PRAVNI MONITORING MEDIJSKE SCENE U SRBIJI

LEGAL MONITORING OF THE SERBIAN MEDIA SCENE

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Kao uvod u ovu Publikaciju, poslužiće nam kratak presek stanja u medijskom sektoru, na osnovu pravnog monitoringa medijske scene u Srbiji i nalaza stručnog monitoring tima ANEM-a o tome šta je karakterisalo medijsku situaciju u periodu jul – decembar 2012.

Za medijski sektor, proteklih šest meseci je izgubljeno vreme, kada je reč o neophodnim reformama i poboljšanju položaja medija i novinara. Nova vlast gotovo ništa nije uradila na tom planu do sada. Brojni su pokazatelji za to. Nije smanjen broj pretnji, pritisaka i napada na medije i novinare, novinari su bili izloženi i ozbiljnom zastrašivanju bacanjem eksplozivnih naprava na njihove kuće, a učinioci ovih dela najčešće nisu bili pronađeni, dok njihovi nalogodavci nisu ni bili predmet istrage. Sudovi su nastavili sa svojom praksom spornih presuda u medijskim slučajevima, što je posledica neuvažavanja ili nepoznavanja specifičnosti slobode izražavanja i slobode medija, kao i evropskih standarda i prakse u ovoj oblasti. Ipak, pojedini sudovi svojim presudama podižu standarde zaštite slobode izražavanja u zemlji, ali njihov primer još nisu spremni ili sposobni da slede i drugi. Medijski regulatorni okvir u ovom periodu nije bio menjan, ali je nova vlast pokazala izuzetno interesovanje za ovo pitanje, uključujući i one organe koji nisu nadležni za to. Novo ministarstvo kulture i informisanja je oformilo radnu grupu čiji je mandat izazvao dosta nedoumica i kontroverzi, jer iz izjava ministra i dalje nije jasno da li će radna grupa raditi na reviziji Medijske strategije ili na njenoj implementaciji i izradi ključnih medijskih zakona koji su njom predviđeni. Dok ta dilema još traje, neki drugi državni organi su svojim nacrtima/predlozima zakona koji nisu iz medijske oblasti stvorili osnov za značajan uticaj na položaj medija i novinara, kako pozitivan, tako i negativan. Zapravo, pozitivan uticaj jedino može imati ukidanje klevete kao krivičnog dela, predviđeno izmenama Krivičnog Zakonika, dok zadržavanje uvrede kao krivičnog dela, a naročito brisanje odredaba koje propisuju strože kazne za pretnje novinarima koje su im upućene u vezi s poslom kojim se bave, čime se četvorostruko smanjuje zakonski minumum za kazne protiv učinilaca tih pretnji, svakako nisu dobre. Takođe, predloženim izmenama Zakona o autorskom i srodnim pravima, jednoj grupi korisnika autorskih dela i predmeta zaštite srodnih prava daje se povlašćeni položaj, dok se suštinski problemi elektronskih medija, nastali zbog loših odredaba zakona o utvrđivanju tarife naknada, uopšte ne razmatraju i ne regulišu predloženim izmenama. Ipak, najdrastičniji negativan efekat na medijski sistem može imati predloženi Zakon o javnim preduzećima, koji, suprotno Medijskoj strategiji i važećim medijskim zakonima, otvara mogućnost osnivanja novih javnih preduzeća u oblasti informisanja. Koliko je pitanje izlaska države iz vlasništva u medijima i za novu vlast izazov, iako ona to deklarativno podržava, govore i pojedine kontroverzne izjave nadležnog ministra, kao i neki slučajevi iz prakse, koji pokazuju koliko je teško odreći se mehanizama kontrole nad medijima, čak i kada je država samo delom vlasnik medija. Još jedan ne-medijski zakon, Zakon o naknadama za korišćenje javnih dobara, čiji Nacrt još uvek nije dostupan javnosti, mogao bi ozbiljno da ugrozi elektronske medije, ali i nezavisnost i finansiranje regulatornih tela, ukoliko bi bila usvojena najavljena rešenja o ukidanju plaćanja regulatornih naknada i uvođenju naknada koje bi elektronski mediji direktno uplaćivali u budžet, a kontrolisala Poreska uprava, dok bi regulatorna tela dobijala deo tih sredstava iz budžeta. Paralelno sa ovom vrstom posrednog pritiska na medije, direktan pritisak predstavljaju ekonomska kriza i ogromni nameti koje sve manje medija u Srbiji može da podnese. Skoro 15% elektronskih medija sa izdatim dozvolama je pred gašenjem zbog neplaćanja regulatorne naknade, a mnogi su u toj situaciji i zbog visokih naknada za korišćenje autorskih muzičkih dela, kao i ostalih naknada i dažbina koje moraju da plaćaju. Ni štampani mediji nisu u boljoj situaciji. Pri tom, politika u marketinškom prostoru medija, favorizovanje pojedinih medija na štetu drugih zloupotrebom marketinških budžeta javnih i državnih preduzeća, kartelski sporazumi i zloupotreba dominantnog položaja na tržištu oglašavanja, odsustvo efikasnih mehanizama kontrole trošenja budžetskog novca i kontrole državne pomoći u medijskoj sferi, značajno utiču na (ne)funkcionisanje medijskog tržišta. Stoga ne čude pojedini zahtevi novinara za poništaj privatizacija, jer uviđaju da je medijima u kojima rade teško da opstanu na tržištu i da je za njih najlakše da se vrate na državne jasle. Slično motivisani su i zahtevi nekih javnih medijskih preduzeća, kojim traže da država odustane od

privatizacije medija ili bar da oformi regionalne javne servise, nadajući se da će baš oni biti jedan od njih i da će za svoje funkcionisanje imati značajnu finansijsku pomoć države. Istovremeno, i postojeći javni servisi imaju problem sa naplatom pretplate i stabilnim finansiranjem, što je bilo posebno aktuelno u ovom periodu, koji ukazuje da je neophodno redefinisanje pitanja finansiranja javnog servisa, ali i redefinisanje njegove uloge, obaveza, nadzora nad njegovim radom i neophodnih uslova za njegovu uređivačku nezavisnost. Iz svega navedenog proizilazi da je neophodna reforma regulatornog okvira, povlačenje države iz medijskog vlasništva, redefinisanje javnih medijskih servisa, kontrola državne pomoći, suzbijanje monopola na medijskom i povezanim tržištima, kao što su tržišta oglašavanja i distribucije medijskih sadržaja, a na svemu tome vlast bi trebalo da radi paralelno. Ovakav razvoj situacije u medijskom sektoru može ozbiljno da ugrozi i uspešnost procesa digitalizacije televizije, za koga je sada izvesno da nije mnogo odmakao od samog početka. Ipak, ono što ohrabruje kada je reč o digitalizaciji, jesu konkretne aktivnosti koje je novo Ministarstvo već preduzelo i pokazana spremnost da u tom procesu sarađuje sa svim učesnicima, uključujući i medije, što do sada nije bio slučaj.

