FREEDOM OF THE PRESS AND PERSONAL RIGHTS

Right of correction and right of reply in Slovene legislation

MATEVŽ KRIVIC
SIMONA ZATLER

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FREEDOM OF THE PRESS AND PERSONAL RIGHTS

Right of correction and right of reply in Slovene legislation

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CONTENTS

SUMMARY

Matevž Krivic and Simona Zatler analyse the meaning of the right of correction and right of reply in relation to press freedom. They both draw attention to the issue of controversial provisions in Slovene media law and suggest possible solutions.

Matevž Krivic concludes that misunderstanding of the right of reply and right of correction in Slovenia arises from unfamiliarity with these institutes of Slovene media law and partly their illogical naming. In the first chapter the author explains terminological issues. Slovene "correction/popravek" is called reply (réponse, Gegendarstellung) in other countries, while Slovene "reply/odgovor" is a reply intended to protect public, not private interests. This right, unknown in other media laws, exceeds both classic (or "external") and internal freedom of the press (i.e. rights of editors and journalists with respect to a medium owner). It is a fragmentary remnant of the former constitutional right to publish opinions of public importance which did not survive the breakup of the socialist system.

Slovene "correction/popravek" is, legally and in comparative terms, somewhere between the stricter, German regulations (a reply is possible only to factual assertions) and entirely liberal French regulations (a reply is limited only with regard to extent and not content). It is closer to the German solution though – but in a way which tempers rather aptly the excessive hardness of German approach without yielding too much to French liberalism. This is evident especially in essential points: a person may reply to all assertions that have affected him/her (including opinions), but only by citing "facts and circumstances" that dispute these assertions.

In the third chapter Matevž Krivic explains how these two rights are treated in the proposed media law. On the request of the author, the Ministry of Culture invited media representatives, journalists and experts to participate in the preparations for the second reading of the proposed law. This created an opportunity to place the views in direct confrontation. In the author's opinion the resulting solutions are good and acceptable to all concerned.

Simona Zatler begins by pointing out that journalists' task and duty is to communicate information or notices in a manner that ensures that the public is always most adequately informed so that it can contribute to the manage-

ment of common issues as effectively as possible. In order to realise this task, journalists are allowed to act autonomously and free of external pressures, but at the same time the very enormity of the responsibility held by the media legitimises a number of restrictions imposed upon their activities. Among these restrictions, and one which seems to have special significance for both journalists and the media, is undoubtedly their duty to publish a reply under certain circumstances.

Even though some oppose this restriction claiming that it imposes an unacceptable burden on the freedom of journalists and the press, the right of reply or correction is regulated, as a reflection of freedom of expression, by the legal systems of all European countries. The author nevertheless emphasises that right of reply should not aim to become a general right of access to the media.

The definition of the right of reply and correction in Slovenia is far from uncontroversial. The ambiguities in the Slovene Constitution and legal system gave rise to a number of controversial issues, the most hotly disputed being the question of whether right of reply can still be understood as a right of a public legal nature. Simona Zatler concludes that right of reply in the public interest is the heritage of the socialist past. The author does not agree with the legislator that the right of reply in the public interest should be included in the new media law because a different solution would call for changes in the constitution itself, which could prove to be a long and complex process likely to delay the adoption of the law.

In author's opinion arguments for the re-institution of the right of (public) reply in new social circumstances are equally disputable. It may therefore prove useful to reconsider the option which Matevž Krivic pointed out years ago - that we should start the procedure for constitutional change, and that this right, as an element of the Slovene legal system, should be harmonised with a modern understanding of journalistic freedom and freedom of expression in general. She proposes that Slovenia should establish an effective mechanism of protecting a balance between freedom of expression and other human rights. This could be a self-regulating mechanism accessible to a wider public through which individual complaints would be solved.

Matevž Krivic

I. CONTROVERSIAL TERMINOLOGICAL ISSUES - SLOVENE "CORRECTION" IS A REPLY ELSEWHERE

The right of correction and the right of reply which have the status of constitutional rights in Slovenia, gave rise to wide-ranging disagreements and disputes, first in the eighties and then again towards the end of the nineties – more precisely in 1999 when their revival was triggered by the first proposed new media law. A significant part of these disputes originated in the considerable, indeed surprisingly large measure of incomprehension and ignorance on the part of journalists of these important institutes of media law. Their incomprehension is largely due to the somewhat illogical naming of these legal institutes, so we shall start with a brief overview of the terminological issues in order to avoid misunderstanding on the part of the readers of this essay.

Before I proceed to an explanation of the terminological part of the problem, which indeed could be called terminological confusion, let me first delineate it schematically:

1 Correction is not "correction"
2 Correction is "reply"
3 Reply is not "reply"

- or, in a concise form (though possibly mathematically incorrect):

correction ≠ "correction" = reply ≠ "reply"

Explanation: in the above "equation" the terms not in quotes signify the meaning as it would be understood, without any additional explanation, by lay people. This is also the meaning which these terms bear in legal systems other than Slovene. On the other hand, both expressions in quotes (later in the text I will, understandably, omit quotes) signify the specific (and in the case of "correction" even illogical) meaning that those two terms have acquired in Slovene legislation.

Let us now analyse individual elements of this peculiar equation. First, we will see why correction is not the same as "correction". In Slovene, as in other languages, the term correction (Sl. *popravek*, Fr. *rectification*, Ger. *Richtigstellung*, *Berichtigung*) is understood as the author's or editorial staff's

subsequent correction of an incorrect or untrue item in the original article. The 1991 Slovene code of ethics in journalism[1] also adheres to this meaning, in contrast to the Slovene statute which only adds to the confusion regarding both terminology and concepts. Of course the press is familiar with another kind of correction too, namely that of misprints or completely unintentional typographical errors that occur during typesetting or printing, but that is not the subject of our interest here. We are not concerned with technical but factual errors (as a rule they are accidental but they can no doubt be deliberate as well) or incorrect, untrue assertions subsequently corrected by the author (editorial staff). Sometimes the correction is made at the author's (editorial staff's) own initiative, sometimes at the demand of the affected party, and in other cases only after a court ruling.[2]

On the other hand the term "correction" (in quotes) in the above "equation" signifies the meaning of the term as it has been used (at least since the sixties), quite misleadingly, in Slovene legislation[3]. The use is illogical and misleading not solely because what is meant by "correction" is actually the reaction of the affected party rather

1 Article 4: Any information or assertion that proves to be wrong must be corrected immediately by the journalist who published it – or by the editorial office – on their own initiative and in the appropriate form.
Guideline 4.1. The correction must clearly show that the previously published information was incorrect in whole or in part. Therefore the correction must invariably contain reference to the previously published item. The editorial board is obliged to publish the correction and cannot circumvent this duty by publishing it in the readers' letters section (Code of the Journalists of the Republic of Slovenia, adopted on 29 November1991 under the auspices of the Association of Journalists of Slovenia).

2 Slovene media legislation has never included this type of correction, even though the court's ruling about this type of correction could probably be possible (admittedly I am not familiar with the practice), in accordance with Article 199 of the Contract Act, which states: "In the event of the infringement of a personal right, the court may order that the judgement or correction be published at the expense of the infringing party, or that the infringing party must revoke the assertion by which the right was infringed, or the court may order other remedies that may fulfil the same purpose as that achieved through compensation." Even if, under the influence of the illogical terminology found in Slovene legislation (at least since the sixties), the Contract Act uses the term "correction" in the (wrong) meaning of "the correction issued by the affected party" rather than editorial correction, a court's ruling that the editorial board's correction should be published (which is the right meaning of correction) would still be possible on the basis of the additional clause in this provision which states ".. or the court may order other remedies ". Such terminological ambiguities do not exist in foreign legislation.

3 Unfortunately this terminological nonsense has now become "fixed" in the Constitution as well, which in effect forestalls the possibility of eliminating it through simple changes in legislation. Article 40 of the Constitution reads: "The right to correct published information which has caused damage to the rights or interests of an individual, organisation or official body shall be guaranteed, as shall be the right to reply to such published information."

than correction by the author or the editor, but even more so because the reaction (the content of the reply) of the affected party is not confined to the "correction" of factual errors, or errors in factual assertions in the published item[4]. To be more precise, the content of a reply is not completely unrestricted: an injured person may reply solely by citing "facts and circumstances" (not merely by giving opinions or assessments), but these facts and circumstances serve to dispute (not just "correct"!) assertions (not just "factual assertions") in the published information (Article 9, paragraph 3 of the Public Media Act[5]). To put it differently, "correction" (actually reply) may be used not only to **correct** allegedly incorrect **factual** assertions in the piece of writing which hurt the person in question, but to dispute **all assertions**, even if presented merely as opinions (for example, that somebody's management of a company was bad), by making use of factual assertions (not simply by stating the opposite). However, the **disputing** of factual assertions is not the same as the correction of asserted facts (for example, even though the information about some failed investment has been correct in itself, the affected party disputes its significance by citing profitable investments that were omitted from the article, or by giving figures proving that the balance at the end of the year was positive, and so on). The specific meaning of Slovene "correction", which is - in legal and comparative terms - halfway between the rather rigorous German regulations (reply only to factual assertions) and entirely liberal French regulations (a reply is limited only with regard to its extent and not its content), is explained in more detail later in this text.

In the previous paragraph we explained, in addition to the first part of the "equation" (that is to say, that Slovene "correction" is not what is usually and rightly meant by correction), the second part of the "equation": Slovene "correction" is indeed a reply (*odgovor*) by virtue of its content, and it is what it is called elsewhere in the world (Fr. *réponse*, Ger. *Gegendarstellung*, *Entegnung*), save for the suc-

4 That is to say, in accordance with the law it should not be limited to them (even though these distinctions were often unclear to Slovene courts; I did not have time for a detailed survey of judicature when preparing this paper, but I can recall some, in this respect obviously wrong and unlawful, judgements).

5 The name of this law and the corresponding translation are quite inadequate. The term »public« (»javen« in Slovene) used with »media« is pure tautology and rather confusing especially to foreign readers. It is the heritage of the past socialist system and its often meaningless rhetoric, but since the expression Public Media Act has been widely used in other translations, we retain it to avoid further confusion. Of course, what is meant is simply mass media.

cessor states to the former Yugoslavia.

