not only Swedish nationals but all persons have free access to public documents subject to the limitations in the Act.

"Document" includes any representation in writing and any recording which can be read, listened to or otherwise apprehended only by means of technical aids. A document is "public" if it is kept by a public authority and if it has been received, prepared or drawn up by an authority. Draft documents prepared by a public authority become public documents once they are officially filed.

19. The most remarkable feature of the Swedish regime is its application in practice. A member of the public has the legal and constitutional right to arrive at a Ministry without notice and demand on the spot to see any document which does not fall within the specific exclusions from freedom of information contained in the Act. The material must be produced immediately and the right of the enquirer to the information he seeks is not dependent on his having any particular interest in the subject matter. Moreover, Government Departments and other public offices are obliged to facilitate public access by maintaining registers setting out details of correspondence and other documents covered by the legislation which can be inspected by the public. Press rooms are kept in which incoming and outgoing documents are exhibited every day. This system is not merely a statutory one : it has been incorporated by reference into the scheme of Swedish constitutional law and is an established part of the life of the country.

20. The way in which this system is interpreted and applied can be illustrated by an incident which is alleged to have occurred in the office of the Lord Mayor of a Swedish city. A journalist, having an appointment with the Lord Mayor, arrived early and opened and read the Lord Mayor's correspondence. The legal adviser of the Lord Mayor upheld the right of the journalist under the Swedish Freedom of the Press Act to do this.

21. The Swedish law lays down the possibility of excluding from freedom of access documentation falling within a certain range of exceptions. Stated briefly, these are documents concerning : the security of the State or foreign relations ; central financial monetary or foreign exchange policy ; certain inspection, control or supervision activities of the public authorities ; the prevention or prosecution of crime ; the economic interests of the State or of local authorities ; the protection of the personal integrity or economic conditions of individuals and the preservation of animal or plant species. Documents falling within these categories are not automatically excluded from freedom of access. They may be excluded, where this is considered necessary, pursuant to separate legislation. Such legislation is contained in a Secrecy Act which provides for secrecy of documents of kinds specifically enumerated in a Government order ; such an order may not, however, protect interests other than those listed as exceptions to the principle of freedom of access in the Freedom of the Press Act. Such secrecy is laid down for a specified period and it may be overridden where, in the interests of the public or of an individual, it is considered to be "of the utmost importance" that the information should be disclosed.

22. Another important characteristic of the Swedish system is that access (inspection of public documents) is free, although the delivery of copies is subject to a charge. More important, civil servants who provide information to third parties concerning public documents (other than those which are excluded from freedom of access) incur no criminal liability and no risk of sanction within the public service : disclosures of this kind are considered not only to be entirely proper on the part of civil servants but to be part of the rights of the citizen which flow from the regime of freedom of information.

23. The modalities for access to documents are that the applicant must frame his request in such a way that the authority can understand with precision what document or documents are being asked for. The principle is that of immediate production of documents in the hands of the authority insofar as they are not excluded from the legislation. An applicant whose demand has not been complied with may apply to the Swedish administrative courts. The court to which an appeal is brought is not confined in its jurisdiction to a review of the legality of the decision (judicial review) ; it reviews the decision of the judicial authority on the merits and in effect may substitute its own decision of substance for that of the administrative authority. A further appeal to a higher administrative court is possible on the part of a discontented applicant.

24. However, Government documents, that is to say, documents pertaining to the actions of the Swedish Government itself, consisting of the Ministers sitting collectively, are subject to a different procedure. Access to a public document which is a Government document is sought initially from the competent ministry; an appeal lies not to the courts but to the Government itself. This means that government documents are not subject to the enforcement regime applicable to public documents as a whole and that, as a consequence, access to such documents (by comparison with other public documents) may in practice be considerably more difficult. However, the potentially restrictive effect of the rule concerning Government documents may be lessened where there are other ways of obtaining access to such documents, for example, if they are available in the hands of other authorities.

25. The effectiveness of any system of freedom of information depends not only on the substance of the "free access" rule but also on the manner in which it may be applied and invoked in practice, and in particular, upon whether in fact the administration makes it easy or difficult for citizens to gain access to official documents; on the scope and degree of precision of the exceptions to the general rule ; and on the ease with which the rights of an applicant may be enforced, either through the courts or through some other form of arbitration. Although at least one of the exceptions to freedom of access contained in the Swedish Freedom of the Press Act - "the economic interests of the State or of local authorities" - seems to be vague and to be capable of covering a wide area of administrative activity, the exceptions laid down in the Act are subject to the interpretation of the courts.

The Swedish regime of freedom of access to public documents is the first of its kind to be introduced in any democratic state; and it is still widely acknowledged as the flagship of open government.

Freedom of information in some other countries

26. In the United States, the Administrative Procedure Act, 1946 established a right of access to Federal Government records in the context of administrative proceedings. This right, did not constitute a general right to access to Government-held information ; it corresponded to the right to obtain from a court an order for discovery and inspection of documents in ordinary judicial proceedings. The Freedom of Information Act, 1966, however, amended the Administrative Procedure Act by extending to the public at large the right of access to Federal Government documents. This amendment involved, in effect, the adoption of a general regime of freedom of information in the interests of democracy. Under the Act, all Federal Government records are accessible to the public without any need for the applicant to demonstrate a specific interest except where disclosure would infringe the privacy of others. Also, information which would be exempt from compulsory disclosure in legal proceedings is exempt from general public disclosure under the Freedom of Information Act. The exceptions to the general principle of freedom of access permit but do not require the federal authorities to refuse access to documents falling within the categories of the exceptions. This has resulted in so called "reverse Freedom of Information Act lawsuits" in which interested persons or bodies have sought to prevent the federal authorities from exercising their discretion in favour of granting access to documents within the excepted categories.

27. The exceptions under the United States law govern national defence and foreign policy, subject however to the jurisdiction of the courts to review and overrule any decision of the authorities to classify particular documents as falling into this category ; internal personnel files; documents exempted under other statutes from disclosure (e.g., individual tax returns or information gathered in the course of a census) ; information containing trade secrets; internal federal documents containing, in particular, advices or proposals for the formulation of policies before a decision is taken ; documents falling within the protection of privilege as between lawyer and client ; documents whose disclosure would constitute an unwarranted invasion of personal privacy ; documents concerned with law enforcement under certain circumstances ; documents concerning the regulation or supervision of financial institutions, and certain documentation concerning oil wells.

28. These exceptions to the general rule concerning freedom of access to federal records are largely enforced in individual lawsuits in the Federal Courts.

29. The so called "whistleblower" - the civil servant who "divulges" information falling within the exemptions from the Freedom of Information Act, is, with some exceptions, protected under the Civil Service Reform Act, as amended by subsequent legislation of 1989 (the Whistleblowers Protection Act) and 1992, provided that he or she reasonably believes that the information disclosed shows a violation of any law, rule or regulation, mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety. As an alternative a civil servant may without risk disclose the information in question to the Office of Special Counsel - an officer appointed by the President of the United States. That Office also has a role in vindicating the rights of "whistleblowers" by protecting them from official penalties or sanctions.

30. Canada, as well as Australia and New Zealand, are also countries which have in the recent past moved from the traditional British system of official secrecy to a regime of freedom of official information. In Canada, there is a right of access for Canadian citizens and permanent residents in Canada to information contained in records under the control of a Government institution. The Government institutions affected number approximately 140 and are listed in a schedule to the relevant statutes. The term "record" is broadly defined. However, Cabinet confidences which are less than 20 years old, which are defined to include Cabinet memoranda, discussion papers, and communications or discussions between Ministers in relation to the formulation of Government policy, are excluded until after the relevant Cabinet decision has been made public, or if it is not, until four years have passed since it was taken. Government institutions have a period of 30 days, which may be extended, to respond to a request for access to a document. Fees are charged for such access and there has been much criticism of the Canadian legislation on this account. The exceptions to the Canadian legislation, some of which are discretionary and others mandatory, appear to be based on principles similar, although not identical, to those applicable in the United States. Information the disclosure of which would infringe the privacy of others falls within the "mandatory" category. An applicant who is aggrieved by a decision of the authorities in a matter of access to information may appeal to the Information Commissioner whose office is established under the legislation. The Commissioner, though he has wide investigative powers, does not have binding decision-making powers ; either the Information Commissioner himself, or an aggrieved applicant, brings an action before the Federal Court if he cannot obtain satisfaction from the authorities.

31. In France, measures have also been taken to improve public access to official documents. A law of 1978 granted a right access to administrative documents to everyone (irrespective of their ability to demonstrate an interest) with certain exceptions. Requests are made to the authority concerned but a central authority, the Commission d'accès aux documents administratives (C.A.D.A.) supervises compliance with the statutory scheme. The C.A.D.A., like

the Information Commissioner in Canada, exercises a most important role in making effective the principle of freedom of information though it has no power of decision : such power lies with the administrative courts.

Some issues which arise in framing legislation for freedom of access to official information

32. No administration which has become accustomed to living under the regime applicable hitherto in the United Kingdom, and in Ireland under the Official Secrets Act, 1963, is likely to welcome the thought of a change, let alone a sudden change, to open government on the Swedish model. The potential problems in the minds of the Irish or British civil servant would range from the belief that already overburdened government departments would find it quite simply impossible to cope with the flood of demands for access to official documents, to a belief that the normal recording of government or departmental business would be prejudiced if not thwarted by the prospect of public disclosure, and that relations between civil servants and their political masters would be permanently damaged. Nonetheless, countries which in the recent past have adopted a regime of public access to official information as of right are said to have escaped these disadvantages. Be this as it may, the following would appear to be some of the issues which seem to require consideration in any country which is contemplating a move from the traditional British regime to a regime of more open government :

a) Whether freedom of access to official information should be limited to those having an interest in the subject matter ?

Those countries enumerated in this paper which have adopted a system of freedom of access to official information not imposed such a restriction on the rights of the public. It appears however to be a common feature of the legislation of the countries in question that the document or information sought must be specified with reasonable particularity so as to avoid the possibility of endless "trawling" through government files by applicants. It is perhaps for consideration whether freedom of access should, in an initial stage, be confined to persons who can demonstrate, at least in some general sense, an interest in the subject matter.

b) To what extent should the administration impose charges in respect of the giving of official information ?