Imajući u vidu da se medijska situacija nije mnogo promenila u ovom periodu i da su i dalje ista pitanja važna, ANEM je odlučio da u ovom, Sedmom broju Monitoring Publikacije, osim tekstova o tim medijskim pitanjima, ponudi tekstove i o onim, koja su uvek značajna i aktuelna. Za ovaj broj Publikacije, tekstove su pisali: *advokat Kruna Savović*, o razlozima za i protiv osnivanja regionalnih javnih servisa; *advokat Slobodan Kremenjak*, o neophodnosti regulacije kablovske distribucije i emitovanja TV programa; *Rodoljub Šabić, Poverenik za informacije od javnog značaja i zaštitu podataka o ličnosti,* o ulozi države i medija u funkciji ostvarivanja prava građana na informisanje; *Dragoljub Popović, sudija Evropskog suda za ljudska prava*, o pristupu informacijama u evropskom pravu ljudskih prava. Peti tekst je sažet prikaz dve presude Evropskog suda za ljudska prava, koje se odnose na primenu člana 10 Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda: *prva* se odnosi na slobodu širenja informacija – nedodeljivanje radio-frekvencije licenciranim TV emiterima, a *druga,* na slobodu izražavanja – apsolutnu zabranu snimanja intervjua sa zatvorenikom unutar zatvora.

Beograd, decembar 2012.

Razlozi za i protiv osnivanja regionalnih javnih servisa

Kruna Savović, advokat[1]

Još kada je usvojena Medijska strategija u septembru 2011. godine, moglo se pretpostaviti da će neka od njenih rešenja nastaviti da budu predmet sporenja. Ovo se posebno odnosi na deo Strategije koji se bavi pitanjem regionalnih javnih servisa, čijem formiranju su se i tada, a i danas se protive najveća udruženja iz medijskog sektora. Podsetimo, regionalni javni servisi se uopšte nisu pominjali u verziji Medijske strategije sa kojom je tadašnje Ministarstvo kulture, informisanja i informacionog društva izašlo u javnu raspravu. Naprotiv, regionalni javni servisi su se u Medijskoj strategiji pojavili naprasno, intervencijom radne grupe, osnovane rešenjem premijera Mirka Cvetkovića. Ova radna grupa, sa izuzetkom predstavnika medijskih udruženja, našla je da su upravo regionalni javni servisi sredstvo koje će omogućiti da svi građani na teritoriji Republike Srbije na jednak način ostvaruju pravo na informisanje. Pri tome, polazne pretpostavke Medijske strategije nisu sporne. Nije sporno ni pravo građana da na lokalnom i regionalnom nivou dobijaju blagovremene i tačne informacije specifične za to područje, kao što nije sporna ni obaveza države da obezbedi punu informisanost građana i neprekidno doprinosi unapređenju kvaliteta medijskih sadržaja. Sporan je mehanizam.

Sporno je i to kako se Vlada, ili radna grupa premijera Cvetkovića, opredelila za baš šest regionalnih servisa – zašto ne pet ili sedam, zašto ne bilo koji drugi broj. Stekao se utisak da su se zapravo brojali regionalni centri u kojima su stranke tada vladajuće koalicije bile na vlasti u lokalu, što je dodatno kompromitovalo i samu ideju da se tim budućim regionalnim javnim servisima obezbedi upravljačka, programska i finansijska nezavisnost.

Sporno je i što Strategija predviđa da regionalni javni servisi funkcionišu na istim principima na kojima funkcionišu dva postojeća javna servisa, RTS i RTV. Da su i RTS i RTV daleko od primera na koji bi se valjalo ugledati, proizilazi i iz Izveštaja koji je rezultat zajedničkog rada organizacija Civil Rights Defenders, ANEM, NUNS, NDNV i Lokal pres, baziranog na indikatorima Saveta Evrope za medije u demokratiji, objavljenog sredinom ove godine, pod nazivom „Medijske slobode Srbije u evropskom ogledalu“. U tom Izveštaju navodi se da su niska naplata televizijske pretplate, niska produktivnost, prevelik broj zaposlenih i neracionalno trošenje sredstava, doveli do toga da RTS i RTV godinama posluju sa gubitkom. Ovo ih logično udaljava od finansijske nezavisnosti i čini podložnim spoljnim uticajima. Isti Izveštaj problematizuje i upravljačku nezavisnost RTS-a i RTV-a. U njemu se ukazuje da se upravni odbori javnih servisa nisu iskazali kao autonomna tela koja imaju odlučujuću reč u upravljanju. Naprotiv, shodno navodima Izveštaja, ključna uloga upravnih odbora svodi se na izbor, a glavna aktivnost na podršku odluka generalnih direktora i užih menadžerskih i uredničkih timova javnih servisa. Ovo kreira situaciju u kojoj glavnu ulogu u ostvarenju upravljačke nezavisnosti javnih servisa imaju njihovi generalni direktori. Nažalost, konstatuje se u Izveštaju, do 2011. godine, za obavljanje ove funkcije ni u RTS-u ni u RTV-u nisu birani ljudi sa reputacijom ličnosti koje su nezavisne i koje se uspešno odupiru političkom uticaju. O tome da li je sve ovo dovelo i u kojoj meri do političkih uticaja na programe javnih servisa, postoje različita mišljenja. Sam RTS poziva se na visoku gledanost i činjenicu da njihovu centralnu informativnu emisiju u proseku gleda dvostruko više gledalaca od najgledanije centralne informativne emisije na programima bilo koje od komercijalnih televizija. Nezavisna istraživanja programa pokazuju, međutim, da izveštavanje javnih servisa jeste politički pristrasno i da u njihovim programima predstavnici vlasti imaju najpovlašćeniji tretman, da se oštar opozicioni diskurs retko čuje, a najvažniji društveni problemi tretiraju van konteksta odgovornosti vlasti.

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[1] Advokatska kancelarija „Živković&Samardžić“, Beograd

Na kraju, sporno je i to što Medijska strategija predviđa da se regionalni javni servisi ustanovljavaju putem konkursa, ne uređujući taj postupak ni u najgrubljim crtama, te potpuno zanemarujući pitanje analize uticaja ustanovljavanja novih javnih servisa na tržište i konkurenciju, ocenu mere u kojoj slična ili zamenjiva ponuda postoji ili je moguća na programima komercijalnih medija.