We have thus arrived at an explanation of the third part of the (non)equation: reply ≠ (Slovene) "reply/odgovor". The concept that stands behind the Slovene reply/odgovor is completely different from the concept expressed by this term in foreign media legislation (for which we use the term "correction", i.e. popravek). Slovene "correction/popravek" (elsewhere: reply/odgovor) is the reaction of an affected party to a published matter about him/her (obviously it is a personal interest that is at work here), while the Slovene "reply/odgovor" is a legal institute unknown elsewhere in the world especially not in the field of print media (where plurality of the media is expected to be guaranteed by market competition rather than by the legally prescribed rights of readers or the obligations of the media)[6]. As for electronic media, I have so far tracked down merely a few precepts vaguely resembling those; more precisely, the right of listeners to file a complaint with the corresponding authority against the biased, false or deficient presentation of facts or opinions[7].

6 As many as 12 years ago, when I was writing the study "From Freedom of the Press to Freedom of Disseminating Information" for the collection of papers entitled The Protection of Human Rights (Mladinska knjiga, Ljubljana 1988), I discovered interesting basis in foreign materials for developments in this area – unfortunately since then I haven't had time to devote detailed attention to foreign media laws and, as far as I know, no other legal experts in Slovenia have. As an interesting detail (to encourage anyone who might be willing to continue this research), I cite below part of footnote 99 on page 221 from the aforementioned study: "In Switzerland, for example, the committee of experts proposed, in 1975, a draft law on the promotion of the press, whose Article 15 reads: 'A newspaper that controls/dominates the newspaper market on a national or regional scale is obliged to publish substantially deviating "material reviews and opinions which are important for the shaping of political opinions". In relation to this, Swiss and German theories use the term Gegendarstellungsrecht (right to present the opposite) or Offnungsklausel (open clause) (cf. Nuspliger, Pressefreiheit und Pressevielfalt, p. 165-167). Furthermore, the MacBride commission report mentions, in addition to the right of correction, the right of reply, then the right of complaint against the "refusal of communication", and also the American commission for federal communications, which deals with complaints about the unbalanced presentation of controversial public issues, etc. (Mnogo glasova, jedan svet/Many voices, one world, Jugounesco, Belgrade 1980).

7 In the above-mentioned study from 1987 this was, regrettably, mentioned only in passing (in notes 21 and 63), without further concrete study of the state of affairs around the world at that time (even this was based on ten-year-old literature). Obviously, the data I had at my disposal at the time originated from Nuspliger's book and the MacBride report for Unesco. Since it is sometimes difficult to find the information one is looking for in today's flood of information, I would like to remind any potential "archaeologist" in the field of media legislation that Nuspliger's book, containing a multitude of precious information, can be "excavated" at the Faculty of Law library. I hope it is still there and will survive the transfer of the faculty to a new location.

REPLY IN THE PUBLIC INTEREST IS UNKNOWN IN OTHER COUNTRIES

The Slovene "reply", which was first introduced into legislation through the Public Information Act in 1986, is not a reaction to the published item in the personal but in the public interest, and in the interest of correct, objective, diverse information about matters of public importance. Classic freedom of the press naturally does not include this "peculiar" right: when it was constituted (200 years ago) it was "confined" (and this remains unchanged[8]) to the freedom of everybody to print (i.e. inform through the print media) whatever they wanted to and in whichever way they chose to do it provided they had print media (i.e. money) at their disposal. Classic freedom of the press therefore means the freedom of a media owner and by no means the freedom (liberty) of the reader, as it is still understood, quite naively and romantically (and completely wrongly), by many people in Slovenia. In this case the reader's right actually means the right of the consumer to choose which newspaper to buy, the only condition being that he/she has a choice (this is actually the idea and practice behind national funds aimed at supporting the plurality of the print media). In the case of electronic media, the consumer does not have to pay extra for the option of choice (except for the purchase of a TV set, antenna and cables, and subscription to pay channels) – but some form of a public fee for public TV channels is charged in all countries while private channels are free of charge[9].

8 Except in electronic media (see previous notes). It is interesting how the progress of technology introduced the need for further advances in the field of human rights and freedoms that appear outright revolutionary when compared to classic understanding. Unfortunately Slovenia remains a backward province in this respect: our legislative bodies (and journalists alike) do not know, for example, that all European countries have laws which prescribe that electronic media should produce objective, unbiased and balanced reports about facts and opinions (this does not of course apply to the print media, which is allowed to be biased). What is most surprising is that in many of these countries these statutory provisions apply to private electronic media as well! What we have here is a realistic (political) recognition that even the utmost plurality of the print media is but slight solace in the face of the magic and omnipresent influence of television (and radio), meaning that it is in the interests of democracy to ensure the balance of political views and ideas disseminated by private media. In Italy Berlusconi's influence does not allow for this – as far as I know, they finally managed to adopt a law which enforces the notorious *par conditio* (ensuring the equality of opportunities to all political competitors) to his TV stations, but only during election campaigns.

9 This was precisely the additional argument used by those countries which decided that private TV stations are also legally bound to be politically unbiased, etc., and consequentially subject to control and sanctions.

It is true that in the 20th century the state had to intervene in classic press freedom but in a different way, first by legally preventing the concentration of the print media in the hands of newspaper moguls, and recently (in a more cautious and subtle way) by expanding the "internal freedom of the press" that is to say, broadening the rights of journalists and editors with respect to media owners. The latter actually applies to Europe but not the United States, where the understanding of press freedom remains exclusively tied to proprietary rights (one of the reasons is undoubtedly the very wide market but also the high level of professionalism in American journalism; being aware of its economic importance, media owners in the United States know how to respect it).

The very interesting topic of internal freedom of the press is not the subject of this essay, however[10]. Our specific and unique right of "reply" (the right to reply to published information in the public and not the personal interest) "outstrips" both classic (or "external") and internal freedom of the press. It is exceptional[11]. It is a miraculous last survivor from the wrecked ship of the Yugoslav socialist system (but only on paper, see note 11), its self-management socialism, and its partly realistic, partly manipulative and deceptive inclination towards the expansion of

10 Those interested will find more on this subject in the above-mentioned book Protection of Human Rights, pp. 216-220. Some further interesting legal viewpoints can be found in the ruling of the Slovene Constitutional Court from 1997, for the time being the only one dealing with the freedom of the press (Ruling No. Up-20/93, published in Odlus under no. 181 – cf. especially points 23 and 35-42).

11 It is in fact so exceptional that it might not be able to survive even here – especially when we know that for the past 15 years it existed virtually on paper alone (in the Constitution and in law) but has never been realised in practice. It is true that since 1994 this special right has not existed in law either (the 1994 law eliminated it unconstitutionally – it actually equated it with the right of correction; for more on this see later in the text). Perhaps the new media law, which is expected to restore this right, will not be able to put it into practice either. Personally (despite the fact that I contributed to its historical development) I do not have any sentimental attitudes towards this right and have already suggested to the proposers of the law that it should be removed from the legislation if anybody dares remove it from the Constitution as well (on the grounds of it being unrealistic and impossible to realise). However, the logical reasoning of "constitution-fearing" Slovenes stops at this point: No, our constitution will not be changed; if this right is in the Constitution then it should remain in legislation too! Consequently it persists – at the moment in the draft law. We tried to instil in it (normatively) some fresh blood, and simultaneously place some normative restraints on it so that it won't turn into a monster and destroy its older sisters (classic and "internal" freedom of the press). As a matter of fact this was the premonition expressly stated by editors and journalists who participated in the preparations for the draft law. Personally I am more apprehensive of the prospect that none of this will produce anything useful and this baby, "stillborn" in 1986, will never be brought to life. Our country is probably too small for such experiments, while our media and general culture is underdeveloped. It doesn't matter – that which is capable of surviving will survive; that which is not will die.

human rights and freedoms. It is in fact a fragmentary remnant of the former constitutional right that was contained in Article 167 of the Constitution of the former Yugoslavia, which referred to the right of citizens to publish their opinions of public importance[12]. Of course this constitutional right, of a megalomaniac nature, could not survive the breakup of the system. Whether its modest remnant, lingering on in the form of a "right of reply", will be able to survive remains to be seen.

This much should suffice as an introduction of the terms; for more on this, see the last chapter.

12 By a miracle I managed to uphold this constitutional right before the Supreme Court twice in 1984 (in one case against the *Delo* daily; in the other as a counsel to Bogdan Novak against the *Nedeljski dnevnik* daily). However, this has not happened again and perhaps nobody will muster enough energy to try something like that again with the "right of reply".

2. RIGHT OF "CORRECTION" (ACTUALLY, "RIGHT OF REPLY") – A COMPARATIVE APPROACH

Before we proceed to a description of how these issues are likely to be settled by a new media law, we find it necessary, for the sake of better understanding, to give a comparative overview of the extremely wide range of solutions employed by various countries to tackle the problem of how to react to published information in the personal interest.

I am not an expert in media legislation and my knowledge of this field is not nearly as good as I would like it to be. Unfortunately, few legal experts in Slovenia are concerned with this field in any way[13] which is why the task of presenting these issues fell to me. I will therefore be grateful for any criticism of or additions to this essay.

As mentioned in the first chapter, Slovene "correction/popravek" is, legally and in comparative terms, somewhere between the stricter, German regulations (a reply is possible only to factual assertions) and entirely liberal French regulations (a reply is limited only with regard to extent and not content). Let us take a more detailed look.

FRENCH REGULATIONS: REPLY TO PRAISE AS WELL

We shall start with a brief exposition of ground-breaking French practice[14]. *Droit de réponse* was first proposed for legalisation to the Council of Five Hundred in Year VII of the French Revolution, and was first enacted in 1822. It was enacted in its current form by the famous press law of 1881. "This right does not imply 'legal defence' with replies to accusations, but it is a basic personal right exer-

13 Dr Andrej Berden wrote about this 20 years ago ("Pravica do popravka, javnega odgovora in sporočila javnosti"/"The Right of Correction, Public Reply and Notice to the Public", Pravnik, 1-3/77) and again last year ("Svoboda izražanja in zaščita posameznikov pred njeno zlorabo"/"Freedom of Expression and Protection of Individuals Against its Abuse", Pravna praksa, 15). The supplement of this issue included interesting articles by Simona Zatler ("Javna glasila: pravica do odgovora in popravka/"Mass Media: Right of Reply and Correction"") and Tone Frantar ("Zakon o javnih glasilih: sodna praksa Vrhovnega sodišča RS"/"Public Media Act: Judicial Practice of the Supreme Court of RS"). The collection of papers from the international forum on legal issues concerning the media in democratic societies, organised in 1994 by the Faculty of Law in Ljubljana and the European Media Law Forum of the European Council, includes papers by Dr Ada Polajnar Pavčnik ("The Freedom of Expression and Civil Law Protection of Privacy") and Dr Lojze Ude ("Proceedings Relating to Matters of the Press").