To some extent it may be though that this question is linked up to the previous one : the imposition of charges for the inspection of government documents may be easier to justify where the applicant can demonstrate no particular interest in the subject matter than when he or she can

demonstrate such an interest. In any event the imposition of fees for the delivery of copies of official documents would seem to be justified.

c) Even if the Swedish rule that documents in the hands of a public authority must be produced immediately on request may be regarded as impractical for some countries, it would seem that authorities should be expected to respond to a request for information within a certain time limit which could, perhaps, be extended where circumstances so warranted.

d) Clearly, the nature of the exceptions to and restrictions on freedom of access to official information are a vital element of any system of open government.

The legislation must accordingly lay down the authorities who are to be subject to the requirements of freedom of access, and, as clearly and specifically as possible, the nature of the information which is to be exempt from those requirements. There appears to be a "core" list of exemptions which is in effect to be found in the legislation of many if not all of the countries which have adopted a freedom of information regime : these cover matters such as defence, security and international relations, internal working documents coming into existence for the purposes of advising as to the formulation of policy, documents concerning law enforcement, documents whose secrecy is necessary for reasons of personal privacy or commercial confidentiality or for reasons of legal professional privilege, and documents which should remain secret for reasons of protection of vital national economic interests, among others.

An important issue for a country contemplating a "changeover" is whether documents which have come into the possession of the administration before the date of commencement of the "freedom of information" legislation should be excluded from access.

Another important issue is whether, in this context, it should be permissible for the courts or other adjudicating authorities, in considering whether particular information is exempt, to overrule the exemption where it can be shown to be imperative, for the sake of some other interest (whether private or public) that this should be done ?

It is assumed for this purpose that some independent tribunal or authority should have jurisdiction to decide whether particular information, for which exemption is claimed by the administration, has been correctly classified as falling within the exemption in question.

e) The position of so called "whistleblowers" and journalists raises sensitive issues.

As regards "whistleblowers", the solution adopted in the United States demonstrates the sensitivity of these issues ; a civil servant who has the right to disclose, to third parties or to the public, official information which is regarded as secret (i.e., falling within one of the exceptions to freedom of information legislation) may find himself in the dilemma that if he discloses the information, he may be accused of political bias or of having an agenda of his own, and of thereby trespassing into the political arena, whereas if he does not, he may also be subject to criticism for failing to serve the public interest. In those countries in which civil servants are expected to refrain from engaging in political activity, it would seem desirable to take care that any regime of protection for so called "whistleblowers" carefully avoids either politicising the civil service or leaving individual civil servants open to charges, however unjustified, that they are politically motivated in their actions.

With regard to journalists, it has to be recognised that there is always a potential conflict between, on the one hand, the role of the courts in the administration of justice and, on the other hand, the role of journalists in gathering information for the purposes of exercising the freedom of the press. The question which seems to arise here is whether a compromise between these two interests is possible - possibly one in which the courts might be empowered to investigate, under conditions of secrecy, the question whether the source which the journalist was seeking to protect (a) was genuine and (b) involved material whose disclosure was in the public interest.

f) No system of freedom of access to information would be complete without an effective machinery for adjudicating on undisputed claims for such access.

In effect, this means a judicial or quasi-judicial machinery for adjudicating on the interpretation and application of the exemptions from the rule of freedom of access. The principal issue which seems to arise here is whether the initial right of appeal of the dissatisfied applicant for information is to an authority with a facilitative or supervisory role of the "ombudsman" type (as in France and Canada), which, though it may have investigative powers, cannot bind the administration by its decision, with an onward appeal to the ordinary courts, or whether the citizen's sole redress is to bring court proceedings. An advantage of an "ombudsman"-type authority in that it may enable disputes to be resolved without the expense and delay of litigation. Clearly, however, there must be an ultimate right of redress to a tribunal with jurisdiction to bind the administration.

## Conclusion

33. The Swedish model of freedom of access to public documents was enacted at a time when the role of government in the lives of the citizens would undoubtedly have been far less extensive than it is today. For a modern, developed democratic country, the changeover from, e.g., the traditional British regime of official secrecy to a regime of open government such as that which applies in Sweden would be much more difficult, and much more painful for the administration, than it would have been for Sweden in 1766. This is not to say that such a change would be impossible. The views of Sir Humphrey, quoted at the start of this paper, on the one hand, and the actions of the Swedish journalist in opening the Lord Mayor's correspondence on the other hand, may be taken as representing the opposite extremes of the two points of view which have been discussed in this paper. It is a delicate matter of national policy to decide exactly how far in the direction of the Swedish model the initial legislation for freedom of information for a country wishing to change from one regime to the other should proceed. I am grateful to the European Commission for Democracy through Law that in inviting me merely to address the legislative framework of this subject, they have not called upon me to attempt to answer this question.

# THE COMMUNICATION OF ADMINISTRATIVE DOCUMENTS IN BELGIAN LAW

B. Statements

a. Statement by Prof. Paul LEWALLE, Professeur ordinaire at the University of Liège

## Introduction

For a long time the administration deemed it necessary to surround itself with secrecy.

This belief was no doubt a matter of tradition. In a study drawn up in 1974, Mr Michel Herbiet showed that there was no legal rule, either written or unwritten, that generally regulated the question of the public or confidential nature of administrative documents[16].

Practice nevertheless reflected a clear trend towards secrecy, and certain particular rules sought to impose confidentiality.

Typical of this attitude was the Royal Decree of 2 October 1937 establishing the rules governing agents of the State, Article 9 of which prohibited them from

[16] *Le secret dans l'administration (Secrecy in the administration), Annales de la Faculté de droit de Liège 1975, pp. 153 et seq.*

revealing facts which came to their knowledge in the course of their duties and were of a secret character either by nature or because of the orders of their superiors[17].

It was necessary to wait until about 1970 for a change in direction.

In French law this change took the form of a rapid development in legislation : with the Laws of 6 January 1978 on information technology, files and freedoms, 17 July 1978 on freedom of access to administrative documents and 11 July 1979 on the requirement to state the reasons for administrative acts, and a Decree of 28 November 1983 on the relationships between the administration and users, the outlines of a code of administrative procedure appeared in France, even though the fragmentary nature of the measures in question has led only to "creeping codification"[18]. These changes in French public law did not go unnoticed by the Belgian draftsmen.

Although more subdued, the development was also apparent in Belgium; it was marked by contributions to academic writing[19]. It also took the form of numerous Bills on the requirement to state the reasons on which acts of the administrative authorities were based[20], or laying down appropriate measures to ensure the publicity of the administration[21], or aimed at improving the relationships between the citizen and the administration[22], or intended to ensure the publicity of the

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17 *This article was repealed and replaced by Article 4 of the Royal Decree of 26 December 1994 laying down various regulatory provisions applicable to agents of the State.*

18 *D. Linotte, La motivation obligatoire de certaines décisions administratives (The requirement to state the reasons on which certain administrative decisions are based), R.D.P., 1980, p. 1699 et seq., and Y. Gaudement, La codification de la procédure administrative non contentieux en France (The codification of non-contentious administrative procedure in France), D. 1986, Chron. pp. 107-112).*

19 *See, in particular, M.A. Flamme, Vers la codification de la procédure administrative (Towards the codification of administrative procedure), R.A. 1970, p. 221 et seq., A. Vander Stichele, La publicité de l'administration et le droit à l'information, Rapport belge présenté aux journées administratives de Rotterdam (The publicity of the administration and the right to information, Belgian report submitted to the Rotterdam administrative conference), 1969, R.J.D.A., 1969, p. 241 et seq., L'accès de l'administré aux dossiers de l'administration, actes du colloque de l'Institut international de droit d'expression française (Access by the individual to the files of the administration, proceedings of the colloquy of the International Institution for the Right of French Expression), Luxembourg, 25 and 26 April 1985, Le droit de l'usager à la transparence des services publics, actes du colloque organisé par la ligue des droits de l'homme (The user's right to transparency of the public services, proceedings of the colloquy organised by the League of Human Rights, Liège, 5 November 1988, La transparence administrative, actes du colloque organisé à Bruxelles par l'Institut international des sciences administratives (Administrative transparency, proceedings of the colloquy organised at Brussels by the International Institute of Administrative Sciences), 6 November 1992.*

20 *Parliamentary Papers, Senate, sess. 1981-1982, No. 33/1 and /2.*

21 *Parliamentary Papers, Chamber of Representatives, sess. 1981-1982, No. 109/1 and /2, sess. 1985-1986, No. 558/1, sess. extra 1988, No. 27/1.*

22 *Parliamentary Papers, Chamber of Representatives, sess. 1983-1984, No. 733/1 and/2, sess. 1985-1986, No. 3871, sess. extra. 1988, No. 486/1.*

administration[23], or on the publicity of the administration[24], or laying down measures intended to grant a general right of information to citizens and to establish general publicity at the level of the central administration and the national services or bodies which come within the authority or control of a Minister or State Secretary[25], or on the consultation, communication and publicity of certain administrative documents[26], or aimed at ensuring freedom of access to administrative documents[27].

The movement of ideas did not remain at the draft stage : it led to the enactment of the Law of 29 July 1991 on the requirement to state the precise reasons on which administrative acts are based and to the Flemish Decree of 23 October 1991 on the publicity of documents in the services and establishments of the Flemish Government.

This movement was certainly inspired by various international instruments which helped secure recognition of the citizen's right to information. A brief account of these instruments will be given below : it should be noted, in particular, that in implementing a European Directive of 7 June 1990 on freedom of access to information on the environment the Walloon Regional Council and Executive adopted the Decree of 13 June 1991 on freedom of access for citizens to information on the environment and the Brussels Council and Executive drew up the Order of 29 August 1991 concerning information relating to the environment for the Brussels-Capital Region.