U ovom kontekstu, ispostavlja se da čak i oni koji podržavaju ideju formiranja regionalnih javnih servisa, iste zapravo doživljavaju pre kao biznis model u kome bi neka od još neprivatizovanih javnih medijskih preduzeća mogla opstati, a njihovi zaposleni sačuvati svoja radna mesta, te kao sredstvo kojim bi lokalne vlasti zadržale mehanizme uticaja na javno mnenje na lokalnom i regionalnom nivou, nego kao mehanizam služenja društvenim, demokratskim i kulturnim potrebama društva. Ovo objašnjava činjenicu da one koji podržavaju ideju formiranja regionalnih javnih servisa, po pravilu, nećemo čuti da govore o zabrani preplaćivanja javnih servisa, o delotvornim mehanizmima njihove eksterne finansijske kontrole, o njihovom konkurentnom ponašanju na tržištu, odnosno, neprihvatljivosti da se javna sredstva kojima se finansiraju zloupotrebljavaju za dodatno zatvaranje tržišta i gušenje komercijalne konkurencije.

Zašto je ovako i zašto danas u Srbiji mnogi ne vide održiv poslovni model za regionalne elektronske medije, osim pogrešno percipiranog modela javnog servisa, shvaćenog kao zelenog svetla za nisku produktivnost, prevelik broj zaposlenih i neracionalno trošenje javnih sredstava?

Zašto Medijska strategija nije makar pokušala da prepozna uzroke koji su okruženje za rad lokalnih i regionalnih elektronskih medija učinili u tolikoj meri nepovoljnim? Istina, niko nije od Strategije očekivao da okonča svetsku ekonomsku krizu i poveća marketinške budžete oglašivača u Srbiji, ali ona jeste mogla da podstakne konsolidaciju tržišta lokalnih i regionalnih elektronskih medija, u toj meri fragmentisanog da osiromašene stanice više ne uspevaju da zarade ni koliko je neophodno da plate regulatorne naknade.

Samo u septembru i oktobru 2012. godine, Republička radiodifuzna agencija pokrenula je 67 postupaka za oduzimanje dozvola za emitovanje zbog neplaćanja naknada za emitovanje programa. Prvih 35 postupaka pokrenuto je početkom septembra, a novih 32 krajem oktobra. Kako su javna medijska preduzeća i inače oslobođena plaćanja naknada Republičkoj radiodifuznoj agenciji, to su svi ovi mediji, protiv kojih su postupci pokrenuti, komercijalni. Ovakav pomor komercijalnih elektronskih medija u Srbiji, pre svega lokalnih i regionalnih, direktna je posledica neuspeha javne medijske politike da kreira povoljnije okruženje za njihov rad.

Pored podsticanja konsolidacije tržišta lokalnih i regionalnih elektronskih medija, iskorak ka kreiranju povoljnijeg okruženja za rad lokalnih i regionalnih elektronskih medija mogao se postići i insistiranjem na transparentnijem i odgovornijem trošenju javnih sredstava. Ovo bi podrazumevalo doslednu primenu propisa o kontroli državne pomoći. Ti propisi bi trebalo da onemoguće situaciju u kojoj država subvencijama narušava konkurenciju tako što pomaže ekonomski neefikasnijem subjektu, i time onoga koji je ekonomski efikasniji, koji ima manje troškove i ima bolji proizvod, sprečava da na tržištu u punoj meri realizuje svoje potencijale. Kontrola državne pomoći trebalo bi da suzbije tu praksu tako što će definisati šta država sme da dotira i na koji način sme da dotira. Ovo kao svoj preduslov zahteva i preciznu definiciju javnog interesa koji država može i treba da finansira, kao i jasne i unapred objektivno utvrđene parametre za izračunavanje visine pomoći ili naknade koje država treba da da. Naznake ove ideje, kroz insistiranje na projektnom finansiranju, postoje u Medijskoj strategiji, ali već više od godinu dana od usvajanja Strategije, nije se otišlo ni korak dalje od tih naznaka.

Iskorak ka kreiranju povoljnijeg okruženja za rad lokalnih i regionalnih elektronskih medija mogao se postići i sprečavanjem vertikalne integracije na tržištima povezanim sa medijskim, kao što su vertikalna integracija posrednika na tržištu oglašavanja sa nezavisnim produkcijama, ili operatora telekomunikacionih mreža za distribuciju medijskih sadržaja sa samim medijima.

Iskorak se mogao postići i odlučnijim insistiranjem na zaštiti konkurencije na medijskom i povezanim tržištima, suzbijanjem sveprisutnih restriktivnih praksi.

U odsustvu ovakvih iskoraka, osnivanje regionalnih javnih servisa ne bi bilo ništa više od cementiranja zatečenog stanja u kome lokalni i regionalni komercijalni mediji, i to, kako oni koji su se u tom statusu našli nakon privatizacije, tako i oni koji su originalno osnovani kao komercijalni, nastavljaju da se gase i nestaju. Nekoliko preživelih javnih medija formalno bi promenilo svoj status i transformisalo se u, makar deklarativni javni servis, a da prethodno nijedan od njihovih problema ne bi bio rešen. Primer RTS-a i RTV-a ukazuje da nema tog čarobnog štapića koji bi ih učinio finansijski i upravljački nezavisnim, a njihovo izveštavanje politički nepristrasnim. Cementiranje zatečenog stanja i nepreduzimanje jednog sveobuhvatnog seta mera koje bi okruženje za rad lokalnih i regionalnih elektronskih medija učinilo povoljnijim, imalo bi za svoj rezultat situaciju koja je upravo suprotna od onoga što Medijska strategija navodi kao motive za osnivanje javnih servisa. Umesto blagovremenih i tačnih informacija specifičnih za konkretna lokalna i regionalna područja, građani bi ostali izloženi monopolu politički pristrasnog izveštavanja, bez alternativnih izvora informacija. Ako je cilj nove vlasti da ovo postigne, ona i ne mora da formira regionalne javne servise, dovoljno je da nastavi da netransaparentno i bez ikakve kontrole finansira postojeća javna medijska preduzeća i sebi bliske komercijalne medije. Rezultat će biti isti. Ako se pak žele promene, ako se građanima želi ponuditi kakva-takva mogućnost izbora, onda će se insistirati na sređivanju stanja u RTS-u i RTV-u i na njihovom doslednom poštovanju obaveza da proizvode i emituju programe namenjene svim segmentima društva, bez diskriminacije, što bi nužno moralo da znači i bez regionalne diskriminacije gledalaca u unutrašnjosti Srbije. Istovremeno, komercijalni lokalni i regionalni elektronski mediji zaslužuju uslove na tržištu u kojima će opstajati oni koji su ekonomski efikasniji i koji imaju bolji proizvod, umesto onih koje država arbitrarno dotira, rukovođena, ne interesima javnosti, već sopstvenim dnevnopolitičkim interesima.