14 This overview is based on the book Droit de l'Information by Marie Auby and Robert Ducos-Ader, Dalloz, Paris 1982, 2nd ed., pp. 496-512.

cised in a manner as wide as possible in order to ensure complete information about some thought or conduct, which could have been only partially presented by the press."[15] The right was extended to apply to radio and TV only in 1975. The scope of this right is extraordinarily wide, and for our "Austro-Hungarian" legal frame of mind it is downright incomprehensible (obviously, Gallic *esprit*, life perspective, culture and tradition are uniquely able to overcome legal obstacles which we would find insurmountable):

- The right is "general and absolute" (a definition of *la Cour de Cassation*).
- The mentioning of a person in the press suffices (a person is not necessarily criticised – praise also counts).
- The assertions to which a person replies may be entirely truthful and accurate (a person wanting to correct a mistake may demand the publication of a correction - *rectificatif*, and the publication of a reply – *réponse* separately).
- No legitimate interests need to be stated, e.g. a person's dignity was injured, etc.
- A reply may refer to literary or scientific criticism as well.
- Courts' judgements, parliamentary debates, etc. are also subject to right of reply.
- The only items exempt are notifications published in the Official Gazette.
- The deadline for submitting a request for a reply is as long as one year from the date of publication.

Provisions regulating the form of publication of a reply are rather standard: it must be published immediately (normally within two days, or within 24 hours during an election campaign); it must be printed in the same part of the newspaper and in the same type; its length must be approximately the same (worth noting here is an interesting provision that a reply can be 50 lines long even if the article that triggered it was shorter, and that it must not exceed 200 lines even if the article was longer, plus an additional note that the court of cassation has always been very liberal as to the length of a reply); and the addition of editorial comments to a reply is permitted, only that they must not "slice" the reply into separate pieces. "The courts try their best to maintain some balance between the vio-

15 "Ce droit apparaît – non point comme une légitime défense répondant á une accusation – mais comme l'exercice d'un droit fondamental de la personnalité exercé de la façon la plus large pour permettre que soit assurrée une information complète sur une pensée ou un comportement qui a pu être partiellement exposé dans la presse…." Ibid, p. 497

lence (forcefulness) of the cause and the reply. If the tone of the reply does not exceed that of the insult (cause), the newspaper has no reason to refrain from publishing the reply."[16]

GERMAN REGULATIONS: PERSON MUST BE AFFECTED BY THE ARTICLE

As already pointed out, German regulations are much less liberal[17]. Admittedly these "German" regulations are not uniformly observed throughout Germany, since media law is under the jurisdiction of separate *Lander*, yet there are characteristics common to all regions. A brief overview, equipped with short comparative notes, is given below:

- A person is entitled to reply if he/she has been hurt by the article; a mere mention does not suffice (the same in Slovenia).
- A person may reply to factual assertions only and not opinions as well; correspondingly, the reply may consist of factual assertions only (in Slovenia, regulations lie somewhere between the French and German solutions: the person may reply to all assertions that have affected him/her but only by citing "facts and circumstances").
- In principle a reply may not be longer than the article that triggered it (in Slovenia it may not be "disproportionately longer").
- A person is not entitled to reply if the media has previously rectified disputable assertions (before the right of reply was claimed) or if the original article has already included the contrasting opinion of the affected party (Slovene law does not explicitly address these issues).
- A reply must be requested immediately ("without unnecessary delay"), generally within 14 days of the date the affected party learned of the publication at the latest, but (as a rule) not later than three months from the date of publication (in some countries this period lasts for as long as the case in point is topical). In Slovenia the deadline is 30 days from the date of publication or the date the affected person learned of the publication.

16 Ibid p- 507. This arrangement seems to me more reasonable than ours, as it attempts to establish the "equality of arms". Our laws, which simply demand that the reply not be insulting, is not theoretically disputable, yet in judicial practice it de facto sides with insulting attacks by journalists by applying the same yardstick to presumably or actually insulting replies – regardless of how insulting the attacks that caused the reply were. What is actually insulting for someone should probably be assessed using more subjective criteria.

17 Source: Michael Schmuck, Presserecht kurz und bündig, Werner Verlag, Düsseldorf 1997

- The truthfulness of the assertions contained in the reply is not a prerequisite for the publication of the reply and is not verified; it is permissible and possible to reply to truthful assertions (it is the same in Slovenia, even though the majority of journalists and editors do not know this; being unfamiliar with the legislation, they assume to the contrary, proceeding from the illogical term "correction" (Sl. *popravek*); German laws provide for one exception though: the media can refuse to publish a reply if it contains obviously false assertions (such an example would be if Kohl claimed he had never been German chancellor, or Boris Becker claimed he had never played tennis).
- The demand that the reply should be printed in the same type size and in the same part of the newspaper is strictly observed in Germany, while Slovene editors (who participated in the drawing up of the media law) strongly opposed this demand, claiming that it would be a nonsense; the ministry supported them (!). The author of this article is proud that he managed to resist their opposition; German jurisdiction, for example, persists in its demand that tabloid newspapers print replies to the articles with the bold-type titles that have appeared on the left-hand side of the cover page exactly in the same place and in the same type size - because at news-stands it is the left-hand portion of the cover page that is visible from a distance (the right-hand portion is hidden behind other papers).
- Commenting on the reply in the same issue is not prohibited, except in Saarland (if my memory has not failed me, the Slovene code of ethics in journalism used to prohibit comments on a reply, while the currently valid code from 1991 does not mention this issue)[18].
- In substance, all these provisions are also applicable to electronic media (the same in Slovenia).

18 Despite the strong reactions of journalists to a number of provisions in the proposed media law, there were no objections to the provision which runs: "The issue or broadcast in which the correction is published or broadcast may not include comment on the correction or a reply to the correction". In Germany and France the interests of (the owners of) the media obviously still prevail in these instances and they do not allow themselves to be deprived of the "last word" in such "contests with readers". Judging by the absence of reaction, in Slovenia the understanding which has long become, especially in real polemics, part of the unwritten laws of fair play, i.e. that a newspaper or periodical may not allow an in-house author to reply to the response in the same issue, prevails. This has been generally accepted as inappropriate. It is correct that the same rule is applied to the statutory right of reply (or "correction"), at least because of the principle of "equality of arms": one presentation of the matter in one issue, another one in the next. One exception would be possible if the author of the reply expressly concedes or even expresses a wish that the editorial replication or explanation should be published in the same issue.

SLOVENE REGULATIONS: REPLY TO OPINIONS USING FACTS IS ALLOWED (OUGHT TO BE ALLOWED)

If we take French provisions as an example of a very liberal approach, and German provisions as a very restrictive approach, the Slovene solution could be placed somewhere in between, but closer to the German. It should be noted here, however, that Slovene regulations temper rather aptly the excessive hardness of German laws without yielding too much to French liberalism. This is evident not only in issues of minor importance, such as time limits, but in particular in the essential points explained above: a person is entitled to reply to all assertions that have affected him/her (including opinions), but only by listing "facts and circumstances" that call into question these assertions.

I find the Slovene solution quite expedient, since opinions may hurt a person much more deeply than mere facts – therefore, it would be quite unjust if the only legal remedy available were criminal and civil (tort) lawsuits, which can be very costly, inefficient and sometimes quite inadequate, while the most adequate instrument (right to reply to an attack) would be denied. There is another strong reason that speaks in support of such an approach: opinions can sometimes be distinguished from factual assertions only with difficulty, and quite often (even when theoretical distinctions are possible) the two are intertwined. Regulations that demand from the affected parties that they make a clear distinction between opinions and factual assertions and frame a reply only around the latter, even though in "the attack" the two were blended, immediately place the affected party in an inferior and expressly worse position, especially in two respects described below.

First, let us point out that less educated and less skilful writers (even though "professional writers" cannot be completely excluded from this category) run the risk of inadvertently including in a reply "one sentence too many", with a counsel of the media sticking readily to that disputable sentence by claiming that the reply is aimed at the opinion and not factual assertions. With many of our courts being rather rigid and inexperienced in these matters, this could suffice for the action to be dismissed. Second, a fastidious discrimination between "opinions" and factual assertions (with an eye on the criteria that are likely to be

used by the court, even though at the time a reply is written these criteria cannot be fully anticipated) and exclusive concentration on factual assertions may result in a reply being so "diluted" that it fails to produce the desired effect, even though the facts contained in it are true, convincing and different from the originally published ones. As a matter of fact, it is well known that the average reader is much more influenced by pertinent comments based on one's opinions than by the rational listing of bare facts. As to the contest between the original information and the reply to win over the inclination of the average reader, German regulations favour the original article much too strongly: even though a journalist may have used all available journalistic means (including incorrect and dishonest ones), the affected party, already handicapped by the demand to cite facts only (this restriction seems reasonable to me and there is no need to explain why), is expected not to respond to opinions (not even by citing facts only). For the purposes of illustration let us suppose that an article attacks the manager of a company (assessing him/her as a failure, incompetent etc.), yet the manager is still not allowed to reply by simply giving facts and figures[19] about, say, the achievements of the company under his/her management.