The most spectacular achievement in Belgian public law, however, was the introduction in 1993 of a new Article 24 ter into the Constitution of 7 February 1831, which became Article 32 of the Co-ordinated Constitution. Article 32 concerns the publicity of the administration. In introducing this provision, the Belgian constitutional draftsman followed the example of the Netherlands : since 1983 Article 110 of the Constitution of the Netherlands has provided for the publicity of the administration[28].

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23 *Parliamentary Papers, Chamber of Representatives, sess. extra. 1988, No. 27/1.*

24 *Parliamentary Papers, Chamber of Representatives, sess. extra. 1988, No. 1181/1, sess. 1990-1991, No. 1380/1.*

25 *Parliamentary Papers, Chamber of Representatives, sess. 1985-1986, No. 163/1, sess. extra. 1988, No. 285.1, sess. extra. 1992, No. 209/1.*

26 *Parliamentary Papers, Senate, sess. 1985-1986, No. 198/1, sess. extra. 1988 No. 261/1.*

27 *Parliamentary Papers, Chamber of Representatives, sess. 1989-1990, No. 1216/1.*

28 *D. Breillat, Remarques sur la nouvelle constitution néerlandaise (Observations on the new Netherlands Constitution), R.D.P. 1983, p. 1177.*

Section I - Instruments of international law which are binding on Belgium and aimed at making the communication of administrative documents compulsory

A list of these instruments is set out in the Government Bill designed to insert Article 24 ter on the publicity of the administration into the Constitution[29].

1) Article 19 of the Universal Declaration of Human Rights

In addition to freedom of expression, this provision mentions freedom to receive information : "Everyone has the right to freedom of ... expression ; this right includes freedom to ... seek, receive and impart information and ideas through any media and regardless of frontiers".

This provision has only moral value, but implies that each State is under a moral duty to give these principles concrete form in its own legislation.

2) Article 10 of the European Convention on the Protection of Human Rights and Fundamental Freedoms

This article provides : "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers".

The European Court of Human Rights stated in the "Sunday Times" judgment[30] that a right to information could be inferred from Article 10 of the Convention : "Not only do the media have the task or imparting such information" (information of public interest) "and ideas : the public also has a right to receive them", and "Article 10 guarantees not only the freedom of the press to inform the public but also the right of the public to be properly informed".

The Strasbourg court has decided in a certain number of cases that the public powers were under no obligation to provide access to administrative information. Might it be inferred a contrario that in certain other cases there would be an obligation to make such information public ?

3) Recommendations and Resolutions of the Parliamentary Assembly and the Committee of Ministers of the Council of Europe[31]

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[29] *Parliamentary Papers, Chamber of Representatives, sess. 1992-1993, No. 839/1 pp. 2 and 3.*

[30] *ECHR, 1986, 26 April 1979, Sunday Times, Publications of the Court, Series A No. 30, §§ 65-67.*

[31] *Resolution 428 (1970), Recommendations 582 (1979) and 1037 (1986), Resolution 31 (1977), Recommendation 19 (1981). See R. Charlier, Les travaux du Conseil de l'Europe en ce qui concerne l'accès de l'administré aux dossiers de l'administration (Proceedings of the Council of Europe*

In these instruments it is postulated that Article 10 of the ECHR also implies the freedom "to seek information ... with a corresponding duty on public authorities to make information available on matters of public interest subject to appropriate limitations".

In its declaration of 29 April 1982, the Committee of Ministers expressed the opinion that in order to achieve the right to freedom of expression and freedom to receive information provided for in Article 10 of the Convention, it was necessary to envisage an "open information policy in the public sector, including access to information, in order to enhance the individual's understanding of, and his ability to discuss freely political, social, economic and cultural matters".

It may be inferred from all these provisions that the Belgian authorities are under a moral duty, at the very least, to ensure that the public has access to information and therefore to guarantee the publicity of the administration, a duty which is legally confirmed in international treaties.

4) The European Convention on the Obtaining Abroad of Information and Evidence in Administrative Matters

This Convention, which is binding only on the Contracting States, entered into force as regards Belgium on 1 January 1983, following the opinion published in the Moniteur Belge on 30 July 1983.

Section II - The Flemish Decree of 23 October 1991 on the publicity of administrative documents in the services and establishments of the Flemish Executive

As far back as 1991 the Flemish Council adopted a measure on the publicity of administrative documents[32] ; by adopting, in relation to the matters within its competence, a legally binding rule of general scope, the Council anticipated the constitutional requirement to do so introduced two years later.

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*concerning the access by the individual to the files of the administration), Revue juridiqe et politique indépendance et coopération, Paris 1987, pp. 106 to 118.*

[32] *See, in particular, D. D'Hooge, De openbaarheid van bestuursdokumenten in de diensten en de instellingen van de vlaamse execitieve (The publicity of administrative documents in the services and institutions of the Flemish Executive), Rechtskundig weekblad 1993-1994, pp. 250 to 260; D. Vandenbossche and F. Gijssels, De Vlaamse overheid: een Glazen huis? Openbaarheid van bestuur in de praktijk gabracht (The Flemish authority: a glass house? Administrative publicity in practice), Tijdschrift voor bestuurswetenschappen en publiekrecht, 1993, pp. 439-445.*

The provisions of the Decree of 23 October 1991 are mandatory in all matters which fall within the competence of the Flemish Community[33].

1) Scope of application

a) Services:

By "services", Article 2 § 2 of the Decree means the administrations of the Ministry of the Flemish Community and also the community and regional establishments created in pursuance of Article 9 of the Special Law on Institutional Reform of 8 August 1980. There is no mention of the decentralised bodies (i.e. the communes and provinces) and it is difficult to maintain that they are included in subparagraph b of Article 2 § 2, since the reference to Article 9 of the Special Law on Institutional Reform defines the scope of the provision.

b) Administrative documents:

According to Article 2 § 1 of the Flemish Decree, the following constitute an administrative document : "any available information presented in written, visual, aural or computerised form, established by or for the services referred to in paragraph 2, which attests either to the existence of an administrative decision or to a document which contributed to an administrative decision".

This definition has the advantage of being more explicit than the explanation provided by the Federal legislature in the Law of 11 April 1994, which will be examined below, but the question arises whether it might therefore prove to be inapplicable to new storage media.

It should be noted that the Flemish legislature gives no special treatment to documents said to be of a personal nature.

It should be emphasised that, in the Order of the Flemish Executive of 9 December 1992 implementing passive publicity, Article 2 § 1 in fine, it is stated that the communication of information applies only to administrative documents where, in the case under consideration, the final decision was adopted after the entry into force of the Decree.

2) Principle : pubicity

[33] *It should be observed that the Flemish Council, acting in pursuance of the former Article 59 bis, paragraph 2, of the Constitution and the Special Law on Institutional Reform, decided to exercise the powers of the Flemish Community and the Flemish Region.*

In principle, administrative documents are public. The services to which the Decree applies are responsible for providing information in time and in a comprehensible manner[34].

This is an enormous requirement with quite flexible outlines !

3) Active publicity

An official responsible for information is appointed at the Ministry of the Flemish Community and in each establishment to which the decree applies[35]. This official is responsible for informing citizens regarding the policy followed and the specific decisions which concern them ; in order to do so, the official may have access to any appropriate document[36]. He must also ensure that documents addressed to citizens are drawn up "in a correct and comprehensible language"[37] etc. The official is to publish an annual report addressed to the Flemish Executive[38], which informs the Council thereof.

4) Passive publicity

Article 9 of the Decree of 23 October 1991 is worded as follows : "Every natural or legal person is entitled to consult any administrative document freely and without charge, to ask for an explanation of such document and to receive a copy thereof on payment of a fee determined by the Flemish Executive".

The detailed rules for the exercise of this right were laid down in an Order of the Flemish Executive of 9 December 1992.

Any application for information must be submitted by registered letter (Article 3 § 1).

Communication of the information may take the form of permission granting the applicant access to the documents desired in order to consult them, an explanation or the provision of a copy (Article 2 § 1). The desired mode of communication must be specified in the application for information.

5) Grounds for rejecting an application

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[34] *Article 3 § 1.*

[35] *Article 4 § 1.*

[36] *Article 4 § 2, Article 5.*

[37] *Article 6.*

[38] *Article 8.*

An application may be refused where to grant it would involve making public incomplete documents or information[39], or transmitting internal documents, or where the request is manifestly unreasonable or couched in too general terms[40].

In addition to these reasons for refusing an application, Article 3 § 2 of the Decree of 23 October 1991 sets forth a number of exceptions to the principle of the publicity of administrative documents; they must not be made public if their publication :

- is prohibited by statute or regulation, or

- would be prejudicial to the confidential nature of information relating to private life[41], or of commercial, industrial or intellectual information associated with industrial or intellectual property, or with intellectual property rights.

6) Procedure where the application is rejected

Acceptance or rejection of the request is to be notified to the applicant within 60 days of receipt of the application[42]. Where no reply has been received at the end of that period the application is deemed to have been rejected (Article 10 § 2).

The Flemish Community has established a procedure involving a particular, if not original, institution : the Mediator[43].

A Mediator is appointed in the Ministry of the Flemish Community and in each establishment to which the Decree applies[44].

Where an application is rejected, the applicant may appeal to the Mediator within 30 days ; the Mediator may pursue any line of inquiry which he deems appropriate. He delivers a reasoned decision within 60 days of the appeal. This decision may form the subject-matter of an application for annulment to the Council of State.

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39 *Article 3 provides that preparatory documents are not to be published until a final decision has been taken.*

40 *Decree of 23 October 1991, Article 10 § 1.*

41 *Subject to written authorisation from the person concerned allowing the information to be made public, according to the method and to the extent determined by that person.*

42 *Article 10 § 1 of the Decree of 23 October 1991; Article 7 § 1 of the Order of the Flemish Executive of 9 December 1992.*

43 *Article 12 of the Decree of 23 October 1991.*

44 *See Order of the Flemish Executive of 13 November 1991 on the recruitment and financial status of the official responsible for information and the ombudsman at the Ministry of the Flemish Community.*

The Mediator draws up a report in respect of each complaint and an annual report covering his activities[45].