Neophodnost regulacije kablovske distribucije i emitovanja TV programa

Slobodan Kremenjak, advokat[1]

Zakonom o elektronskim komunikacijama iz 2010. godine („Službeni glasnik RS“, br. 44/2010), liberalizovano je tržište elektronskih komunikacija u Srbiji. Ovo praktično znači da se delatnost elektronskih komunikacija u Srbiji sada obavlja po režimu opšteg ovlašćenja, a da je pod režimom dozvola ostalo samo korišćenje numeracije, kao i korišćenje radio-frekvencija, u slučajevima u kojima je Planom namene određeno da se u okviru pojedinog radio-frekvencijskog opsega radio-frekvencije koriste na osnovu dozvole. Na takvom, liberalizovanom tržištu, su i pružaoci usluge distribucije medijskih sadržaja. Shodno Ratelovom Pregledu tržišta telekomunikacija za 2011. godinu, u Srbiji je prošle godine delovalo 76 kablovskih operatora i dva IPTV operatora. Ovome možemo dodati i tri satelitska DTH operatora. Po istom izvoru, penetracija kablovske, IPTV, odnosno satelitske DTH usluge u Srbiji iznosi 53% ukupnog broja domaćinstava, a broj pretplatnika u odnosu na 2010. godinu, porastao je za 6,7%. Najveći operator je Serbia Broadband – Srpske kablovske mreže d.o.o. (SBB), sa preko 50% tržišta. Sedam najvećih operatora (SBB, JP PTT, Telekom Srbija, Kopernikus, IKOM, Digi SAT i Radijus vektor) zauzimaju zajedno oko 88% ovog tržišta.

Ovakva situacija na tržištu nameće ozbiljna pitanja zaštite interesa medija, odnosno proizvođača ili pružalaca medijskih sadržaja u odnosu na operatore mreža, odnosno pružaoce usluge distribucije medijskih sadržaja, ali i pitanje zaštite javnog interesa. Podsetimo, Medijska strategija usvojena krajem septembra 2011. godine, kao jedan od ciljeva javne politike u ovoj oblasti, izdvojila je očuvanje i unapređenje medijskog pluralizma. Ostvarivanje navedenog cilja, shodno Strategiji, vlada namerava da postigne i podrži preduzimanjem mera koje građanima treba da omoguće pristup različitim izvorima informacija, mišljenja i medijskih sadržaja koji im pomažu da oforme sopstveno mišljenje i odupru se uticaju dominantnog mišljenja stvorenog u centrima moći. U svetlu činjenice da penetracija kablovske, IPTV, odnosno, DTH usluge u Srbiji iznosi 53% ukupnog broja domaćinstava, pri čemu jedan operator na ovom tržištu učestvuje sa preko 50%, a sedam najvećih operatora zajedno sa oko 88%, nesumnjivo je da ostvarivost ambicije države da očuva i unapredi medijski pluralizam, ali i da ostvari neke druge interese, kao što su podsticanje stvaralaštva u oblasti radija i televizije u Republici Srbiji (član 3, stav 1, tačka 7 Zakona o radiodifuziji), ili obezbeđivanje maksimalne koristi za korisnike elektronskih komunikacija i mogućnosti slobodnog prijema informacija po svom izboru (član 3, stav 1, tačke 8 i 11 Zakona o elektronskim komunikacijama), zavisi od mehanizama regulacije koji joj u konkretnom slučaju stoje na raspolaganju. Ispostavlja se, nažalost, da su ti mehanizmi krajnje oskudni.

Zakon o elektronskim komunikacijama samo na jednom mestu, u članu 101, propisuje da Republička agencija za elektronske komunikacije, na zahtev organa Republičke agencije za radiodifuziju, određuje operatora elektronske komunikacione mreže za distribuciju i emitovanje medijskih sadržaja, koji je dužan da prenosi jedan ili više radijskih ili televizijskih programa, na nacionalnom, pokrajinskom, regionalnom ili lokalnom nivou:

- kada značajan broj krajnjih korisnika koristi elektronsku komunikacionu mrežu tog operatora kao jedini ili prvenstveni način za primanje medijskih sadržaja, i
- kada je to neophodno radi ostvarivanja jasno određenih ciljeva od opšteg interesa, što utvrđuje Republička agencija za radiodifuziju, poštujući načela srazmernosti i javnosti.

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[1] Advokatska kancelarija „Živković&Samardžić“, Beograd

Republička agencija za elektronske komunikacije donela je samo dva takva rešenja, u martu ove godine – jedno, kojim je operatoru SBB-u naložila da u Novom Sadu distribuira program četiri tamošnje televizijske stanice, i drugo, kojim je istom operatoru naložila da u tom gradu distribuira program dve lokalne TV stanice.

Ako imamo u vidu da je, shodno Ratelovom pregledu tržišta telekomunikacija u 2011. godini, osnovni paket IPTV i digitalne KDS u 2011. godini sadržao 66 televizijskih programa, osnovni paket DTH usluge – 41 program, a osnovni paket analogne KDS – u proseku 51 televizijski program, nameće se pitanje koji su to programi, budući da prosečan broj programa daleko prevazilazi postojeću ponudu u zemaljskoj ili terestričkoj radiodifuziji. Drugo pitanje je da li se i kako se uopšte izdaju dozvole za kablovsko, IPTV ili satelitsko DTH emitovanje, odnosno da li operatori kablovskih, IPTV i satelitskih DTH platformi postaju važniji i moćniji igrači na tržištu i od samog regulatora – Republičke agencije za radiodifuziju. Po Zakonu o radiodifuziji, dozvole za kablovsko i satelitsko emitovanje izdaju se bez javnog konkursa, na zahtev operatora distributivnog sistema. Od obaveze pribavljanja dozvole, izuzeti su programi za koje je Agencija izdala dozvolu za zemaljsko emitovanje, na području za koje je dozvola za emitovanje izdata, pod uslovom da operator besplatno emituje programe javnih servisa. Od obaveze pribavljanja dozvole izuzeti su i programi koji se mogu primati putem slobodnog (nekodiranog) satelitskog emitovanja na teritoriji Srbije.

Ovome treba dodati i član 4. ratifikovane Evropske konvencije o prekograničnoj televiziji, koji predviđa da će države ugovornice, pa i Srbija, garantovati slobodu prijema, i neće na svojim teritorijama ograničavati reemitovanje programskih usluga koje su u skladu sa odredbama Konvencije. Pri tome, „programska usluga“ je ono što obično zovemo pojedinačnim televizijskim kanalom ili programom – skup priloga koji se emituju u okviru tog kanala ili programa.