AUSTRIAN REGULATIONS: REPLY ONLY TO FALSE ASSERTIONS

Quite the opposite line of reasoning from the one described above – let me mention that I became familiar with it through arguments with Slovene editors during the prepa-

19 Judicial practice should, of course, allow the author of the reply to suitably connect these bare facts and figures with linking sentences, yet it is sometimes difficult to avoid "assertions based on opinions", and even when this is possible one has to ask why an affected party should be compelled to do so. The most important thing should be that the reply consists primarily of facts so that the courts would not be able to dismiss a reply on the basis of a single sentence that "smells of an opinion", discovered through microscopic scrutiny and using delicate scales (under the influence of aggressive and well-paid media lawyers). I know of examples in which our courts behaved exactly like this, leaning on the ultra-positivistic diction of Article 9 in the currently valid Public Media Act: "The correction must contain only facts and circumstances that dispute the assertions in the published information." A logical formulation would be that the reply must contain predominantly facts and circumstances, or that it must be based on them, and not that it may not contain anything besides facts and circumstances. Reasonable judicial practice could, of course, arrive at the same conclusion on its own, through logical and teleological interpretation of the text, yet unfortunately the practice of the courts is not always entirely reasonable. Therefore it is much better if judges educated in the positivistic manner are not challenged by such statutory formulations.

ration of a new media law in 1999 – has obviously prevailed in Austrian law, probably under the pressure and lobbying of the media itself. In 1981 (exactly one hundred years after the introduction of the extremely liberal French law) this line of reasoning produced[20] regulations that proved to be even stricter than German law, to which Austrian regulations had largely corresponded before that. To be quite precise, this cannot be said of all elements: the time limit for a reply is as generous as two months (one month in Slovenia and only half a month in Germany); the length of a reply is even more elastic ("as much as needed"); and the German and French rules prescribing type of the same size, etc. are substituted with a more general "of the same prominence" (*der gleiche Auffälligkeitsgrad*), etc., meaning that these points do not constitute essential differences.

The essential difference, however, lies in the fact that Austrian law allows for a reply to false (or misleading or incomplete) assertions only; moreover, it allows the media to refuse to publish a reply if it contains false assertions. At first glance this appears reasonable, normal and acceptable - "truth-friendly" indeed. Yet there are two main reasons why other legal systems oppose such a solution. First, it is universally recognised that the truth is not always and necessarily one only (it depends on the nature of the problem in question), so the media should in the first place ensure that the advocates of various "truths" have equal opportunities to defend their own - according to the principle "*Audiatur et altera pars*!"

The second important reason is that even if the truth can be established objectively (and through the courts), this cannot always be achieved easily and quickly - through the courts.

The resolution of a dispute regarding the (non-)publication of a reply in the print media should be extremely rapid if it is to have any significance. However, even the duration of proceedings with very short time limits in which verification of the truth is not allowed at all (precisely in order to make proceedings as short as possible) are often on the verge of acceptability. The Austrians were aware of this problem, of course, and tried to alleviate it through a whole series of intricate and detailed rules of proceedings (burden of proof of the media, the splitting of the procedure into a quick procedure with an interim decision and a subsequent, more detailed procedure). In the article pub-

20 Source: Heinz Wittmann, Einführung in das Medienrecht, Orac, Wien 1981.

lished in *Pravna praksa* No. 15 mentioned earlier, Simona Zatler wrote, drawing on W. Berk's *Law in Austria*, that Austrians themselves criticise this provision "above all due to the complex rules applying to both regulations, namely the one concerning the reply and the one concerning refusal to publish a reply".

I cannot get rid of the impression that the difference between the German and Austrian media laws is very much like the difference between their respective constitutions. The German Constitution is short and principle-driven but very clear, while the Austrian is written in a hairsplitting and rules-of-procedure-style which makes it, in many points, less comprehensible than the German Constitution; the German Constitution is increasingly more often imitated across the world, in contrast to the Austrian, which has practically no imitators. I assume and hope that the same will be the case with the media law.

Of course nothing is only black or white. Personally I find quite inspired the provision that I first encountered in the Austrian law, that which specifies that the court is not necessarily bound to consider the proposed reply "*tel-quel*" (meaning that it may accept or reject it in whole only), but it can decide that only some parts of the proposed reply should be published i.e. those parts that, in the court's opinion, conform with the law. This provision may prevent absurd refusals of replies based on a single controversial sentence or part. The Austrian law also includes another interesting provision worth imitating: if a reply is grounded yet poorly formulated, the court can decide on publication of the reply conditionally (especially if the affected party has no legal representation) – on condition that the affected party modifies the reply so that it conforms to the instructions given by the court.

SLOVENIA AND AUSTRIA: STATE BODIES ALSO HAVE THE RIGHT OF REPLY

Finally let me mention another interesting similarity between Slovene and Austrian law. In France and Germany the right of reply is granted to natural persons or legal entities exclusively – this in fact applies to all rights (except for some rights pertaining to legal action, for example, an administrative body as the defendant in an administrative lawsuit has adequate rights). By their nature state bodies cannot be the holders of rights, as they have

national competences (a competence is not the same as a right). Therefore state bodies do not have the status of a legal person but the state itself does, with its various bodies acting "in its name and on its account". Despite this the Austrian law grants the right of reply to state bodies as well. In Slovenia, Article 9 of the currently valid Public Media Act states that the right of reply belongs to "everybody... whose right or interest has been infringed". If we proceeded solely from the above explanation of who can be a holder of a right and from the diction of Article 9, state bodies would have to be excluded. Yet Article 40 of the Slovene Constitution explicitly states: "The right to correct published information[21] which has caused damage to the rights or interests of an individual, organisation or official body shall be guaranteed..." Therefore, according to Slovene and Austrian laws, state bodies also have the right to demand publication of a reply (i.e. "correction" in Slovenia). However, any theoretical debate concerning the legal grounds of this provision would exceed the scope and purpose of this essay.

21 From my own long years of experience I know many tricks editors are capable of employing in order to invalidate or diminish the effect of a "correction". The question of the title given to the "correction" is very important here, as it is well known that many readers just scan headings without reading corresponding articles. Virtually all our editorial offices regard it as their inalienable right to choose the titles of every piece of printed matter (even of articles written by their own journalists, so the title occasionally states something that cannot be traced in the article itself). Most readers, and unfortunately many legislators and judges, are unaware of this. To my regret, when preparing the text of the law I did not manage to enforce the proposal that the beginning of the text should explicitly state "without modification or additions, including the title and other elements". It is true that the present formulation "without modifications and additions" by itself means that the original title of a correction should not be changed by the editorial staff, since it is an integral part of the correction (of course, if the author has put down a title). I suppose courts will not pose problems in this respect, but editors will. Consequently, respect for the law will be ensured when some court rules that the correction must be published again because when it was first published the original title had been changed (or printed in smaller type, or in an improper part of the newspaper, etc.). German courts do not tolerate such instances: I know of an example in which a tabloid had to publish the correction on the left-hand side of the cover page again because it had previously been published on the right-hand side.

3. CORRECTION AND REPLY IN THE DRAFT MEDIA LAW - ACCEPTABLE SOLUTIONS

Towards the end of 1998, at the request of the Ministry of Culture, which was preparing the proposed new media law, I wrote a paper about the most urgently needed modifications of the previous law concerning the right of correction and reply, and included rather detailed grounds for the proposed changes. After many intermediate versions, the draft law was first officially proposed in May 1999. At one of the previous stages of harmonisation the media and journalists were also invited to contribute their comments. Their response was razor-sharp (in my opinion justifiably so with regard to many issues), but the articles that were actually torn to pieces were those pertaining to correction and reply. Their extreme response reflected, in many respects, the confusion over concepts and terminology described in the first chapter (the 1994 law, which completely blurred the distinction between correction and reply, added to the confusion) and their ignorance or even misunderstanding of foreign regulations concerning these issues. On the other hand they also contributed some sensible objections that drew attention to the still-open issues contained in the draft law.

The Ministry fortunately accepted the proposal that media representatives, journalists and other experts should participate in preparations for the second reading so that the views could be placed in direct confrontation and an attempt made at finding a solution acceptable to all concerned. This was accomplished at several meetings in the course of December 1999 so in July 2000, when at the public presentation in parliament the draft law, which was ready for its second reading, met with deadly criticism from the media and the expert audience, the articles about correction and reply were hardly mentioned at all.

CORRECTION AIMED AT DISPUTING PUBLISHED ASSERTIONS

In December 1998 I proposed replacement of the term "**informacija**" (Eng. information), used in connection with the right of correction in the currently valid Public Media Act, with "**obvestilo**" ("notice" in English). The Slovene "obvestilo" could also be understood as an equivalent of

the foreign term "informacija" (information), yet the Constitution does maintain the distinction by using the term "obvestilo" in connection with correction, and "informacija" in connection with the right of reply[22]. Perhaps the term "information" is directly associated with factual assertions and less so with opinions (despite the fact that notifying the public of one's opinions is undoubtedly some form of information, at least in its broader sense); it therefore seems sensible to use, in connection with the correction, a less definite term which is less laden with meaning – as used in Article 40 of the Slovene Constitution. It was precisely the term "information" in Slovene legislation that occasionally served as the basis of restrictive jurisdiction concerning these issues.

To prevent overly restrictive jurisdiction, which used to be a result of erroneous interpretation of domestic legislation due to our looking from the "German perspective", even though Slovene legislation significantly differed from the German beforehand as well as now, the draft law includes a paragraph that reads: "By the term *notice* is meant the publication of content that could affect the rights or interests of an individual, organisation or body". It therefore encompasses every kind of communication, regardless of journalistic genre – as a matter of fact, some have seriously believed, and even stated publicly, that correction may be claimed with regard to the "informative type" of writing only (reports, news) but not also with regard to a piece of writing given in the form of a commentary, glossary, field report or similar.

In order to avoid endless confusion caused by the illogical term "correction" to the average reader not familiar with theoretical debates on these issues, the aforementioned section is followed by another paragraph reading: "The term *correction* is not used in the most narrow sense of the word - that is, the correction of incorrect or false assertions in the notice - but also covers the citing of facts and circumstances by which the affected person disputes or significantly supplements the assertions in the published article for the purpose of disputing them". My original proposal was somewhat different from the one described above i.e. the last part was formulated "…disputes assertions in

22 The current English translation of the Constitution does not reflect this distinction as it uses the term "information" in connection with correction and reply alike.

the published communication or throws new light on them". The journalists, however, were of the opinion that such a formulation was too ambiguous and controversial and, through a joint effort, we arrived at the new formulation, which is undoubtedly better. It clearly allows not only for the direct disputing of published assertions (stating that they are not true) but indirect disputing as well (for example, negative data relating to somebody or something, say the business of a company, was correct but presented with a bias because positive facts were not included even though they would have thrown a different light on the point at issue).