7) Procedure for correction

Any person, whether a natural or a legal person, finding any inaccuracy or omission in a document concerning him which he has consulted may demand that the document be corrected[46].

Where his application for correction of the document is rejected the mediation procedure is available[47].

Section III - Article 32 of the Co-ordinated Constitution

Article 32 of the Co-ordinated Constitution of 17 February 1994 lays down the basic principles concerning the publicity of the administration.

"Everyone is entitled to consult each administrative document and to obtain a copy thereof, save in the cases and conditions determined by law, decree or the rule referred to in Article 134"[48].

1) Scope of application

In the explanatory memorandum attached to the Bill introduced for the purpose of inserting Article 32, the Government gave a very broad definition of the expression "administrative document" ; the expression covers "all information, in any form whatsoever, which the authorities have ... all available information, whatever the medium: written documents, sound and visual recordings including data held on computer. Reports, studies, even those of unofficial consultative committees, certain records and minutes, statistics, administrative directives,

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45 *See Article 12 of the Decree and Articles 8 to 11 of the Executive Order of 9 December 1992.*

46 *Article 11 of the Decree of 23 October 1991 ; Article 4 of the Order of the Flemish Executive of 9 December 1992.*

47 *Article 8 of the Order of the Flemish Executive of 9 October 1992.*

48 *The genesis of this article was very complex. The explanatory account of the private members' bill lodged in the Chamber of Representatives on 27 June 1988 by Mr. Daras, Mrs. Vogels, Mr. Simons and Mr. De Vlieghere (Parliamentary Papers, Chamber of Representatives, sess. extra. 1988 No. 10/24t-477/1), contains a brief statement of the constitutional draftsman's reasons for the proposed insertion of a new provision which initially related to publicity, the requirement to state the reasons for acts of the administration and the Mediator. The following reasons are significant: a desire to provide an effective guarantee for human rights and civic rights, the lacunae in the traditional structures for protection and surveillance, the increasing intervention of the public powers in all sectors of social life, the complexity of legislative documents in the broad sense, a tendency towards over-regulation, the increasing powers and resources of the Executive and, as a corollary, the diminishing powers of the Legislature.*

circulars, contracts and licences, public inquiry records, results of tests, films and photographs in the possession of an authority"[49].

No distinction is made between documents drafted prior to the adoption of the decision and those relating to the decision itself, or between documents drawn up prior to and those drawn up subsequent to the entry into force of Article 32 of the Co-ordinated Constitution[50]. The measure applies not only to administrative acts but also to the documents preparatory to the decision[51].

The provision implies that administrative documents may be consulted and copied freely. However, the federal, community or regional legislature can provide for exceptions or impose conditions on the exercise of the right to consult or copy the documents held by the authorities which fall within their respective jurisdictions ; they can provide for exceptions which will hold good for all the administrative authorities on the basis of grounds falling within the exercise of their powers[52]. Complete transparency of the administration could be contrary to other rights already recognised to individuals by statute, the Constitution or international instruments, such as the right to respect for private life, the secrecy of correspondence, medical secrecy, secrecy in banking matters, etc.

The various legislatures must determine at which stage of the adoption of the decision this right of consultation can be exercised.

The Flemish Decree of 23 October 1991 provides in the final subparagraph of Article 3 that administrative documents preparatory to administrative decisions can be made public only when the final decision has been adopted.

The Minister for the Interior and the Civil Service has stated that there was no need to show a particular interest to exercise this right, it was sufficient to be concerned as a citizen. Even though the various legislatures can, by establishing exceptions, demand specific interests, they are prohibited from making consultation of a document conditional upon a direct interest on the part of citizens[53].

2) Entry into force

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49 *Parliamentary Papers, Chamber of Representatives, sess. 1992-1993, No. 839/1, p. 5.*

50 *Parliamentary Papers, Chamber of Representatives, sess. 1992-1993 No. 839/4, p. 5.*

51 *Parliamentary Papers, Senate, sess. extra. 1991-1992, No. 100-49/2, p. 10.*

52 *No. 100-49/2, p. 3, No. 839/1, pp. 4, 5.*

53 *No. 100-49/2, pp. 10, 11.*

In order to provide the Regions and Communities with time to establish their own legislative measures[54], the entry into force of Article 32 was postponed until 1 January 1995[55].

After that date Article 32 will immediately enter into force[56] ; it will be "self-executing"[57].

The Minister for the Civil Service had the opportunity to explain that the intention was to prevent proceedings from being brought to obtain the right to be able to consult administrative documents on the basis of the general constitutional principle before the various legislatures had had time to adopt their own measures[58].

Mr Reynders proposed that the entry into force of Article 32 should be made subject to the entry into force of the statute, decree or rule referred to in Article 26 bis, which became Article 134 of the Co-ordinated Constitution, as regards their respective subject-matter. That amendment was rejected[59].

One member of the Commission of the Senate observed that a constitutional provision need not necessarily be implemented by a statute in order to be directly applicable[60]. It will be for each administration to establish the procedure for consultation of its documents and the Council of State will have jurisdiction to say whether the relevant regulations adopted by an administration are consistent with the constitutional requirement.

On 9 July 1993 the Government took over from the numerous parliamentary initiatives aimed at a similar objective and introduced a Bill on the publicity of the administration which was intended to ensure both "active publicity" and "passive publicity" for administrative documents (Parliamentary Papers, Chamber of

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[54] *The Walloon and Brussels Regions have only sector-based instruments relating to publicity; the Walloon Decree of 13 June 1991 concerns freedom of access for citizens to information on the environment and the Brussels Order of 29 August 1991 on access to information on the environment in the Brussels-Capital Region; only the Flemish Community has enacted a general instrument on publicity, the Decree of 23 October 1991 on the publicity of administrative documents in the services and establishments of the Flemish Executive (Moniteur Belge, 27 November 1991) - see above.*

[55] *See Co-ordinated Constitution, Entry into force and transitional provisions, II.*

[56] *Parliamentary Papers, Senate, sess. extra. 1991-1992, No. 100-49/2, p. 4.*

[57] *Parliamentary Papers, Senate, sess. extra. 1991-1992, No. 100-49/2, p. 3; summary record, 2 June 1993, p. 1058.*

[58] *Parliamentary Papers, Chamber of Representatives, sess. 1992-1993, No. 839/4, p. 3.*

[59] *Nos. 839/3 and 839/4, p. 10.*

[60] *Parliamentary Papers, Senate, sess. extra. 1991-1992, No. 100-49/2, p. 6.*

Representatives, sess. 1992-1993 No. 1112/1). This Bill led to the enactment of the Law of 11 April 1994.

Section IV - The Law of 11 April 1994 on the publicity of the administration

The Law of 11 April 1994, which was published in the Moniteur Belge of 30 June 1994, provided in Article 14 that it was to enter into force on the date determined by the King, and at the latest six months following its publication.

The Law entered into force on 1 July 1994, in pursuance of a Royal Decree of 23 June 1994, which was also published in the Moniteur Belge of 30 June 1994.

The Law of 11 April 1994 defines the scope of Article 32 of the Co-ordinated Constitution[61] ; it should bring about what was described as a "revolutionary" change in administrative ways, "a veritable earthquake from the point of view of current administrative culture"[62].

1) Federal legislation and the publicity of the administration

As stated in Article 1 of the Co-ordinated Constitution of 17 February 1994, Belgium is now a Federal State.

Is it within the powers of the federal legislature to regulate the publicity of acts of the administration within the general meaning of the expression ?

A reading of Article 32 of the Co-ordinated Constitution reveals that it must be recognised that since administrative transparency is associated with a fundamental right it falls within the jurisdiction of the federal legislature.

The definition of fundamental rights and the determination of their exercise remains within the competence of the constitutional draftsman and the federal legislature ; when the question arose of making general the requirement to state the precise reasons on which administrative acts are based, however, there was some discussion as to whether the federal legislature, by stating that a right was of a fundamental nature, could impose obligations on the community and regional authorities which would limit their autonomy, however slightly[63].

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[61] *Parliamentary Papers, Chamber of Representatives, sess. 1992-1993, No. 1112/13, p. 13.*

[62] *Parliamentary Papers, Chamber of Representatives, sess. 1992-1993, No. 1112/13, pp. 11 and 16.*

[63] *The same thing occurred where the legislature undertook to make general the obligation to state the precise reasons for all unilateral administrative acts of individual scope: see opinion of the Legislative Division of the Council of State, Parliamentary Papers, Senate, sess. extra. 1988, No. 215-2 ; R. Andersen and P. Lewalle, La motivation formelle des actes administratifs (The requirement to state the precise reasons on which administrative acts are based), Administration, Trimestriel 1993, p. 62.*

The discussion could have resurfaced in relation to publicity for the administration.

However, the wording of Article 32 itself made it possible to curtail any discussion on this subject : it provides that exceptions to the principle may be made by the statute, decree or rule referred to in Article 134[64].

Thus was formed the plan according to which the publicity of the administration was to be regulated in Belgium ; it is for the federal legislature to implement the constitutional principle and to provide for exceptions in so far as such exceptions fall within its jurisdiction ; in respect of matters which concern them, the community and regional legislatures may provide for exceptions which fall within their specific spheres of competence[65].

2) Scope of application

a) The federal administrative authorities - Other administrative authorities

According to Article 1 of the Law of 11 April 1994, the Law applies to the federal administrative authorities ; it also applies to the other administrative authorities, but only to the extent to which, for reasons which fall within federal competence, the law prohibits or restricts the publicity of administrative documents.

The concept of administrative authority used in the Law of 11 July 1994 coincides with that used in Article 14 of the co-ordinated laws of 12 January 1973 on the Council of State[66]. The legislature followed the method which it had already adopted when it drew up the Law of 29 July 1991 on the requirement to state the precise reasons on which administrative acts are based : Article 1 of that law, too, refers to the concept of administrative authority within the meaning of Article 14 of the co-ordinated laws of 12 January 1973.