Ključno pitanje ostaje šta jeste, a šta nije, reemitovanje programskih usluga u smislu Konvencije, i to prevashodno u pogledu lokalizovanih stranih televizijskih kanala kojima obiluje lokalna kablovska, IPTV ili satelitska DTH ponuda, kako u osnovnom, tako i u premijum paketima usluga, i koji iz ponude u dobroj meri istiskuju lokalne terestrijalne kanale, posebno lokalne. Definicija reemitovanja, u odnosu na autorska dela, postoji u Zakonu o autorskom i srodnim pravima. Član 29. tog Zakona kaže da je reemitovanje autorskog dela saopštavanje javnosti emitovanog dela, u celosti, istovremeno, i u neizmenjenom obliku, od strane drugog operatora, a ne onog koji delo izvorno emituje, uključujući i saopštavanje javnosti kablovskim sistemom, kao i situacija u kojoj se delo izvorno emituje iz druge države. Ako sve ovo prenesemo sa nivoa individualnih autorskih dela na nivo celokupne programske usluge ili kanala, izgleda da je ključna činjenica da li se kanal reemituje u celosti, istovremeno i u neizmenjenom obliku, jer bi se jedino u tom slučaju moglo govoriti o reemitovanju programskih usluga koje države potpisnice Konvencije o prekograničnoj televiziji ne smeju da ograničavaju. Ukoliko se programske usluge pak reemituju u izmenjenom obliku u odnosu na izvorno emitovanje, drugim rečima, ako se emituju u lokalizovanoj formi namenjenoj srpskom tržištu, ili sa prekidima radi umetanja lokalnih reklamnih poruka specifično namenjenih gledaocima u Srbiji, teško da možemo govoriti o reemitovanju zaštićenom Konvencijom o prekograničnoj televiziji.

Tržište distribucije medijskih sadržaja u Srbiji je danas neuporedivo veće i značajnije nego što je bilo u vreme donošenja Zakona o radiodifuziji 2002. godine. Srbija više nema pravo da u toj meri zanemaruje regulaciju kablovske, IPTV i satelitske DTH distribucije, kao što je to uradila pre 10 godina. Jer, ako je pre 10 godina zemaljsko emitovanje bilo pravilo, a kablovsko i satelitsko izuzetak, Ratelovi pregledi tržišta pokazuju da je to danas vid distribucije koji zahteva odgovoran pristup i regulaciju, kako u interesu očuvanja i unapređenja medijskog pluralizma, tako i u interesu razvoja stvaralaštva u oblasti televizije u Republici Srbiji. U suprotnom, stvaralaštvo u oblasti televizije u Srbiji, svešće se na titlovanje stranih programa i umetanje lokalizovanih reklama u njihovim pauzama.

Država i mediji u funkciji ostvarivanja prava građana na informisanje

Rodoljub Šabić[1]

Ono što predstavlja verovatno glavnu karakteristiku odnosa države i medija u Srbiji uopšte a pogotovo u kontekstu ostvarivanja prava građana na informisanje je – mnoštvo kontroverzi. U prilog ovoj oceni moglo bi se navesti mnogo različitih primera. Za ovu priliku, imajući u vidu raspoloživi prostor i vreme, mogu da posluže i samo dva. Jedan se tiče formalnih obaveza da se građanima, odnosno javnosti obezbede informacije, a drugi se odnosi na pravo da se neke informacije uskrate.

Već na najvišem, ustavnom nivou, član 51. Ustava Republike Srbije, jedan od fundamentalnih za temu ovog teksta, i svojim „istorijatom" i svojom sadržinom ilustruje gore navedenu ocenu.

„Svako ima pravo da istinito, potpuno i blagovremeno bude obaveštavan o pitanjima od javnog značaja i sredstva javnog obaveštavanja su dužna da to pravo poštuju.

Svako ima pravo na pristup podacima koji su u posedu državnih organa i organizacija kojima su poverena javna ovlašćenja, u skladu sa zakonom".

„Istorijat" je indikativan zbog toga što u prvoj verziji nacrta danas važećeg Ustava, koja se pojavila u leto 2006. godine, uopšte nije bilo odredbe koja bi jemčila pravo na slobodan pristup informacijama od javnog značaja. I to, i pored činjenice da je to pravo već bilo utvrđeno, ne samo Zakonom o slobodnom pristupu informacijama od javnog značaja, nego (bez obzira na vrlo relativnu vrednost normativnih akata tadašnje Državne zajednice Srbije i Crne Gore) i na „ustavnom" nivou, u tzv. „Maloj povelji". Bilo je neophodno da se Poverenik za informacije od javnog značaja tim povodom javno oglasi i uputi članovima ustavnog odbora i predsedniku Narodne skupštine pismo u kome je ukazao da je neophodno obezbediti i ustavne garancije za ovo pravo. Tek nakon te intervencije, u tekst Ustava uvrštena je gore citirana odredba.

Dobro je što je na taj način obezbeđena kakva-takva ustavna garancija prava na slobodan pristup informacijama, ali je to moglo biti učinjeno i na kvalitetniji način. Sadržina te odredbe je indikativna zbog načina na koji tretira korelaciju prava i obaveza. Čije su obaveze u korelaciji sa pravom svakog da „istinito, potpuno i blagovremeno bude obaveštavan o pitanjima od javnog značaja?" Koliko je logično i opravdano utvrditi da su „mediji dužni da to pravo poštuju", a propustiti da se utvrdi baš nikakva obaveza države, odnosno vlasti?

A obaveza države, odnosno organa vlasti, u kontekstu „prava na obaveštenost", bez obzira na sve moguće dileme o njegovom obimu i domašaju, mora biti nesporna.

U kontekstu savremenih shvatanja prava na slobodan pristup informacijama, obaveze države odnosno vlasti morale bi da podrazumevaju više od korektnog odnosa prema zahtevima koje podnose novinari, odnosno mediji. Morale bi da podrazumevaju obavezu proaktivnog objavljivanja što je moguće većeg broja informacija na proaktivnoj osnovi, bez čekanja da neko konkretno to zatraži.

S tim u vezi, zanimljive su odredbe Zakona o slobodnom pristupu informacijama od javnog značaja i Uputstva za izradu i objavljivanje informatora o radu državnog organa koje je Poverenik

[1] Poverenik za informacije od javnog značaja i zaštitu podataka o ličnosti, Republika Srbija

doneo na osnovu ovlašćenja iz Zakona a koje su direktno, odnosno trebale bi biti u funkciji unapređenja javnosti rada.