There was a great struggle over the diction of the article specifying how the correction should be printed, which now runs: "The correction must be published without modifications or additions, in the same section of the medium and with the same prominence, in the same or equivalent style as the article to which the correction relates". Article 10 of the currently valid Public Media Act is formulated in the same way, yet the Ministry wanted to remove from it – stating the most peculiar reason that this provision was not observed in practice (!) – the demand that the correction should be published "in the same or equivalent style", which was our equivalent of the German and French provisions about the same type, etc. or the Austrian provision about the "same prominence" or "same level of conspicuousness". Finally I managed to persuade other participants that this demand was urgently needed if the media were not to substantially devalue the right of correction (e.g. print "attack" as a bold type heading and "correction" in small print).

REPLY IN THE PUBLIC INTEREST WITH PROVABLE ASSERTIONS

The specific nature of this right was described in the first chapter. It was introduced through the Law on Public Information in 1986, but the 1994 Public Media Act dropped it, with the legislative body of that time being quite unaware of what they were doing (that they had actually eliminated a constitutional right). Its normative or legal "revival" at least (the actual revival remains doubtful – see the first chapter) was brought about in a paradoxical way, through a constitutional complaint.

At the time this constitutional right still existed in law

in its original form, a journalist working for the Maribor-based *Večer* daily was denied the publication of a replication to the stance of the editorial board concerning his article. The journalist filed a suit against this decision and lost, but he lodged a constitutional complaint with the Constitutional Court. Constitutional complaints actually began to be resolved only in 1994 (when we adopted pertaining laws), but the content of this particular complaint proved to be a tough nut to crack and was thus resolved only in 1997.

The paradoxical dimension of this event arises above all from the journalist's claim that his constitutional right of reply was violated because the court's decision was based on the then valid Law on Public Information, but this law (being older than the Constitution) was allegedly in conflict with the current Constitution (i.e. Article 40 defining the right of correction and right of reply). The Constitutional Court decided, however, that the decision of the court was in harmony with both the Law on Public Information and the Constitution, since this law, although older than the Constitution, was in perfect harmony with it, in contrast to the Public Media Act (of a later date) which was not! The reason they gave was that the new law eliminated the previous distinction between the right of correction (in the personal interest) and the right of reply (in the public interest) that presented the only grounds on which the right of reply as a special right distinct from the right of correction could be based. It is precisely this distinction, even though it is not explicitly emphasised in the Constitution, which has, according to the interpretation of the Constitutional Court, legal constitutional significance. The essence of the constitutional right of reply is that a person exercises it in the public and not prevailingly private interest (thus making it a political right in some sense and not a personal right, one could add).

Since the Public Media Act eradicated this distinction in 1994, it must be re-instituted in the new media law. In December 1998, due to the shortage of time (and being unable to consult others), I could not but propose the reintroduction of this provision from the 1986 Law on Public Information, which has already been recognised as being harmonious with the Constitution ("... a reply that significantly supplements facts and data in the published information"). The only change I proposed was a change in diction, as I substituted "supplement" with "deny, cor-

rect or substantially supplement". I did, however, add – in order to make the distinction between correction and reply understandable to everybody by reading this law alone – the following provision: "A right of reply is intended to ensure objective, diverse and timely information in the public interest as one of the indispensable conditions for democratic decision-making pertaining to public matters".

My proposal of the right of reply met with hostility on the part of editors and journalists in spring 1999, but by December 1999, after an intensive exchange of opinions and suggestions, we arrived at the consensual solution now found in the draft media law. The aforementioned general provision (which states the purpose of this right) is thus followed by a paragraph specifying the content, which runs as follows: "…use **provable assertions** to deny, **substantially** correct or substantially supplement assertions of facts and data in the published information". In our opinion both additions radically reduce the risk that the provision, which in the former law was essentially the same, could be used, because of lack of clarity or explicitness, as a means of exerting organised pressure arising from political parties' views, for example by replying to information on various proposals or reports by the government or a ministry, or by replying to every article about any public issue, etc.

In my opinion such apprehension was completely groundless since the "right of reply" is in any case a "stillborn baby" or a survivor of the cataclysm of the previous political system (see the first chapter), but I do agree that – in our era of strange political circumstances – no precaution against strange abuses of rights in the interest of political parties can be dismissed as excessive. Therefore, we replaced the former provision stating that in relation to everything else the provisions on the right of correction shall be applicable with an additional article that explicitly states "alleviating actions" that can be employed by the media when fulfilling its duty to publish replies:

- It can demand that a reply be shortened.
- It can refuse to publish a reply whose content is essentially the same as that of the reply already published (this is a safety valve against the flood of replies from political parties much feared by the editors).
- The publication of a reply may be refused if it contains false or non-provable data or assertions (yet if only some assertions are such, the author must first be asked to remove them from the reply).

HOW TO PROTECT FREEDOM OF THE PRESS AND RIGHT OF REPLY SIMULTANEOUSLY

If this statute is not to exist merely on paper and this unusual right comes to life in reality, judicial practice is in for an important task; if it wants to ensure respect for the "competing" constitutional right, which is freedom of the press or the right of a media publisher to freely shape the content of the media, it must strike a necessary balance when protecting these two "competing constitutional rights". In my opinion, the court would be justified in denying legal protection to the right of reply in cases where a reply denies or supplements information which is completely unimportant for the public – or has such minor importance that the protection of freedom of the press (freedom of a publisher to shape content according to its own interests) prevails over the gravity of the infringement of constitutional provisions. On the other hand, if the information that is of little importance to the public injures someone's private interests, the affected party still has the option of exercising the right of correction formulated precisely for such purposes.

The draft media act has not omitted the provision according to which judicial protection of this right is ensured through the analogous application of the provisions on judicial protection of the right of correction. This solution is by no means the only obvious or possible one; moreover, it may be legally disputable. I called attention to this question in the explanation accompanying my first proposal: "Given the fact that the right of reply is granted prevailingly in the public interest (even though, by exercising this right, a person in fact realises his/her own freedom of expression and the dissemination of news and opinions), the question may be posed as to whether judicial protection of this right would not better be transferred from the courts for private disputes to the administrative courts? On the other hand, disputes relating to the right of reply and those relating to the right of correction still have some common traits; because of this, both should be resolved before the same court. Opinions and objections of the courts, associations of publishers, journalists and other experts regarding this issue should be gathered during the legislative procedure."

None of this has yet been realised; I do not think anybody at all has taken notice of the question. If the right of

reply is really a "stillborn baby" and will never come to life, such an outcome may prove to be the best one. However, if my prediction is wrong and the institute of reply in the public interest comes to life in journalistic practice in Slovenia, the first law suits will probably expose the advantages and weaknesses of this type of judicial protection and the potential need for a change.

Simona Zatler

THE RIGHT OF REPLY AND CORRECTION: OBSTRUCTING THE FREEDOM OF THE PRESS?

The core of every democracy is freedom of expression and protection of human rights. Yet the meaning of both concepts is neither absolute nor unlimited: the conditions and areas of restrictions are determined by national legal systems and a number of international documents. On the one hand the legal system protects an individual's right to personal dignity and guarantees the protection of personal rights; on the other it is precisely freedom of expression that is a direct manifestation of a person's individuality within society and, at the same time, the foundation of a free and democratic society[1].

The opportunities to exercise the right of freedom of expression available to an individual are far less plentiful than the opportunities accessible to journalists. Realisation of the right of communication presupposes access to adequate means of communication, usually available to journalists and other media people but not to all citizens. In this respect the chance to touch on this or that area, to disclose events and freely disseminate information, thoughts and opinions of the public, is a special privilege of the journalist. Journalists must therefore be accountable to the public, and it is their task and duty to communicate information or notices in a manner that ensures that the public is always most adequately informed so that it can contribute to the management of common issues as effectively as possible. In order to realise this task, journalists are allowed to act autonomously and free of external pressures, but at the same time the very enormity of the responsibility held by the media legitimises a number of restrictions imposed upon their activities. Among these restrictions, and one which seems to have special significance for both journalists and the media, is undoubtedly their duty to publish a reply under certain circumstances.

Even though some oppose this restriction (especially the media in countries with common law), claiming that it imposes an unacceptable burden on the freedom of journalists and the press, the right of reply or correction is regu-

1 Freedom of expression is a prerequisite for the shaping of a free personality capable of independent and responsible decisions. Free individuals capable of rational decisions are the basis of a democratic political system whose indispensable element is an open debate about issues of general importance.

lated, as a reflection of freedom of expression, by the legal systems of all European countries. In its wider sense freedom of expression embraces both freedom to inform and freedom to be informed, thus incorporating plurality of information, and variety and diversity of voices. Within such a wider context of freedom of expression, journalists must have free access to information, but at the same time journalistic activities should be regulated in such a way as to protect the diversity of opinions and information.

Right of reply enables every individual to correct incorrect assertions about him/her, or to react to defamatory statements. This actually empowers citizens to defend their dignity and good name, their right to privacy, and to participate effectively in public debates relating to them. "By having the opportunity to reply to information, the affected person is placed in a more equivalent position with regard to the mass media, a certain balance is achieved and the principle of equality of arms is protected.[2]"

THIS IS NOT THE GENERAL ACCES RULE

Rather than ensuring a complete and balanced presentation of an event, the purpose of this right is to protect the dignity and honour of individuals. Nevertheless this right must not turn into a means of exploiting the limits set by the system established to protect dignity and honour. A right of this kind must invariably demonstrate its purpose clearly and must not aim to become a general right of access to the media that would be claimed by any member of society whenever he/she is offended or feels affected in some way. "The right of access to the media may loosely be defined as the right of an individual or organisation to use a particular medium – a newspaper, radio or TV channel – to put over an opinion in the form of an article, broadcast for a few minutes, or even to make a programme." [3] But this is not what is implied by right of reply, since it only arises when triggered by previously published article or programme, and in some cases it is even confined to the correction of incorrect factual assertions.

2 A. Finžgar: "Odgovornost sredstev množičnega obveščanja zlasti tiska pri posegih v osebne in poslovne pravne položaje"/"The responsibility of the mass media, especially the press, when intervening in legal individual and business positions", Zbornik znanstvenih razprav Pravne fakultete v Ljubljani, 1972, p. 108, (Collection of scientific debates published by the Faculty of Law in Ljubljana, 1972).