In any event, acts of the legislative power and the judiciary are excluded from the scope of application of the law, as are acts of the executive power which are very

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64 *As the Administrative Division of the Council of State pointed out in its Opinion of 18 February 1993 on the preliminary draft which became the Law on the Publicity of the Administration, it was clear that a regulation of this type could not exceed the practical effect which the inclusion of this right in the Constitution sought to achieve (Parliamentary Papers, Chamber of Representatives, sess. 1992-1993 No. 1112/13, p. 24).*

65 *See Parliamentary Papers, Chamber of Representatives, sess. 1992-1993, No. 1112/13, p. 24.*

66 *Nothing could be less simple than to define the concept of administrative authority in the sense thus invoked. Indeed, it is not the few indications set out in the account of the grounds on which the law is based (No. 1112/1, p. 9), or those which appear in the abovementioned opinion of the Legislation Division of the Council of State (ibid., p. 31) that suffice to determine the scope of the concept. It should simply be noted here that the legislature was aware that the concept was evolutionary and used in what was clearly a broad sense.*

closely linked with the legislative or judicial function, such as, for example, the appointment or dismissal of ministers[67], or the drawing up of reports establishing the elements of an offence[68].

It might also be considered - although here the position is not quite so clear - that the documents of the Council of State and the administrative courts are also excluded from the scope of application of the law.

This is because Article 14 of the Co-ordinated Laws of 12 January 1973 on the Council of State provides that the decisions of the administrative courts are to be regarded as distinct from the acts and regulations of the administrative authorities[69].

The legislature also found it necessary to specify what was to be meant by federal administrative authority.

The legislature adopted up the interpretation suggested by the Legislation Division of the Council of State : the expression covers "public bodies and assimilated public services which come under a federal administrative authority, and also private persons charged by a federal authority, following events other than fortuitous events, with exercising a federal public service ; also part of the federal level are the personnel of the provinces who come under the federal authorities, including district commissioners"[70].

Thus the King, Ministers and certain officials acting on their authority, such as the Permanent Secretary for Recruitment, are to be regarded as federal administrative authorities. However, the legislature found it necessary to state that the King would be regarded as an administrative authority only in respect of matters covered by ministerial responsibility, and, visibly embarrassed, went on to state that "documents and correspondence in the possession of the Head of State do not in any event fall within the application of this Law"[71].

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67 *The expression "act of state" has been used in that regard: see No. 1112/1, p. 11.*

68 *No. 1112/1, p. 11.*

69 *In that article decisions of the administrative courts are referred to under the title of "contentious administrative decisions". On that point, see, in particular, J. Salmon, Council of State, Brussels, Bruylant 1987, p. 339 et seq. I consider this explanation more convincing than the explanation which arose during the discussion at the committee stage in the Senate, according to which decisions of the administrative courts, like provincial councils, fall within the exceptions provided for by the Bill being debated (Parliamentary Papers, Senate, sess. 1993-1994, No. 999-2, pp. 8, 9).*

70 *No. 1112/1, p. 9.*

71 *No. 1112/1, pp. 9, 10.*

The legislature further stated that members of ministers' offices were not administrative authorities, which is consistent with case-law[72].

On the other hand, the legislature included among the administrative authorities the functionally decentralised public services with autonomous power of decision which can be regarded as coming within the orbit of federal authorities, such as the Savings and Retirement Bank, the National Employment Office, the National Office for Family Allowances for Employed Workers and the Banking Commission. The legislature did likewise as regards the Communal Savings Bank of Belgium, at the same time pointing out the special features of its statutes[73].

As regards undertakings of mixed management (i.e. those established to provide a public service, but in whose management and constitution individuals are called upon, such as S.A.B.E.N.A., the S.N.C.B., the National Bank of Belgium), the legislature's embarrassment reappeared : it simply stated that they were governed by the law on publicity only to the extent to which the Council of State recognised that they had the capacity of administrative authority[74].

It should be added, as regards autonomous public undertakings[75], that an amendment aimed at including them among the administrative authorities covered by the Law was rejected by the committee of the Chamber of Representatives[76]. This might give the impression that they are not concerned by the publicity requirement.

However, the Minister for the Interior, when questioned on this point by a member of the Commission of the Senate, stated that there could be "no doubt that the proposed law will apply to the autonomous public undertakings to which the Law on the Reform of Certain Economic Undertakings and the Law on the Requirement to state the Precise reasons for Administrative Acts apply".

The Minister went on to state, however, that it was impossible to foresee how the matter would develop. "There is in fact an increasing tendency to regard these undertakings as simple private undertakings rather than public undertakings. Furthermore, the position may change if an undertaking is privatised or becomes a

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72 *Council of State, 1 February 1957, Michel No. 5.478, Rec. p. 60; 23 May 1961, Van den Steen No. 8597, Rec. p. 420; 30 March 1979, Estievenart No. 19.544, Rec. p. 352.*

73 *No. 1112/1, p. 10.*

74 *No. 1112/1, p. 10.*

75 *What is meant here is those undertakings referred to by the Law of 21 March 1991 on the reform of certain public economic undertakings, i.e. Belgacom, La poste, the S.N.C.B. and the State-owned airways company (Régie des voies aériennes).*

76 *Parliamentary Papers, Chamber of Representatives, sess. 1992-1993, No. 1112/13, pp. 26 and 40.*

subsidiary of another undertaking. It will then be for the courts concerned to say whether the undertaking or subsidiary is still concerned" ... [77]

As regards the public consultative bodies (the Central Council for the Economy, the Higher Council for the Middle Classes, the National Employment Council), they do not act in the capacity of administrative authorities when they formulate their opinions, but only in the exercise of their power of decision vis-à-vis their personnel.

Lastly, since the professional bodies governed by public law, such as the Order of Doctors, the Order of Pharmacists, the Order of Veterinary Surgeons, the Order of Architects, etc., are regarded as administrative authorities, they come within the scope of the law on the publicity of the administration[78].

It should also be added that, according to the statement of the reasons, the non-federal administrative authorities are those which form part of the other administrative levels - the Communities, the Regions, the provinces and the communes[79] cannot be described as federal administrative authorities - ; the same

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[77] *Parliamentary Papers, Senate, sess. 1992-1993, No. 999-2, p. 5.*

[78] *No. 1112/1, p. 11.*

[79] *The question of whether or not the law on the publicity of the administration should apply directly to the provinces and communes was aired on a number of occasions during the debates in Parliament. The problem was not simple ; at the present time the organisation of the provinces and the communes still comes under the federal legislature (although it the political intention is to place their organisation under the Regions - see the so-called "Saint Michel" agreements) ; on the other hand, however, the ordinary supervision of the communes and provinces is the responsibility of the regional authority (see. Co-ordinated Constitution, Article 162, and the Special Law on Institutional Reform of 8 August 1980, as amended by the Special Law of 8 August 1988, Article 7). When questioned on a number of occasions as to whether the measure under preparation would eventually apply to the communes and provinces, the Minister for the Interior replied that the Government intended first to consult the Regions on the matter, in a spirit of federal fairness (Parliamentary Papers, Chamber of Representatives, sess. 1992-1993, No. 1112/13, pp. 17, 29, 30, 31, 64 and 65; Parliamentary Papers, Senate, sess. 1993-1994, No. 999-2, p. 2). Amendment No. 39, filed by Mr. Bertouille with the Chamber of Representatives and aimed at making the provisions of Chapter III apart from §§ 1 and 2 applicable to the administrative authorities of the communes and provinces (No. 1112/3), was rejected by 10 votes to 3, with one abstention (No. 1112/13, p. 40). An amendment with a similar purpose filed with the Senate by Mr. De Donnéa and Mr. Vandenhaute met with a similar fate : it was rejected by 11 votes, with one abstention (Parliamentary Papers, Senate, sess. 1993-1994, No. 999-2, p. 17 et seq.).*

*On the other hand, amendment No. 66, filed by Mr. Ansoms and Mr. Breyne and aimed at allowing the King to associate the communal administrations with the realisation of passive publicity (No. 1112/6), was accepted by the Commission (No. 1112/13, p. 50) and finally adopted by the legislature in Article 4 para. 3.*

*In my view, it is necessary to conclude that, as the law stands at present, the communes and provinces are not subject to the application of the Law of 11 April 1994. However, they are clearly within the scope of Article 32, which is directly applicable as from 1 January 1995. Furthermore, Articles 84 and 102 of the*

applies to the services of the Communities, the Regions, the Community Commissions or the establishments created by them, private persons carrying out tasks in the general interest which come within the competence of the Communities and Regions, such a community and provincial bodies, inter-community organisations, provincial bodies responsible for polders, drainage, church fabrics, etc...[80]

b) Administrative documents

An administrative document is any information, in any form whatsoever, in the possession of an administrative authority. The expression is clearly taken in a broad sense : "it concerns all available information, whatever the medium : written documents, sound and visual recordings including data held on computer. Reports, studies, even those of unofficial consultative committees, certain records and minutes, statistics, administrative directives, circulars, contracts and licences, public inquiry records, results of tests, films and photographs in the possession of an authority are generally public"[81].

It can be seen that, according to the intentions of the legislature, both final documents and preparatory documents are covered[82]. It should be pointed out, however, that the authority can refuse to allow a document to be consulted or to provide an explanation for it or a copy of it where to do so could lead to misunderstanding because the document is unfinished or incomplete[83].

c) Personal documents

A personal document, according to Article 1 (3) of the Law of 11 April 1994, is an administrative document containing an appreciation or value judgment relating to a natural person who is identified by name or easily identifiable or the description of conduct the disclosure of which can clearly harm that person.

3) Active publicity

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*new communal law and Article 120 of the provincial law already guarantee a certain transparency at their level.*

80 *No. 1112/1, p. 9.*

81 *No. 1112/1, p. 12.*

82 *The Minister for the Interior stated that:"to define an administrative document as a document in respect of which a final decision has been adopted is too restrictive. Documents which played an important part in the adoption of the decision or which contributed thereto must also be regarded as administrative documents" (No.1112/13, p. 33).*

83 *See Article 6 § 2(1); hereinafter referred to as § 6.*

Articles 2 and 3 of the Law of 11 April 1994 impose a number of positive obligations on the federal authorities.