Odredbe Zakona i Uputstva, uz uslov da, logično, budu striktno poštovane, omogućile bi medijima da svakodnevno imaju na raspolaganju ozbiljnu, veliku količinu podataka itekako značajnih sa stanovišta ostvarivanja prava građana na informisanje. Dakle, reč je o tome da nekoliko hiljada organa vlasti ima obavezu da medijima na raspolaganju drži, i to online, sledeće informacije – osnovni podaci o državnom organu i informatoru, organizaciona struktura; opis funkcija starešina; opis pravila u vezi sa javnošću rada; spisak najčešće traženih informacija od javnog značaja; opis nadležnosti, ovlašćenja i obaveza; opis postupanja u okviru nadležnosti, ovlašćenja i obaveza; navođenje propisa; usluge koje organ pruža zainteresovanim licima; postupak radi pružanja usluga; pregled podataka o pruženim uslugama; podaci o prihodima i rashodima; podaci o javnim nabavkama; podaci o državnoj pomoći; podaci o isplaćenim platama, zaradama i drugim primanjima; podaci o sredstvima rada...

Iako je reč o obavezi koja ne može biti sporna, evo sasvim „svežih“ informacija o tome kako odnos organa vlasti, i to onih najviših, prema njoj izgleda u praksi.

U postupku sprovođenja Zakona o slobodnom pristupu informacijama od javnog značaja i Uputstva za izradu i objavljivanje informatora o radu državnog organa, u pogledu primene propisanih mera za unapređenje javnosti rada organa, Poverenik je u septembru ove godine uputio dopis svim ministarstvima kojim je skrenuo pažnju na obavezu izrade informatora o radu, jer je utvrdio da su se na veb prezentacijama novoformiranih ministarstava nalazili informatori prethodnih, da su informatori uglavnom bili neažurirani i da određen broj ministarstava u to doba nije uopšte imao objavljen informator. Poverenik naravno nije dužan da podseća organe vlasti na ono što je njihova zakonska obaveza, ali je uzeo u obzir da su u tom periodu ministarstva bila opterećena poslovima koji su nastali kao posledica promena u nadležnostima i unutrašnjoj organizaciji, pa je ukazao na obavezu ministarstava da kao najvažniji organi izvršne vlasti moraju biti pozitivan primer kada je u pitanju ispunjavanje zakonskih obaveza i obaveza koje imaju prema javnosti.

Služba Poverenika je u oktobru uradila ponovnu analizu stanja u pogledu objavljivanja informatora o radu ministarstava. Poverenik se tim povodom ponovno javno oglasio i istakao da je nekoliko ministarstava naknadno objavilo informator sa sadržajem koji odgovora propisanom Uputstvu, ali da u tom trenutku još uvek, ne mali broj ministarstava nije imalo informatore koji bi kvalitetom, sadržajem i ažurnošću podataka odgovorili na zahteve Uputstva i očekivanja javnosti.

I pored svega, poslednja analiza stanja u novembru pokazala je da dva ministarstva još uvek ovu zakonsku obavezu uopšte nisu izvršila a da ih je nekoliko izvršilo samo delimično.

Pošto propuštanje državnog organa da izradi informator sa propisanim podacima o svom radu predstavlja prekršaj kažnjiv po članu 47. Zakona o slobodnom pristupu informacijama od javnog značaja a Poverenik nema ovlašćenja da sam pokrene prekršajni postupak protiv odgovornih lica, on se obratio Ministarstvu pravde i državne uprave koje po zakonu ima pravo i dužnost da nadležnom prekršajnom sudu podnese zahteve za pokretanje prekršajnog postupka, tražeći da ono kao nadležno to učini.

S tim u vezi, vredi podsetiti da u 2011. godini Ministarstvo, odnosno Upravna inspekcija u njegovom sastavu, nije podnela nijedan zahtev za pokretanje prekršajnog postupka uprkos velikom broju evidentiranih prekršaja iz Zakona o slobodnom pristupu informacijama od javnog značaja. I ponoviti ocenu da takav odnos, i nepreduzimanje zakonskih mera predstavlja indirektan poziv na kršenje zakona i naravno, izigravanje, odnosno neizvršavanje obaveza koje su direktno u korelaciji s pravom građana na informisanje.

Za odnos države, odnosno vlasti i medija u vezi sa ostvarivanjem prava građana na informisanje, još jedan fenomen je, moglo bi se reći, „neuralgičan“. Reč je o „tajni“. U pomenutom odnosu i jedna i druga strana polažu pravo na tajnu.

Kad je reč o novinarima, odnosno medijima, radi se o jednom pravu koje svakako spada u sam fundament slobode medija, o pravu da se uskrate i ne otkriju podaci u vezi sa izvorom informacija. S tim u vezi, na normativnom nivou, nema nikakvih problema, naprotiv. Odredbama Zakona o informisanju ovo pravo uređeno je na vrlo dobar način. Dakle, novinar ili medij nije dužan da otkrije te podatke osim ako se oni odnose na izvršioca, odnosno izvršenje krivičnog dela za koje je zakonski minimum predviđene kazne 5 godina zatvora. Imajući u vidu da je takav minimum predviđen za izuzetno mali broj krivičnih dela, za najteže oblike najtežih krivičnih dela, reč je, dakle, o garanciji koja se može oceniti kao više nego solidna. Međutim, iako, u praksi, bar formalno ta garancija nije dovedena u pitanje, ipak se može konstatovati da je bilo situacija koje su direktno upućivale na drugačiji zaključak.

U tom kontekstu kao dobar primer mogao bi poslužiti slučaj u kome je Osnovno javno tužilaštvo u Novom Sadu podiglo optužnicu protiv novinara „Nacionalnog građanskog“ zbog navodnog odavanja tajne.

„Nacionalni građanski“ je objavio strogo poverljiv materijal „Izveštaj o stanju priprema za odbranu“ o kome se raspravljalo na zatvorenoj sednici Narodne skupštine Republike Srbije.

Tada sam, ocenjujući da će mnogi sa mnogo razloga ovaj postupak tužilaštva doživeti kao ugrožavanje slobode štampe i prava javnosti da zna, javno upozorio da, ako za to uopšte ima razloga, odgovorne za odavanje tajne ne treba tražiti među novinarima, već među državnim funkcionerima i službenicima.

Uz dužno poštovanje prema samostalnosti tužilaštva, smatrao sam svojom obavezom da upozorim da ovakav postupak upućuje na uznemiravajuće zaključke u vezi sa slobodom štampe i pravom javnosti da zna.

Novinari su, radeći ono što je njihov posao, pisali o lošem stanju nekih odbrambenih resursa, pozivajući se pri tom i na konkretne podatke iz dokumenta koji je bio označen kao poverljiv.