3 E. Barendt: "Access to the media in Western Europe", *Right of Access to the Media*, Kluwer Law International, 1996, p. 112.

These definitions of right of reply and right of correction should be taken into account by the normative system in Slovenia. Both Slovene theory and judicial practice recognise this right (as in other countries) as one of the most important means of ensuring genuine freedom of expression and as a means of protecting honour, dignity, rights and interests if they were harmed by the press or some other information media. Yet in establishing the basis of this right (note that this has been taking place in the period of transition in Slovenia), we obviously have to overcome problems arising from the basic characteristics of the previous system, such as legal isolation and certain specific features that were used to exercise and defend the social and political objectives of that time.

CONTROVERSIAL SLEVENE DEFINITION OF RIGHT OF REPLY (IN THE PUBLIC INTERESTS)

One specific feature is undoubtedly the historical development of two substantially different rights, i.e. right of reply and right of correction. The usage of the term "right of correction" has long since become established in Slovenia to denote the right which, by virtue of its content, could be compared to the right of reply in other legal systems, while the interpretation of the right of reply that prevailed in our legal system is unknown in other foreign (Western European) legal systems.

The right of (public) reply was, in fact, a special instrument introduced into Slovenia by the socialist regime. From that point on it continued to evolve (until 1973) as a right of a public legal nature that was recognised as a means of protecting public interests (e.g. truthful, timely and unbiased informing of the public) and not personal or private interests. It was thus intended for the public and was originally used with the attribute "public", which was later omitted from the legal definition.[4]

4 It is possible that other formerly socialist countries have recognised the right of public reply since most of the media laws in these countries, as Slovene law does, refer to the "right of reply and correction" rather than the right of reply only (e.g. proposed new media laws in the Czech Republic and Slovakia). As for other republics of the former Yugoslav federation, the right of public reply was regulated by separate provisions in Serbian and Montenegrin laws defining notice to the public. Legal systems in other ex-Yugoslav republics, save for Macedonia, do not recognise the right of public reply (for more details see Berden, "Pravica do popravka, javnega odgovora in sporočila javnosti"/"The right of correction, public reply and notice to the public", *Pravnik*, 1997, Vol. 32, No. 1-3).

On the other hand the Slovene "right of correction" is a right comparable to that found in other legal systems, implying an individual's right of a civil legal nature that is exercised to protect personal rights or interests when they have been harmed by published information.

Such was the understanding of the meaning and purpose of right of reply and right of correction at the time Slovenia gained independence and established a new legal system. Even though both rights found their place in the Slovene Constitution, due to its unclear wording (which defines the right of correction precisely but merely mentions the right of reply) it has become disputable whether, in the new legal system, the right of reply continues to be a public right whose purpose is to protect public interests; perhaps the Constitution actually lumped these two rights together into one and the same right. The task of defining more precisely the content of both rights was thus passed over to legislators who, through the mass media law, actually equated the two rights, with the result that the distinction has been eliminated from the legislation as well.

Soon after the adoption of this law, Lojze Ude[5] drew attention to the unclear and constitutionally controversial regulation of both rights. We did not have to wait long before the courts had to deal with different interpretations of the content and purpose of the rights of reply and correction in resolving various disputes regarding the publication of a reply or correction. Arguments recently reopened upon the occasion of the drafting of the new media law, which should replace the former Public Media Act, with experts proposing various viewpoints regarding the legitimacy of regulations pertaining to these rights. The question of whether a new law should once again define the right of reply as a public right has in fact been the most debated issue since the beginning of the preparation of the new law. Given the fact that the Constitution mentions two rights and that, in the opinion of the Constitutional Court, the equation of both rights in law would be unconstitutional, the current proposed new media law accordingly treats them as two separate rights. As a matter of fact journalists also became convinced by the argument put forward by the legislator that different statutory regulations would call for changes in the constitution itself, which

5 Ude L.: "Proceedings relating to matters of the press", *Legal problems of the functioning of media in a democratic society*, Ljubljana 1995, pp. 101-125.

could prove to be a long and complex process likely to delay the adoption of the law.

SHOULD THE CONSTITUTION BE CHANGED?

In dealing with these issues everybody seems to have forgotten much more important questions: one is whether such statutory regulations conform with the modern understanding of journalistic freedom at all; the other is whether this instrument perhaps leads towards a general restriction of the media on the one hand and the general right of access to the media on the other. The latter would mean that every member of society would have the right of access to the media whenever he/she estimates that the information which he/she wants to communicate to the public contributes to the diversity and objectivity of public information. The point at issue is therefore not only the unclear wording of that part of the Constitution dealing with the rights of reply and correction, nor simply the need for a more precise legal definition of these rights; arguments for the re-institution of the right of (public) reply in our new social circumstances are equally disputable. With this in mind it may prove useful if we reconsidered the option which Matevž Krivic pointed out years ago - that we should start the procedure for constitutional change, and that this right, as an element of our legal system, should be harmonised with an understanding of journalistic freedom and freedom of expression in general.

In the next section I will try to give a brief overview of the arguments and justifications. Since the transitional period and deep social changes have brought recognition that statutory regulation of the right of expression cannot be reduced solely to the wording of a law, I will first explain the evolution of the rights of reply and correction in Slovenia, in particular the purpose and grounds for their recognition in law, and then proceed to describe changes in the area of their legal justification brought about by the new social order.

THE HERITAGE OF THE SOCIALIST SYSTEM AND SELF-MANAGEMENT

The right of reply has been part of our legislation since the earliest stages of the drawing-up of the legal system and social order in the former Yugoslav federation.[6] How-

ever, it seems that since then the question of whether this right should be called the right of reply or the right of correction has been a source of controversy. The 1925 law used the term right of correction, and this right continued to be so called when one of the first laws of the new Republic of Yugoslavia, the press law, was adopted in July 1946[7]. In 1960 there followed the adoption of a new law on the press and other forms of public information provision in which legislators replaced the term "correction" with the term "reply". In 1973 Slovenia adopted the Public Information Act[8], which re-introduced the term correction and, in addition, introduced two new institutes: the right of public reply and notice to the public.[9]

The 1973 law and both new provisions belonged to a new era in Yugoslavia's political system, which began with the adoption of constitutional amendments in 1971[10]. Of course, this transformation and the development of a new legal framework that was to sanction changed relationships also (or perhaps above all) induced changes in attitudes towards the informing of the public, which was to become "an integral part of self-management and its basic condition". This was the framework within which the "freedom of information and of being informed" had to be furnished with new content and, within such new content, the existing right of correction and previously unknown right of reply, which had nothing in common with a reply caused

6 The right of correction and reply in the Slovene legal system has been analysed by A. Berden in a text entitled "Pravica do popravka, javnega odgovora in sporočila javnosti"/"The right of correction, public reply and notice to the public", *Pravnik,* 1997, Vol. 32, No. 1-3), p. 36, and partly also by M. Krivic in an essay about freedom of expression, "Od svobode tiska do svobode informiranja"/ "From freedom of the press to freedom of disseminating information", *Varstvo človekovih pravic/Protection of human rights*, MK Ljubljana, 1988.

7 Official Gazette of the Federal People's Republic of Yugoslavia, No. 56, 1946.

8 Official Gazette of the Socialist Republic of Slovenia, No. 7/73.

9 "Notice to the public" was another new development that accompanied the "transformation of the social order". In the said article Berden criticised this instrument by stating that the law on public information was introducing it "quite unsystematically and once again with a lack of proper understanding" and that "it can be found in practice even without its legal background, while its purpose is clear". This instrument was used by state bodies to request that the editor-in-chief of a newspaper publish, free of charge, in the following issue of the newspaper, a notice of particular importance for citizens and organisations. The legislators did not set any conditions on the use of these means; a notice to the public was information that was not necessarily related to previously published information.

10 After adopting constitutional amendments in 1971, which gave legislative power to the republics, the field of public information provision, including the right of correction, came under the jurisdiction of the Yugoslav republics. The only legal regulations that remained under federal jurisdiction were regulations concerning international communications relations and part of criminal law relating to communication-related offences.

by damage to reputation, good name or some other individual right (as it is known in other Western European countries), also had to be defined.

While the right of correction was defined by the federal and republic constitutions of that time, the same cannot be said of the right of (public) reply. The legal system tied the right of reply to the article in the Constitution which provided for the right of citizens to express and publish their opinions in a medium of public communication.[11] The legal system therefore guaranteed, to all and everybody, freedom of expression and the right to publish opinions, information and replies to published information in all means of public communication. Of course, as Krivic pointed out at the time, "this did not mean that this right could be exercised". It is also questionable whether it was ever the objective of the constitutional and legislative bodies of the time, or perhaps just one of many political precepts that abounded in the Constitution of the time[12]. As Slavko Splichal said, the press of the communist world had as much freedom as the state chose to allow its citizens. "Freedom of the press, of association and of expression are not rights enjoyed by citizens; they are limited privileges occasionally granted by a regime in order to achieve its own objectives"[13].

In the Public Information Act, adopted in 1986 and 1989[14], when Slovenia was still one of the Yugoslav republics, the provisions regarding reply and correction remained essentially the same as when they were introduced into the Slovene legal system in 1973, and they did not change until Slovenia gained independence. In this law the rights of reply and correction were defined separately as two entirely independent categories.

According to this law the right of correction belonged to anybody whose dignity, good name or interests had been harmed by published information. This right was therefore exercised when a person's individual right or interest had been harmed. The veracity or otherwise of a correction was

11 The second paragraph of Article 167 of the Constitution of the SFRY (similar to the even more detailed fifth paragraph of Article 209 of the Slovene Constitution at that time) read: "Citizens have the right to express and publish their opinions in the means of public communication".

12 That the right of reply had not been an entirely "dumb" provision without practical implications was proved by M. Krivic through successful lawsuits at the Supreme Court in 1984 after "long, tough legal struggle".

13 Splichal, Slavko 1992: "Izgubljene utopije"/"Lost utopias", *Znanstveno in publicistično središče*, Ljubljana, p. 35.

14 Official Gazette of the Socialist Republic of Slovenia, Nos. 2/86 and 42/89.

not specified as a reason upon which the refusal of an editor-in-chief to publish the correction could be based, unless the correction referred to assertions whose veracity had already been established through an enforceable act of a competent state body. The subject of the proceeding could have been any natural or legal person, including state bodies.