The King is made responsible for determining, by an Order in Council, the organisation and tasks of the federal information service, and the federal administrative authorities are required to appoint a specialist authority with responsibility for developing and implementing an information policy[84].

Each federal administrative authority[85] is to publish and keep available for anyone who may ask for it a "guide"[86] describing its powers and the organisation of its operations.

All correspondence from a federal administrative authority must show the name, capacity, address and telephone number of the person able to supply fuller information on the file[87].

Every document whereby a decision or administrative act of individual scope issuing from a federal administrative authority is notified to an individual must show the possible channels of appeal, the authorities with jurisdiction to hear such an appeal and the forms and time-limits to be observed, failing which the time within which an appeal must be lodged does not begin to run[88].

According to Article 3 of the Law of 11 April 1994, any fee charged for issuing information cannot exceed the cost price[89].

4) <u>Passive publicity</u>

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84 *According to the statement of the reasons, the actual form of these authorities may vary according to requirements: "An authority may be a specialist body or an information service, but also an agent with either full-time or part-time responsibility for the information policy" (No. 1112/1, p. 12).*

85 *In its opinion on the Bill, the Council of State considered that this obligation also applied to persons governed by private law assimilated to the administrative authorities in the light of the application of the law (No. 1112/1, p. 32).*

86 *This is the word used in the statement of the reasons (No. 1112/1, ibid.).*

87 *It was stated that the fact that a member of staff was mentioned by name did nothing to alter the theory of the responsibility of the institution (No. 1112/1, p. 13).*

88 *This provision was introduced on the recommendation of the Council of State (No. 1112/1, p. 32). It was already applied in Article 19 § 2 of the Co-ordinated Laws of 12 January 1973 on the Council of State, introduced by the Law of 24 March 1994. It is apparent from that provision that the time within which the appeals referred to in Article 14 § 1 must be lodged begins to run only where the notification of the act or decision of individual scope indicates the existence of those appeals and the forms and time-limits to be observed.*

89 *In that regard, the Minister for the Interior emphasised that access to information should in principle be free; that the possibility of charging a certain price was intended to prevent or counter abuse; that any income should serve to improve the information of the public; that there was no question of impeding publicity (No. 1112/13, p. 49).*

The individual will find in Articles 4 and 5 of the Law of 11 April 1994 the basis of a right of consultation according to the following rules.

The right to consult an administrative document of a federal administrative authority and to receive a copy of the document consists in everyone's right, as provided for in the Law of 11 April 1994, to consult any administrative document at the place where it is held, obtain an explanation thereof[90] and to receive communication thereof in the form of a copy.

Where documents of a personal nature are concerned, the applicant must show an interest.

The King may regulate the intervention of the communal administrations for the purpose of consultation or correction of documents.

Anyone wishing to consult an administrative document, obtain an explanation thereof or receive communication of the document in the form of a copy must submit an application[91]. The application must clearly indicate the matter concerned and, where possible, the administrative documents concerned (so that the administrative authority does not have to make too great a number of documents public) and must be addressed in writing to the competent federal administrative authority, even if this authority has filed the document in the archives. In such a case, however, it is for the federal authority to decide what action is to be taken in respect of the application, in accordance with Article 11 of the Law.

Where the application for consultation, explanations or communication in the form of a copy is addressed to a federal administrative authority which is not in possession of the administrative document, this authority must inform the applicant without delay that it does not have the document and send him the name and address of the authority which, according to the information available to it, holds the document. The federal administrative authority must enter the applications in a register in order of receipt.

The legislature has provided that administrative documents obtained in this way are not to be distributed or used for commercial purposes[92].

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[90] *A number of members of parliament pointed out that this obligation might quickly prove oppressive for the administration (No. 1112/13, p. 7).*

[91] *The legislature intended the procedure to be "as simple as possible. The sole condition is that the application should be made in writing to the competent authority, in order to ensure the probative force and for practical reasons. Clearly, this does not prevent action from being taken in respect of telephone applications, but in this case there can be no guarantee that the appeal procedure will apply" (No. 1112/1, p. 14).*

[92] *Law of 11 April 1994, Article 10.*

The legislature provided that receipt of a copy of an administrative document may be subject to payment of a fee, the amount of which is to be determined by the King.

5) Grounds for compulsory exclusion

In accordance with the plan set forth in Article 32 of the Co-ordinated Constitution, the federal legislature provided for a series of cases where the federal or non-federal authority[93] must reject the application for consultation, explanation or communication in the form of a copy of an administrative document. The source of these exceptions is to be found in the desire to proceed carefully when dealing with certain interests coming within federal protection[94].

a) The balance of interests

According to Article 6 § 1 of the Law of 11 April 1994, the federal or non-federal authority must reject the application if it has found that the interest of publicity does not prevail[95] over the protection of one of the following interests, which are listed exhaustively[96] :

- the security of the population ;
- the freedoms and fundamental rights of individuals ;
- the international federal relations of Belgium ;
- public order, national security or national defence[97] ;
- investigations or proceedings in respect of punishable acts ;
- a federal economic or financial interest[98], public funds or credit ;

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93 *The construction of a nuclear power station has been cited as an example: the safety of nuclear power stations comes within federal competence, but the issue of a building permit comes within regional competence. The Region cannot make public the file relating to the building permit, and more especially the data concerning the safety of the power station, if the interest of publicity does not prevail over the safety of the population (Parliamentary Papers, Senate, sess. 1993-1994 No. 999-2, p. 7).*

94 *Without giving examples, the Council of State observed that certain of the grounds for exceptions set out in Article 6 came within the competences shared between the federal authority, the Communities and the Regions. Protocols or co-operation agreements could make the desired objectives easier to achieve (No. 1112/1, p. 35).*

95 *The grounds for exception are therefore relative. The fact that one of the interests provided for may be at stake is not sufficient for the authority to be automatically relieved of the obligation to give information or to make the documents public (No. 1112/1, p. 15).*

96 *No. 1112/1, p. 17.*

97 *The example was cited of documents describing the security system of official buildings or containing the programme for the protection of a nuclear power station against possible terrorist attack; likewise, details of chemical products capable of being used in an attack (No. 1112/1, p. 17).*

98 *The example was cited of estimates by the public authorities of the costs involved in the construction of federal public buildings when tenders are being considered, similarly the manner or date of recovery of fiscal debts or directives of the Ministry of Finance (No. 1112/1, pp. 17 and 18). "The concept of public*

- the essentially confidential nature of information concerning undertakings or manufacturing communicated to the authority[99] ;
- the secrecy of the identity of the person who communicated the document or information to the administrative authority in confidence in order to report a punishable offence or an allegation thereof[100].

b) Documents which are confidential by law

The only exceptions, where the former rule of secrecy applies, concern certain acts which cannot be consulted, explained or communicated in the form of a copy if publication of the document would be harmful to :

- private life, unless the person concerned has first given his consent in writing to consultation or communication in the form of a copy ;
- a statutory requirement of secrecy ;
- the secrecy of the deliberations of the Federal Government and the responsible authorities coming under the federal executive power[101] or with which a federal authority is associated[102].

6) Grounds for optional exclusion

Under Article 6 § 3 of the Law of 11 April 1994 the federal administrative authority[103] may reject an application for consultation, explanation or communication in the form of a copy of an administrative document if the application :

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*economic interest is a vast concept capable of broad interpretation and able to concern both the federal level and the regional level at the same time", explained the Council of State. "Nonetheless the article [32] of the Constitution and the purpose of Article 6 § 1 assume that the ground determining the exception called for by the public economic interest comes within a competence which, under the laws on institutional reform, comes within the federal authority" (No. 1112/1, p. 35).*

99 *The exception is justified by the desire not to compromise fair competition; it could cover an exploitation licence where disclosure would enable third parties to obtain information relating to a manufacturing process (No. 1112/1, p. 18).*

100 *The intention is to avoid situations in which persons would fail to report punishable offences to the authorities or public institutions because the publicity of the correspondence would enable them to be identified (No. 1112/1, p. 18). Since it deals with criminal proceedings, the same exception is of general application and also applies for the non-federal administrative authorities (No. 1112/1, p. 36).*

101 *The example of the Sickness and Invalidity Institute was cited in the statement of the grounds (No. 1112/1, p. 18).*

102 *The example of the Committee of Concertation was cited in the statement of the grounds (ibid.).*

103 *The grounds for Article 6 § 3 can be invoked only by the federal administrative authorities (No. 1112/1, p. 19).*

- concerns an administrative document whose disclosure could lead to misunderstanding because the document is unfinished or incomplete ;
- concerns a point of view or an opinion communicated freely and in confidence to the authority ;
- is manifestly abusive ;
- is couched in terms which are manifestly too vague.

7) Principle of publicity, grounds for exclusion and freedom of expression of federal officials

Clearly, the principle of publicity is not unconnected with the determination of the professional obligations of federal agents. The need to reconcile officials' duty of discretion and the principles of transparency caught the attention of one member of the Commission of the Chamber of Representatives[104].

The question was revived when, in 1994, after a first unsuccessful measure[105], the Government undertook to define in a new Royal Decree, adopted in pursuance of the Special Law on Institutional Reform of 8 August 1980[106], the general principles of the administrative and financial status of agents of the State applicable to the personnel of the services of the Community and Regional Governments and the Boards of the Common Community Commission and the French Community Commission and also to the legal persons governed by public law coming under those institutions.

In its opinion on the draft regulation, the Legislative Division of the Council of State emphasised the pre-eminence of the principle laid down in Article 32 of the Co-ordinated Constitution and the superiority of the Law of 11 April 1994 in comparison with the draft Royal Decree[107]. The Government stated that it adopted that point of view[108].

I fail to see, however, how co-ordination has been ensured between the grounds for optional or compulsory exclusion set out in Article 6 of Law of 11 April 1994 and the exceptions to freedom of expression provided for in Article 3 para. 2 of the Royal Decree of 26 September 1994.