Iole dobronameran pristup onome što su radili upućuje pre na zaključak da su želeli dati doprinos nastojanjima da se propusti otklone a odbrambeni resursi poprave i unaprede, a ne da su uradili nešto loše.

Ali, i sasvim nezavisno od toga, oni očito nisu ti koji su odgovorni za odavanje tajne. Sadržinu dokumenta koji je, s razlogom ili bez razloga, svejedno, bio označen kao poverljiv, odao je neko drugi, funkcioner, odnosno službeno lice. A novinari, čak i da znaju ko je to, po važećim zakonima, nisu dužni da to kažu, da odaju izvor informacija.

Za insistiranje na odgovornosti novinara, moglo bi se reći da nije bilo inspirisano uverenjem da su odgovorni za odavanje tajne, već idejom da se na taj način mogu prisiliti da označe izvor informacija. Na takav zaključak uostalom upućuje i slično postupanje vlasti u nešto ranijem slučaju kada je list „Borba“ objavio „tajnu“ o isplati oko milion dolara novca poreskih obveznika u slučaju M. Kovačević. U svakom slučaju, takvo postupanje u odnosu na predstavnike medija, pogotovo bez istovremenog insistiranja na odgovornosti drugih, očigledno odgovornih, bez obzira na namere tužilaštva ili policije, za rezultat objektivno ima štetne efekte po slobodu štampe i pravo javnosti da zna.

Naravno, i druga strana, država, odnosno vlast, polaže pravo na tajnu. Samo, kako stvari s tim u vezi stoje?

Zakon o tajnosti podataka je stupio na snagu 24. decembra 2009. godine. Zakon se primenjuje od 1. januara 2010. godine. Ovim zakonom „uređuje se jedinstven sistem određivanja i zaštite tajnih podataka koji su od interesa za nacionalnu i javnu bezbednost, odbranu, unutrašnje i spoljne poslove Republike Srbije, zaštite stranih tajnih podataka, pristup tajnim podacima i prestanak njihove tajnosti, nadležnost organa i nadzor nad sprovođenjem zakona kao i odgovornost za neizvršene obaveze i druga pitanja od značaja za tajnost podataka“.

Za sprovođenje ovog zakona bilo je potrebno u zakonom utvrđenom roku doneti jedan, može se reći, veoma veliki broj podzakonskih akata koji bi omogućili punu primenu zakona. Ova okolnost je nešto što je *ab initio* zaslužilo ozbiljne kritike. Prvo, jer principijelno nije dobro da se uređivanje velikog broja pitanja koja su *materia legis* spušta na podzakonski nivo. I drugo, jer je dosadašnja praksa primene velike većine „tranzicionih“ zakona pokazala da u sličnim situacijama nadležni organi, pre svega, Vlada i ministarstva nedopustivo često „zaboravljaju“ na obavezu donošenja potrebnih podzakonskih propisa.

Vlada jeste donela jedan broj tih podzakonskih akata. Teško je poverovati, ali nažalost, samo jedan jedini od njih donet je u predviđenom roku, svi ostali sa manjom ili većom docnjom.

Ali osnovni i svakako najveći, glavni problem je to što Vlada nije donela, za primenu zakona, najvažnije podzakonske akte. Tako Vlada nije utvrdila bliže kriterijume za određivanje stepena tajnosti „državna tajna“ i „strogo poverljivo“ prema članu 14. stav 3. Zakona. Posledica ove situacije je da Vlada nije mogla da donese ni bliže kriterijume za određivanje stepena tajnosti „Poverljivo“ i „Interno“ a na predlog nadležnog ministra odnosno rukovodioca organa javne vlasti.

Ovakva situacija i izostanak efekata (praktično svih očekivanih), i to nakon više od dve godine „primene“ zakona, je višestruko zabrinjavajuća. Ona se ne bi smela tolerisati ni sa stanovišta opšte pravne sigurnosti, ni sa stanovišta bezbednosti, a naravno ni sa stanovišta ostvarivanja prava na slobodan pristup informacijama i informisanja javnosti, odnosno ostvarivanja funkcije medija.

Jedan od izostalih efekata ima za posledicu ozbiljno ograničavanje pristupa medija, pa prema tome i javnosti, jednoj potencijalno vrlo zanimljivoj „riznici“ informacija. Prema članu 105. stav 2. Zakona rukovodioci organa javne vlasti bili su u obavezi da u roku od dve godine od dana stupanja na snagu zakona (24.12.2011.) preispitaju oznake stepena tajnosti nad podacima i dokumentima određenim prema ranijim propisima. Usled nepostojanja bilo kakvog nadzora nema nikakvih konkretnih podataka o načinu i stepenu izvršenja ove obaveze. Ali se s velikim pouzdanjem može pretpostaviti da su željeni efekti u potpunosti izostali. To se, uostalom, s obzirom na način na koji je artikulisana norma koja je trebalo da obezbedi deklasifikaciju inače izuzetno velike količine dokumenata koji još uvek nose formalnu oznaku poverljivosti, iako za to ne postoji stvarna potreba, moglo i pretpostaviti. Jer, artikulisana je bez ikakve sankcije za eventualno propuštanje ove obaveze, kao i bez *ex lege* deklasifikacije nakon isteka utvrđenog roka.

Ocenu da Zakon o tajnosti podataka „egzistira“ pre kao fikcija nego kao realan i relevantan element pravnog poretka i sistema, potvrđuje još jedan specifičan fenomen. Naime, Zakon o tajnosti podataka predvideo je jedinstvenu, manje-više klasičnu nomenklaturu klasifikovanih podataka – interno, poverljivo, strogo poverljivo, državna tajna. Dakle, ovim zakonom su, budući da je njim „uređen jedinstven sistem određivanja i zaštite tajnih podataka“, kao relikti stare „bezbednosne kulture“, eliminisani „vojna tajna“ i „službena tajna“, čak i kao pojmovi. Pa ipak se u medijskim tekstovima, odnosno emisijama, ti pojmovi često, praktično redovno sreću. Tome se ne treba čuditi, s obzirom da su i Vlada koja je bila predlagač Zakona o tajnosti podataka i Narodna skupština koja ga je usvojila u svojoj legislativnoj praksi nastavili sa upotrebom „eliminisanih“ pojmova. I to, moglo bi se reći, prilično intenzivno. Prilično je brojna grupa zakona koji su usvajani ili menjani i dopunjavani nakon stupanja na snagu Zakona o tajnosti podataka, a u kojima egzistiraju pojmovi, odnosno oblici klasifikacije koje on ne poznaje.