THE RIGHT OF PUBLIC REPLY IS CONNECTED WITH THE SOCIALIST SYSTEM

In contrast to the right of correction, the right of reply was of an exclusively public legal nature, recognised in the interests of the public and not as a reaction based on personal reasons (harm). The law therefore prescribed that the public media also had to publish replies which substantially complemented facts and data in the published information. While the right of correction was granted to natural persons as well, the right of public reply was not. The veracity or otherwise of the correction was not established; in contrast, that of public reply was. A public reply served the interests of a wider public. The media was thus obliged to publish the reply only if it significantly supplemented facts or data in the published information with the aim of ensuring truthful and complete information, meaning that facts and data contained in such a reply had to be true[15].

The right of correction and the right of reply were therefore two different rights, just as their purposes were different. They were, after all, introduced within different historical frameworks[16]. The latter especially holds true of the right of (public) reply, which was a reflection of the political transformations of that time, thus making it inseparable from our socialist past[17]. The end of the socialist regime and the introduction of a new social order generated the drawing-up of new statutory norms. However, it was difficult to determine which norms were to be observed by

15 Ibid, Berden, p. 40.

16 The former theoreticians defended the standpoint that the right of reply and of correction were two similar rights, or practical manifestations of one and the same right. They also supported the view that the demarcation line between these two rights was not clear. Others, however, leaned on statutory provisions and stated that the two rights are distinct, whereby the right of reply has a public legal nature and is granted to citizens in cases where their personal right or interest was not affected, while the right of correction is an individual right of a civil legal nature aimed at protecting the right and interests of individuals (Ude, in the text cited above, pp. 116-118).

17 Also emphasised by Berden in the cited work.

the new legal system. Every social and economic turnabout brings with it changes in the relationships between people themselves and between people and things, with these changes occurring much more quickly than changes to legislation itself.

Difficulties became especially evident in the area of freedom of information, where Slovenia is (still) painstakingly looking for criteria by which to draw up normative rules so that they reflect the development of the autonomy of human rights protection. Opposing views regarding the sphere of human rights and the source of sovereignty find their expression precisely in media legislation: in democratic societies the law guarantees the right of expression and other rights and freedoms to "every citizen", "every person" or, to put it simply, to "everybody", but in former socialist societies – to which Slovene society belonged in the era of the former Yugoslavia – the lawful subject of these rights was society and not its individual members.

Within the new legal system in Slovenia the right of expression and right of reply found their place as two separate rights in the legal act of the highest order, i.e. the Constitution (in the part concerned with human rights and freedoms). The merging of these two rights in the media law occurred later. However, since this caused a number of disputes, many of which ended up before the courts, the new media law is now faced with the question of whether it would not be necessary, given the wording of the Constitution, to re-introduce the distinction between these two rights. Taking into account the development and history of the right of reply, the answer to this question could be quite simple, but the arguments are much more complex, especially given the wording of the new Constitution. We will now describe the main difficulties associated with this constitutional provision throughout the transitional period; at the same time we will try to shed some light on the essential purpose that this right (of correction, reply or similar instruments) should have in a free and democratic society.

The new Slovene Constitution[18], i.e. where it concerns basic human rights and freedoms, contains two provisions of especial importance for journalists and the media. The first is, of course, freedom of expression (Article 39). This provision guarantees freedom of expression to everybody

18 The Constitution of the Republic of Slovenia, Official Gazette of the RS, No. 33-14099/91, 28 Dec 1991.

(or, more precisely, to natural persons and legal entities involved in the public dissemination of information) to freely choose, receive and disseminate information, thoughts, ideas and opinions. The second paragraph of the same article provides that everybody is entitled to information of public importance for which legitimate interests exist, with exceptions determined by the law.

The second constitutional provision which significantly determines the fate of journalistic freedom and freedom of expression in general is that which refers to the right of correction and right of reply. Article 40 of the Constitution reads: "The right to correct published information which has caused damage to the rights or interests of an individual, organisation or official body shall be guaranteed, as shall be the right to reply to such published information."

This article therefore provides for two rights: the right of correction, which is conditioned by a person being harmed by information, and the right of reply, which is not defined in detail in the Constitution and is not tied to any condition. This wording of the Constitution does not make it clear whether, under Slovenia's new legal system, the right of reply remains a right of a public legal nature which may not be exercised if a personal right or the interest of citizens (organisations and bodies) have been harmed.

More clarity was expected to be introduced by legislators, but the 1994 Public Media Act, without any explanation, equated both rights by defining them together and uniformly. This law actually stipulates that "everybody has right to demand from the editor-in-chief that he publish, free of charge, a reply to and correction of the published information that harmed his right or interest" (Article 9). In accordance with this formulation, both the reply and correction presuppose that a person's right or interest has been harmed.

The above-mentioned provisions set by the Constitution and the statute, along with the still-vivid memories of the historical development of the right of reply in Slovenia, gave rise to a number of controversial issues, the most hotly disputed being the question of whether right of reply can still be understood as a right of a public legal nature, and the relationship between right of reply and right of correction on the one hand and right of expression on the other, especially when we know that the Constitution draws a distinction between these two rights. Another arguable point is the fact that the Constitution grants this right to

any harmed person, organisation and even state body with regard to every piece of published information (disregarding the type or form of public media which published it).

All these issues were, in past years, more or less successfully resolved by the courts, but legislators are now expected to eliminate all ambiguities "definitely and for ever". However, the burden might prove to be too heavy for the legislators. As a matter of fact, the reason why this right has been misunderstood does not lie with the currently valid law on mass media but arises from the ambiguous wording of the constitutional provision. It is obvious that this constitutional provision is part of our heritage, and that constitutionalists were influenced by past understanding of the right of reply and of correction when they were drawing up the Constitution. Whether such an understanding is inherent to the new legal order, which is expected to establish real freedom of the media and of journalists, has thus become a constitutional rather than a legislative issue.

RIGHT OF REPLY AS A PUBLIC LEGAL RIGHT – THE SUBSTITUTION FOR THE FORMER RIGHT TO PUBLISH "OPINIONS OF PUBLIC IMPORTANCE"

The first question which should now be explained by legislators assigned the task of writing a new media law is whether, with regard to the Constitution, right of reply can still be understood as a right of a public legal nature. However, the standpoint taken by the Supreme Court at several proceedings involving this issue significantly differs from the standpoints upon which the 1997 resolution of the Constitutional Court[19] was based.

The Supreme Court actually explained on more than one occasion that only a person whose right or interest had been harmed by published information was entitled to right of correction and/or reply. "Therefore this is not *actio popularis* or the right of a public legal nature; instead, suit is filed by a personally injured party. Injury to a right or interest is a condition for exercising both the right of correction and right of reply, as it also proceeds from Article 40 of the Slovene Constitution, which reads: "The right to correct published information which has caused damage to the rights or interests of an individual, organisation or official body shall be guaranteed, as shall be the right to

19 Ruling of the Constitutional Court No. UP-20/93, 19 June 1997.

reply to such published information". By using "as shall be" (understood as "in the same way", "under the same conditions"), the constitutional body actually equated the conditions for exercising the two rights. Consequently, this constitutional right, although not directly realisable, obtained its legal background.[20]

However, when this issue was considered by the Constitutional Court in 1997, it adopted a viewpoint which suggested that the distinction of these two rights should continue to be maintained. The Court actually decided that "the difference between right of reply and right of correction is based primarily on the linguistic and logical interpretation of Article 40 of the Constitution, where the right of correction is tied to the plaintiff's rights being affected while right of reply is not tied to this or any other similar condition. This further means that the task of defining this right more precisely has been left to legislators, and that the constitutional body, when drawing up the Constitution and this right, was influenced by the-then prevalent understanding of this right". The same ruling of the Constitutional Court includes the explanation that "in connection with the constitutional right to reply to published information, and taking into account the circumstances and manner in which this constitutional right was established, it is possible to interpret this provision in such a way as to arrive at the conclusion that this constitutional right by itself incorporates – in addition to the usual content that could be ascribed to the concept of "reply to published information" – a meaningful distinction that sets it apart from the right of correction. The condition of exercising the latter right is harm to personal or private interests, which is not also the condition for exercising the right of reply recognised by the Constitution as a right aimed at the protection of public and not private interests (e.g. the interest of objective, truthful, timely and unbiased informing of the public)…"

20 Ruling II Ips 38/98, similarly in rulings 142/97, 602/97, ruling II Ips 235/97, ruling II Ips 551/95, II Ips 413/98, II Ips 413/98, etc. However, the Supreme Court has explained that there is a difference between "reply" and "correction". "A correction may contain only facts and circumstances that are used to dispute assertions in published information (it is thus restricted with regard to its content and interests), while reply (which is not covered by the said restriction in the third paragraph of Article 9 of the Public Media Act) may be wider and subject to the condition of public interests, i.e. that the public should be informed about true facts and data. The same as correction, it may refer only to information (fact). (Ruling II Ips 340/95, as in Ruling II Ips 413/98).

In accordance with the decision of the Constitutional Court, the right of reply exercised by an individual to protect public interests is, in the current Constitution, the only substitute for the former constitutional right that guaranteed the publication of "opinions of public importance"; therefore "it would be even more important for this right to be dealt with adequately by legislation, in harmony with constitutional provisions". However, the Constitutional Court did not attempt to assess the legitimacy of this constitutional provision, neither did it address an even more important question, i.e. whether this right of a public legal nature on the one hand and the duties of the media (including print, broadcast, public and private media) and journalists on the other are in harmony with the wider understanding of journalistic freedom, and whether the constitutional right of this type actually presents an over-strict interference in the freedom of the media, the independence of editorial policies, and so on.

Perhaps Slovene legislators could include in our legal system the duty to publish a reply (in the public interest) to which national (public) media would be subject; perhaps some other means could be used to provide for "stricter" legal liability of national radio and television to ensure adequate and balanced presentation of all important lines of reasoning, and social and political events. Yet such a move on the part of the legislator would be in conflict with the Constitution, which guarantees right of reply and right of correction with regard to all "published information", thus not making a distinction between print media, radio or television, nor between public and private media. As for right of correction (or reply) arising from personal injury, such regulations may not be controversial at all. But they would become inappropriate as soon as (and if) the constitutional right is interpreted as a right granted for the protection of public and not private interests (e.g. the objective, truthful, timely and unbiased informing of the public). This kind of regulation and state-imposed constraint on private media contents of a programme, especially private print media, would certainly mean over-strict interference in media activities.