Thus, for example, Article 3 of the Royal Decree prohibits agents from disclosing facts to do with national security and the protection of public order ; it does not

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[104] *No. 1112/13, p. 12.*

[105] *The Royal Decree of 22 November 1991, annulled by the Council of State on 31 May 1994.*

[106] *Article 87 § 4, as amended by the Special Law of 8 August 1988.*

[107] *See Moniteur Belge, 1 October 1994, p. 24.869.*

[108] *See Report of the King, Moniteur Belge, 1 October 1994, p. 24.850.*

strike the balance of interests found in Article 6 § 1 of the Law of 11 April 1994 as regards the non-communication of documents concerned with the security of the population, public order or national security or defence.

This is without doubt a potential source of discontent.

8) The special case of a document which includes a work protected by copyright

Where an application for publicity relates to an administrative document of a federal administrative authority which includes a work protected by copyright, the authority does not require the permission of the author or the person to whom the copyright has been assigned in order to authorise consultation of the document at the place where it is held or to provide explanations of the document.

However, communication in the form of a copy of a work protected by copyright is allowed only where permission has first been obtained from the author or the person to whom the copyright has been assigned.

In all cases, the authority must state that the work is protected by copyright[109].

9) The special case of documents which have been placed in the archives

The Law of 11 April 1994 also applies to administrative documents which have been placed in the archives by a federal administrative authority.

The administrator of the federal archives is required to collaborate in applying the law.

The grounds for compulsory or optional exception no longer apply once the time determined for the secrecy of the archives in question has expired.

It was not the legislature's intention to derogate from the legislation on the archives ; it stated that the three paragraphs set out above did not apply to either the General Archives of the Kingdom or the State Archives in the provinces[110].

10) Procedure where the application is adjourned or rejected

A federal administrative authority which cannot take immediate action in respect of an application, or which decides to reject it, must, within 30 days of receipt of

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[109] *Law of 11 April 1994, Article 9.*

[110] *Law of 11 April 1994, Article 11.*

the application, communicate its reasons for postponing or rejecting it[111]. Where the application is adjourned, the period can never be extended by more than 15 days.

Where the authority fails to communicate its reasons within the prescribed period the application is deemed to have been rejected.

11) <u>Right of correction</u>

Article 7 of the Law of 11 April 1994 establishes the right to demand that the administrative documents to which it refers be corrected.

Where a person shows that an administrative document of a federal administrative authority contains inaccurate or incomplete information concerning him, that authority is required to make the necessary corrections, at no cost to the person concerned. The correction is made upon written application from the person concerned, without prejudice to a procedure prescribed by or in pursuance of the law.

A federal administrative authority which is unable to take immediate action in respect of an application for correction or which rejects such an application must, within 60 days of receipt of the application, communicate its reasons for adjourning or rejecting it[112]. Where the application is adjourned, the period can never be extended by more than 30 days. Where there is no communication within the prescribed time, the application is deemed to have been rejected.

Where the application is addressed to a federal administrative authority which is not competent to make the corrections, that authority must inform the applicant of the position without delay and communicate to him the name and address of the authority which, according to the information available to it, is competent to do so.

12) <u>Disputes concerning the publicity of administrative documents</u>

According to the wording of the Bill, the rejection, by a federal authority[113], of an application to consult a document or to receive communication of a copy could

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[111] *Can this strange choice of words provide the basis for an exception to the requirement to state the precise reasons for unilateral administrative acts of individual scope expressed in the Law of 29 July 1991? It might be thought so, since that law requires that the reasons for the considerations of law and of fact which serve as the basis for the decision be stated in the document itself. Unless it is accepted that the legislature was clumsy in expressing the obligation on the authority to reply to the application by a reasoned decision within 30 days ...*

[112] *The choice of words raises the same question as that set out in the preceding note.*

[113] *According to the Legislative Division of the Council of State, federal competence could not extend to subjecting the decisions of a non-federal administrative authority to an administrative appeal procedure*

form the subject-matter of an appeal to the King ; this appeal was a necessary preliminary to an appeal before the Council of State[114]. No appeal lay against a decision authorising the consultation or communication of documents.

The legislature gave virtually no explanation for a complete change of approach and, openly guided by French law on the publicity of the administration, abandoned that first formula and decided to establish a Commission for Access to Administrative Documents, to which an applicant could apply for an opinion in the event of a difficulty affecting the consultation or correction of an administrative document[115].

Furthermore, the legislature organised a procedure of reconsideration - a kind of administrative appeal - and provided for the creation by Order in Council of a special advisory body, the Commission for Access to Administrative Documents.

The legislature also confirmed the competence of the Council of State in the sphere in question.

A - Application for reconsideration and application for the opinion of the Commission for Access to Administrative Documents

Where an applicant encounters difficulties in securing consultation or the correction of an administrative document under the Law of 11 April 1994 he may submit an application for reconsideration to the federal administrative authority concerned.

At the same time, the applicant may bring the matter before the Commission for Access to Administrative Documents for its opinion.

The Commission must communicate its opinion to the applicant and the federal administrative authority concerned within 30 days of receipt of the application. Where it is not communicated with the prescribed time the opinion is disregarded.

The federal administrative authority must communicate its decision approving or refusing the application for reconsideration to the applicant within 15 days of receipt of the opinion or of the expiry of the period within which the opinion

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*regulated at the federal level, even where the appeal concerned exclusively a prohibition on publicity imposed for reasons arising at the federal level. "It is not within the power of the ordinary legislature to subject the decisions of a community or regional administrative authority to review proceedings before the King" (No. 1112/1, p. 39).*

[114] *No. 1112/1, p. 26.*

[115] *No. 1112/1, p. 20; No. 1112/13, p. 64. It will be observed that an amendment, based on the model of the Flemish Decree of 23 October 1991, aimed at establishing a Mediator with responsibility for deciding in the event of difficulty, was rejected (No. 1112/13, pp. 64 and 66).*

should have been communicated. Should it fail to communicate its decision within the prescribed time, the authority is deemed to have rejected the application.

The Commission may also be consulted by a federal administrative authority. It may, of its own motion, issue opinions on the general application of the law on publicity of the administration. It may submit proposals to the legislature concerning the application of the law or its possible amendment[116].

B - Recourse to the Council of State

Only the decision adopted by the federal authority on an application for reconsideration can form the subject-matter of an appeal to the Council of State[117]. Where appropriate, this appeal must be accompanied by the opinion of the Commission.

In referring to the Co-ordinated Laws of 12 January 1973 on the Council of State, the legislature seems to accept that in urgent or extremely urgent cases an application may be made to the competent administrative judge for the suspension of the decision on the ground that its adoption was ultra vires, in accordance with the requirements of Article 17 of the Co-ordinated Laws[118].

13) Rule of interpretation - wider regimes of publicity are to be maintained

Lastly, the legislature stated, in the final provisions of the statute, that the rule which it adopted was without prejudice to the legislative provisions which provide for wider publicity of the administration[119].

Thus the Minister for the Interior stated in a memorandum to the Commission of the Chamber of Representatives that approval of the Bill which became the Law of 11 April 1994 would not imply that the Flemish Decree of 23 October 1991 would be automatically and completely void[120].

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[116] *Law of 11 April 1994, Article 8 §§ 3 and 4.*

[117] *Law of 11 April 1994, Article 8 § 2(4).*

[118] *It should no doubt be recalled that the suspension or annulment by the Council of State of an administration decision of refusal cannot be interpreted as equivalent to the issue of authorisation. However, it may follow from the grounds for the judgment that the administration is obliged to issue such authorisation - see, on that point, P. Lewalle, L'annulation des actes et réglements administratifs par le Conseil d'Etat (The annulment of administrative acts and regulations by the Council of State), Editions du Jeune Barreau de Liège 1991.*

[119] *Law of 11 April 1994, Article 12.*

[120] *Parliamentary Papers, Chamber of Representatives, sess. 1992-1993 No. 1112/12, p. 24.*

## THE LEGISLATIVE FRAMEWORK FOR ACCESS TO AND DISSEMINATION OF OFFICIAL INFORMATION

b. Statement by Ms Marita LILJESTRÖM, Justice Supreme Administrative Court of Finland

1. Historically, publicity of official documents as a legal institution is closely connected with freedom of the press and its development. The breakthrough of the idea took place in Sweden/Finland at a very early stage. The Freedom of the Press Act of 1766 was unique in two respects. The country was the first in the world to extend constitutional protection to freedom of the press. Another extraordinary feature was the introduction of the principle of publicity in the form of open access to official documents.

One of the objectives of classical liberalism was to safeguard the influence of public opinion on State affairs by institutionalising publicity as a general principle of organisation. In Sweden/Finland the idea was implemented in the form of public trials and parliamentary publicity and, furthermore, the publicity principle was put into practice even in the sphere of executive activity and administration.

During the following decades, freedom of the press was often curtailed by periods of censorship. Access to official documents was also more or less restricted, but the principle was never abandoned altogether.

In 1917 Finland gained independence. The Freedom of the Press Act was enacted in 1919. Even though this Act did not explicitly provide for the right to obtain official documents, adherence to the principle itself was unquestioned. It was specifically stipulated in the Act on the Publicity of Official Documents in 1951.

2. The democratic nature of the publicity principle is expressed in the provision granting every Finnish citizen the right to obtain official documents. This right may be exercised independently of the motives of the applicant. Mere curiosity establishes a sufficient basis for access.

The main principle of the 1951 Act is that official documents are public. The Act defines the concept of an official document, provides exceptions from the principle of publicity and regulates the procedure for gaining access to the documents. An official document is any document drafted, given or received by a pubic authority. In 1987 the status of documents was extended to technical and electronical recordings.

A document becomes public when it is finished. An entry in an official list, journal or diary becomes public as soon as it is written down. Consequently, even

official diaries are public in Finland. This principle is of particular importance to the mass media, enabling them to identify newsworthy items.

Minutes of meetings are public as soon as they have been approved. Official letters become public when signed. This principle applies to letters sent to private citizens as well as to inter-agency correspondence. Documents addressed to public authorities become accessible when received by the addresses.