DOES THE MEDIA VIOLATE FREEDOM OF EXPRESSION BY REFUSING TO PUBLISH A REPLY?

The inclusion of right of reply and right of correction

in the new Slovene Constitution obscured the relationship between right of reply and right of correction on the one hand, and freedom of expression on the other. As we have already pointed out, the Slovene Constitution contains two provisions: freedom of expression is provided for in Article 39; Article 40 defines right of reply and right of correction. As a result and on more than one occasion, courts have had to answer questions posed by plaintiffs as to whether, by refusing to publish a reply without a justifiable basis, the media violated, in addition to right of reply and right of correction, freedom of expression of thoughts and opinions, or whether, perhaps, these two provisions are completely unrelated after all.

Slovene courts have searched for an answer to this question within the process of clarification of another issue – that is, whether the rights of reply and correction, given the distinction they have in the Constitution, can be considered to be "specialised" rights of a wider character arising from freedom of expression of thoughts and opinions. Our judicial practice, however, does not recognise the existence of the relationship between freedom of expression and right of correction. It is evident from judgements pronounced on several occasions that the rights contained in Article 40 (rights of reply and correction) and Article 39 (freedom of expression) are different, and that an unfounded refusal to publish a reply or correction would constitute a violation of the provisions set by the statute (and the provisions contained in Article 40 of the Constitution) but not also a violation of the constitutional right to freedom of expression as defined by Article 39.[21]

The point at issue as regards judicial practice in Slovenia is therefore no longer the relationship between a wider and narrower understanding of the right, since it is obvious that the right of reply and correction (at least with respect to its formal and legal justification) has acquired an entirely independent character. The right of reply and correction has thus been forging a new path for its development; with it, the original and globally recognised purpose of this right has also been changing. It is therefore questionable to what extent this right can still be understood as the expression of a wider right of communication.

21 Ruling of the Constitutional Court No. UP-20/93 of 19 June 1997. Also, Ruling of the Supreme Court II Ips 602/97, Ruling of the Supreme Court II Ips 143/98, as in Ruling of the Supreme Court II Ips 38/98).

As a matter of fact, the essence of the right of communication, which significantly exceeds the classic civic "freedom of the press", consists of the "right to listen and be listened to, of informing and being informed". Only within this frame of interpretation of the right of communication could justification be found for the restriction of journalistic freedom introduced through the legal protection of the right of reply or correction. Of course, the purpose of such legal protection is to ensure the opportunity to exercise freedom of expression and the correction of published assertions to every individual who assesses that such an assertion relating to him/her has been incorrect or untrue. This right should therefore evince the stated objective and should not aim to become a general means of access to the media that would be available to every member of society whenever he/she chose to exercise it.

Constitutional constraint on journalistic freedom?

From the perspective of freedom of expression, justification of the right of reply and correction in Slovenia is much too broad. Because of this it has acquired characteristics that exceed the limits set by the system designed to protect honour and privacy. The right could therefore turn into a constitutionally based restriction of journalistic freedom or a general right of access to the media available to every member of society (and state body) whenever he/she feels offended or thinks that his/her right to protect honour or another personal right has been infringed upon. Such a development would mean that connection with the original purpose of this right, i.e. ensuring the integral and balanced provision of information to the public, has been lost.

A further controversy can be found in the potential further evolution of the constitutional right of reply and correction as Matevž Krivic points out in his essay. As a matter of fact, **the Constitution grants this right to everybody, including state bodies, and it pertains to any published information** (in print media, on radio and on TV). However, it is questionable whether state bodies should be entitled to this right at all (except perhaps with regard to information published in state-owned/public media). Such a definition of the right of reply or correction has been borrowed from former Slovene and federal constitutions which provided for the right to correct a published

notice "which has harmed the right or interest of an individual, organisation or body". The purpose of this essay is not to examine whether a state body can claim that its rights have been harmed at all. It seems appropriate, nevertheless, to point out the basic difference between the new and old social and political systems that also (and especially) found expression in the area of freedom of expression: the primary task of the new democratic order is to protect individuals and their fundamental rights, while the previous system was primarily concerned with the protection of society as a whole, whereby protection of individuals was subordinated to the collective character of legal protection. Proceeding from this line of reasoning, it is understandable that state bodies were also holders of the right of reply and correction.

THE PUBLICATION OF A REPLY OR CORRECTION AT THE REQUEST OF STATE BODIES

The new role of political authorities in democratic society dictates changes in attitude towards executive bodies. In addition, state bodies themselves are obliged to tolerate a higher measure of public criticism since it constitutes the core of democracy and the basis of freedom of expression. The Slovene Constitutional Court has pointed out more than once that "freedom of the press and of expression of opinions are conducive to creating and shaping an impartially informed public; it is a prerequisite for the public's ability to control all branches of authority; and it ensures effective political opposition to any ruling political power. Through this it enables a balanced performance of the ruling political power in the country, and the control of that power".[22] The free expression of thoughts and ideas in a democratic system warrants an ongoing debate about issues of general importance, so state bodies must be able to accept criticism of their performance. Because of their role in society they are inevitably exposed to severe appraisals of their conduct, so they must accept the risk that both their conduct and stance may become the target of strident, relentless, even overstated criticism expressed by means of public debate.

22 Ruling of the Constitutional Court U-I-172/94 of 9 November 1994 (Odlus III, 123) and Ruling of the Constitutional Court U-I-226/95 of 8 July 1999 (Odlus VIII, 2).

That freedom of expression concerning all issues of public importance deserves a high level of legal protection is also evident from the judgements of the European Court of Human Rights. A restriction of journalistic freedom, that is to say the obligation of private radio stations, TV channels and the print media to publish a reply at the request of a state body, should therefore clearly be removed from Slovene legislation.

On the other hand this restriction could be imposed on public radio stations and TV channels, but it is not necessary that the obligation of the media or the right of state bodies be prescribed by law, and even less so by the Constitution. As a matter of fact both the duty and the right are implied by the definition and purpose of public radio stations and TV channels – their task is to notify the public of issues of general interest, and to ensure unbiased and complete information. As regards these issues, Slovenia could take as an example foreign court decisions which have ruled that the constitutional right of freedom of expression and indiscriminate treatment demands that state-controlled media also publish state bodies' replies to criticism of their conduct or other controversial issues. This obligation may acquire special importance during election campaigns, where the right of voters to receive diverse information means that political parties or candidates whose views or standpoints were presented incorrectly or were attacked should have the opportunity to "present the other side of the story", i.e. have the right of reply or correction.

The definition of the right of reply and correction in Slovenia is thus far from uncontroversial. The difficulties lie in the Constitution and its provisions. The creators of the Constitution were undoubtedly influenced by the former understanding of the rights of reply and correction. It is clear that the article of the Constitution which grants this right (as did the Constitution in the previous system) to "individuals, organisations and official bodies" is a hangover from the socialist past. The fact that such a right has been included in the Constitution at all may be attributed to the same reason, as we know of no other comparable examples in the constitutions of Western European or other countries across the world. The only exception is the constitution of Lesotho, which provides that "any person who feels aggrieved by statements or ideas disseminated to the public by a medium of communication has the right to reply or to require correction to be made using the same

medium under such conditions as the law may establish"[23]. However, in contrast to Slovene regulations, the provision in Lesotho's Constitution grants the right of reply only to affected persons (who feel aggrieved). Comparable to the situation in Slovenia is perhaps their pointing out that "Lesotho has not yet matched [its] law with freedom of expression as stated in [Lesotho's] Constitution.... [Lesotho's] Courts still have to really say what [Lesotho's] law, as modified by the Constitution, really is."

CONCLUSION: THE LEGAL SYSTEM IN SLOVENIA SHOULD BE HARMONISED WITH THE MODERN UNDERSTANDING OF JOURNALISTIC FREEDOM

The question of whether the right of reply in Slovenia should again be defined as a right of a public legal nature was in fact one of the most disputed issues at the time the new media law was drawn up. With the Constitution referring to two rights and, given the opinion of the Constitutional Court that the equating of these two rights in law would be unconstitutional, the currently proposed media law treats the two rights separately. However, the Constitutional Court has not yet considered the legitimacy of such a constitutional provision, nor has it looked into the much more important question of whether this right on the one hand, and the duty of the media (print, broadcast, private and public) and journalists on the other, are in harmony with a wider understanding of journalistic freedom and freedom of expression in general. In deciding on these issues Slovenia could lean on the principles and criteria observed in other countries. The regulations indeed differ from one country to another and with regard to type of media, yet definitions similar to those in Slovenia cannot be traced anywhere else.

Solutions applied by countries where, in addition to statutory rights of reply or correction there also functions an effective mechanism of self-regulation (which may be the most appropriate method of introducing and protecting a balance between freedom of expression and other human rights), could be especially interesting for Slovenia. Almost all international organisations concerned with the regulation of media operations encourage professional self-regulation, and point out that the protection of the right

23 Media Law and Practice in Lesotho, www.article19.org/docimages/519.htm

of reply and correction can be most effectively achieved by enabling the publication of the reply through the mediation of a press council or ombudsman, if the media itself does not do it on its own initiative.

The run-up to the adoption of a new media law is certainly the stage at which the media and journalists should consider the possibility of establishing an effective mechanism to resolve public complaints that would be professional, be accessible to a wider public and authorized to adopt binding decisions. Such a mechanism should include an authorization that enables the media to refuse the demands of the plaintiff or to impose measures leading to the successful remedying of an error or injustice. The right of reply or correction could be one of the means, but not the only one available to such a body. Of course, this would simply be an alternative to other types of protection, yet the very submission and consideration of a complaint should discourage the plaintiff from seeking other remedies (e.g. legal). Legal protection could then be sought only if a plaintiff or a medium is not satisfied with the settlement achieved through such an out-of-court procedure.

The Slovene government should thus give enough time to the local media to consider the establishment of an out-of-court complaint mechanism whose decisions would be respected by all media. This could gain them the recognition of a wider public.