There are two kinds of exceptions to the principle of publicity. Certain documents are non-public. Such documents may be disclosed at the discretion of the authority. On the other hand, certain documents are secret and must not be revealed to unauthorized persons.

One of the most central and problematic provisions of the 1951 Act deals with internal documents such as inter-agency proposals, drafts, reports, memoranda and notes prepared by officials. These internal documents are non-public, which leaves the authority with a discretion in the matter of disclosure. Nevertheless, the provision offers a very large degree of discretion to the authorities and the current law is therefore not a very expedient instrument for advance control of official decision-making processes.

3. The efficiency of the publicity principle as a controlling device is determined to a great extent by the scope of review in respect of secrecy rulings. It largely depends on how much Parliament has delegated its powers to the executive sector. The more extensive the executive powers are and the lower the hierarchical level is, the weaker the possibility of control. In Finland the right to issue rules of secrecy is currently extended to the President of the Republic and to the Cabinet, even if their competence is somewhat more limited than that of Parliament.

There are legal remedies available to an applicant whose application has been rejected. The first step after denial is to demand a formal decision from the proper authority. If the decision is negative, the claimant may appeal to superior authorities. The final instance is the Supreme Administrative Court.

4. It is fashionable to demand more publicity and less secrecy. To approach the problem of open access in a realistic manner it is, however, necessary to emphasise that there are numerous interests requiring secrecy or non-publicity, such a national security, maintenance of law and order, economic interests of a public and private character, privacy of the individual, maintenance of confidence in public authorities, and administrative efficiency. Non-disclosure of official documents is to a certain degree a kind of necessity of the system.

5. Important legislative reforms concerning publicity are in the process of being adopted in Finland. A new comprehensive piece of legislation - a Publicity

Act - has been drafted. The aim of the draft Act is to broaden the scope of publicity, as well as to improve the transparency to the relevant legislation by incorporating all rules relating to publicity, non-publicity and secrecy in a single Act. It is also proposed to increase the publicity of matters under preparation. When the handling of a matter has been finished, the preparatory documents shall be made public.

6. The Finnish Constitution Act of 1919 guarantees freedom of expression and freedom of the press. The provisions concerning fundamental rights are being amended. A Government Bill proposes that freedom of expression and freedom of the press be expressed in a more detailed and exact manner. Freedom of expression would contain the right to express, publish and receive information, opinions and other communications without censorship. Everyone's right of access to documents and other recordings held by public bodies is to be stated in the Constitution. The intention of the amendment is to guarantee the prerequisites of a democratic society - the free forming of public opinion, open public debate, the free development of mass media, and popular control of the use of power.

The concept of freedom of expression and information is defined in a broad manner in accordance with human rights instruments and constitutional practice in Finland. In addition to the traditional right to express and publish messages of different kinds, it also contains the right to receive information without censorship. The provision thus prohibits governmental interference with the editorial work of the press even before the actual publishing of information.

The Government Bill also proposes to strengthen the existing principle of publicity by introducing into the Constitution Act a general rule that everyone has a right of access to official documents and technical recordings. More detailed provisions concerning this right shall be provided for by law. A constitutional provision would have the effect that exceptions from the main rule of publicity have to be established by law, and that they must be as limited as possible.

## ACCESS TO INFORMATION UNDER GREEK LAW

c. Statement by Ms Ioanna KIKI, Lecturer, Panteios University, Athens

I will make a brief intervention on the various constitutional aspects of freedom of information which have been elaborated upon under the Greek Constitution of 1975.

The Constitution does not guarantee freedom of information in an explicit manner. Nonetheless, both legal theory and decided cases admit that an individual right of access to information can be construed from a proper interpretation of the relevant constitutional provisions, having regard also to the fact that Article 10 of the

European Convention on Human Rights has been incorporated into the Greek legal system.

First, access to personal data and administrative files can be given to any citizen, on request, unless such data or files also contain information which discloses official secrets or breaches the privacy of third persons. This kind of access to personal information is guaranteed by Article 10 paragraph 3 of the Greek Constitution and is regulated further by Law 1599/86.

Until now, Greece has not enacted a law for the protection of the individual from data flows, lest such a piece of legislation might provoke violations of constitutionally protected aspects of private life.

As a consequence of this lack of legislation, the country cannot implement, on a European level, either the provisions of the relevant Convention of the Council of Europe concerning data nor those laid down by the Schengen Agreement, for the european external frontiers.

Second, as far as mass information is concerned, there is currently in Greece a widespread belief that public access to information is mainly secured, however ineffectively, through the mass media.

From a legal perspective, Article 15 paragraph 2 of the Greek Constitution provides that the aim of broadcasting is equality and objectivity in the dissemination of information. Although this provision is supposed to have a directive character and not a fully binding legal content, Greek case law has dealt with many questions, especially in cases concerning the apportionment of broadcasting time to political parties by the government during electoral campaigns, as if Article 15 paragraph 2 had a fully binding content. Given this view, the case law has finally come to accept that claims can be raised on the basis of the abovementioned provision (Council of State 930/90). Both the Council of the State and the High Court have ruled that, in the case of claims by political parties, access to objective information presupposes that all the existing Greek political parties can in turn have access to broadcasting time, especially before elections.

The constitutional obligation for the dissemination of objective information primarily falls upon public broadcasting channels. This is mainly because the Greek Constitution expressly states that broadcasting has a concrete social mission, so that the right to information is characterised by social elements in this context and the State accordingly has an obligation to take positive measures in order to make possible the exercise of this right.

More specifically, to fulfil their duty in respect of the provision of objective information, journalists are especially empowered with the individual right to

have access at least to all open sources of information. Unfortunately, Greek legislation does not grant them the right to decline to reveal their sources of information, and thus to maintain professional secrecy.

d. Summary of discussion

Mr Pinelli said that Italy in principle followed the Swedish model, but with the big difference that the relevant law had only been adopted in 1990. This law is contrary to the Italian tradition and there is a lot of resistance on the part of administration to its implementation. It has not yet become a social reality. Apart from the usual exceptions to the principle of openness described by the Rapporteur, the law requires also that the person seeking access has to have an interest in the matter. Another dimension in Italy is that the problem of access to information exists not only between the public and the administration, but also between the different sectors of the very complex administration.

He asked the Rapporteur whether the principles of political accountability of politicians for the civil service and anonymity of the civil service could be regarded as an impediment to granting access to administrative files, and asked what was the relationship between these principles and access to official information.

Mr Plunkett said that this question was difficult to answer because there was only just now in Ireland a change of emphasis away from the principle of ministerial accountability for everything happening in a specific department towards more responsibility of civil servants.

Mr Vengerov said that the Russian mass media law contained a provision on access by journalists to official information. The ordinary legal system was however too slow to deal with such requests from journalists, and his Court Chamber had in its Statute as one of its tasks to examine complaints by journalists about denial of access to information. The very first decision by the Court Chamber concerned a case of discrimination among journalists concerning access to information.

For the private citizen it was practically impossible to get access to official information. There was a very strong tradition of bureaucracy and red tape. His Court Chamber had prepared a draft bill on citizen's access to information, and he was therefore very curious to learn more about the situation in other countries.

Mr Vitruk recalled the competence of ordinary courts to deal with disputes on access to information. If journalists did not set the example by going to court, from whom could it be expected?

Questions of confidentiality of administrative proceedings were often exploited for political purposes. There were some files which necessarily had to be kept confidential, like the files of the secret service. The Russian Penal Code distinguished between State secrets and service information. Only the confidentiality of State secrets was protected by criminal law.

Usually the question concerned the executive. However, there also had to be specific principles concerning the judiciary. The secrecy of deliberations of the courts had to be maintained. The Russian Constitutional Court had now established the rule that dissenting opinions could not be published before the reasons for the main opinion had been given.

Mr Simonov said that the Russian Criminal Code condemned prohibitions addressed to journalists. However, this Article had only been applied two times. The Russians did not trust the courts and did not dare to complain about any interference by administrative bodies.

The Press services were to be regarded rather critically. They had only very vague ideas about their professional duties, and journalists preferred not to use them. The press services were a source of corruption, and lied frequently, but this fact did not distinguish them from those politically responsible.

Mr Kanagros, Head of the Cyprus Journalists Association, said that the Cyprus Press Act of 1989 protected the confidentiality of journalists' sources. Journalists had to reveal their sources only if this was the only evidence available for solving a criminal case. Journalists' access to state documents was also guaranteed by the law with some exceptions, but in practice this provision was not enforced. Most administrative documents were still classified, and the Civil Service Act, in contradiction with the Press Act, prohibited civil servants from giving information to journalists. There was some progress in areas like local authorities, but problems remained as regards the police and the courts, which outlawed cameras and the recording of proceedings. He emphasised that journalists needed access to public documents not on their own behalf but on behalf of citizens.

Mr Plunkett said that any rule on access to offical information should be the same for journalists and for ordinary members of the public. There was neither a reason to discriminate against journalists nor to give them a privileged position. The confidentiality of journalist sources might be abused. On the other hand, it went too far to have, as is presently the case in Ireland, to grant no protection at all of the confidentiality of journalists' sources. It might be possible to have some sort of compromise solution.

The need to maintain the confidentiality of the deliberations of courts had been raised by Mr Vitruk. He would like to point out that this did not arise for the courts only, but also within the administration, and that many of the exceptions to

opennness generally admitted concerned advice given before decisions or discussion documents preparing for later deliberations. If one published discussion documents destined to prepare a decision after the decision was taken, this might undermine the decision itself. Therefore, in Canada, for example, discussion documents preparing a decision could be made accessible to the public only a certain time after the decision had been taken.

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The European Commission for Democracy through Law (the Venice Commission) is an advisory body on constitutional law, set up within the Council of Europe.

It is composed of independent experts from member states of the Council of Europe, as well as from non-member states. At present, some forty states participate in the work of the commission.

Its main task is to co-operate with countries that request its assistance in the process of constitutional reforms. The commission can also undertake general studies, and propose draft laws and treaties.

The commission launched the UniDem (University for Democracy) programme of seminars and conferences, aimed at strengthening democratic awareness in future generations of lawyers and political scientists.