Na osnovu svega iznetog može se zaključiti da Zakon o tajnosti podataka ni nakon gotovo tri godine nakon njegovog stupanja na snagu, nije dao nikakav doprinos kvalitetnijem i konsekventnijem rešavanju pitanja koja se otvaraju u postupku ostvarivanja prava na slobodan pristup informacijama. Štaviše, i u vezi sa ostalim i drugim pitanjima na koja se direktno ili indirektno odnosi, on nema ni izdaleka punu primenu, slabo funkcionišu ili ne funkcionišu gotovo svi bitni zakonom utvrđeni mehanizmi. Ta činjenica ne može ostati bez mnoštva negativnih posledica. Neke od tih posledica se neminovno odražavaju i na ostvarivanje prava građana na informisanje.

Pristup informacijama u evropskom pravu ljudskih prava

Dragoljub Popović[1]

1. Mediji kao čuvari demokratije
2. Pristup novinara informacijama
3. Pristup javnosti informacijama / insajderi
4. Saopštavanje informacija
5. Zaključak

1. Mediji kao čuvari demokratije

Evropski sud za ljudska prava konstatovao je u svojoj presudi u slučaju *Gudvin protiv Ujedinjenog Kraljevstva* (Goodwin v. The United Kingdom) da štampa ima posebnu ulogu u društvu. Njena uloga je, kako je naveo Sud, da preuzme „vitalnu ulogu 'psa čuvara' demokratije (*public watchdog*)“.[2] Komentatori su prvobitno isticali stav Suda kao da se odnosi isključivo na štampu, ali su postepeno počeli da ga tumače šire, tako da se može primeniti na medije uopšte.[3] Mediji su uvek na oprezu, beleže događaje, informišu i informišući pružaju značajnu pomoć građanima. Građani mogu da donose bolje odluke, prave bolji izbor i oblikuju svoje stavove prema društvenim faktorima. Prema tome, funkcionisanje moderne demokratije nezamislivo je bez medija koji obavljaju svoju „čuvarsku“ ulogu. Da bi mogli da ispune taj zadatak, mediji, odnosno novinari, moraju imati pristup informacijama. To važi i za širu javnost, kojoj se mora omogućiti pristup informacijama. Kako bi se takav dvostruki cilj ostvario, potrebno je širiti informacije.

2. Pristup novinara informacijama

Pristup novinara informacijama se pojavljivao u jurisprudenciji Suda kao pitanje pristupa izvorima i zaštite novinarskih izvora. Ovo prvo je bilo u srži slučaja listova Obzerver (*Observer*) i Gardijan (*Guardian*).[4] Ta dva engleska dnevnika podnela su predstavku Sudu po članu 10. Konvencije da im je povređena sloboda izražavanja. Predstavka je bila zasnovana na sudskim zabranama koje je odredio domaći sud u Engleskoj i koje su se odnosile na zabranu objavljivanja memoara jednog bivšeg agenta britanske tajne službe, u kojima su obelodanjene razne protivzakonite radnje u toj službi dok je on bio aktivan. Knjiga je imala zanimljiv naslov – „Lovac na špijune“ (*Spycatcher*). Mere su donete po zahtevu Javnog tužioca, koji je pokrenuo postupak zbog povrede poverenja.

Sud je našao da je zadiranje u pravo podnosilaca predstavke bilo propisano zakonom i da je imalo legitimni cilj. U daljoj analizi, Sud je postavio pitanje da li je to bilo neophodno u demokratskom društvu.

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[1] Sudija Evropskog suda za ljudska prava, Strazbur

[2] Goodwin v. The United Kingdom, Reports 1996-II, stav 39. U cilju sažetosti, Evropski sud za ljudska prava će u daljem tekstu biti nazivan „Sud“, a Evropska konvencija o ljudskim pravima „Konvencija“.

[3] Restriktivniji pristup kod: Jacobs, White & Ovey, The European Convention on Human Rights, Oxford – New York 2010, 432-433. Širi pristup kod: J. Casadevall, El Convenio europeo de Derechos humanos, el Tribunal de Estrasburgo y su jurisprudència, Valencia 2012, 367.

[4] Observer and Guardian v. The United Kingdom, Judgments and Decisions A 216 (1992.)

Kako bi rešio problem i pružio merodavan odgovor na to pitanje, Sud je konstatovao da je „svojstveno štampi da prenosi informacije i ideje o pitanjima od javnog interesa“.[5] U tom pogledu, Sud je istakao ulogu štampe koja je već pomenuta na početku ovog teksta – da bude čuvar demokratije za račun građana. Sud je uzeo u obzir interese nacionalne bezbednosti i na kraju presudio u korist podnosilaca predstavki po osnovu proporcionalnosti. Mere donete na domaćem nivou su se ukazivale nesrazmernim njihovom cilju posle trenutka kada je knjiga izdata u Sjedinjenim Državama. Sudske zabrane svejedno nisu bile ukinute i zabrana objavljivanja u Ujedinjenom Kraljevstvu ostala je na snazi.

Sudske zabrane i rešenja engleski sud je doneo i u slučaju *Gudvin* (Goodwin), iako se suština zabrane razlikovala od one pomenute u prvom slučaju. Činjenice su bile sledeće. Podnosilac je bio britanski novinar koji je dobio informacije od nepoznate osobe telefonom. Dobijene informacije odnosile su se na kompaniju koja je bila aktivna na tržištu i koja je u dato vreme bila u finansijskim poteškoćama. Domaći prvostepeni sud doneo je privremenu zabranu objavljivanja „bilo kakvih informacija proisteklih iz korporativnog plana“.[6] Posle zabrane prvostepenog suda, usledilo je rešenje Apelacionog suda kojim je podnosiocu naređeno „ili da obelodani svoje beleške dotičnoj kompaniji ili da ih podnese Apelacionom sudu u zapečaćenoj koverti uz overenu pismenu izjavu“. [7] Novinaru je tako naređeno da obelodani svoj izvor informacija. Sud je još jednom zaključio da je sloboda izražavanja podnosioca predstavke povređena, ali u pokušaju realizacije legitimnog cilja. Na kraju se sve svelo na isto pitanje koje se pojavilo u prethodnom slučaju – da li je takvo ometanje neophodno u demokratskom društvu? Sud je smatrao da obelodanjivanje izvora informacija nije dovoljno da se „nadjača vitalni interes javnosti u zaštiti novinarskog izvora podnosioca predstavke“.[8] Na osnovu toga je Sud zaključio da će zahtev da novinar otkrije svoj izvor dovesti do povrede njegovog prava na slobodu izražavanja po članu 10. Konvencije.

U slučaju *Fajnenšl Tajms i ostali protiv Ujedinjenog Kraljevstva* (Financial Times Ltd. and Others v. The United Kingdom) ponovo se pojavilo isto pitanje.[9] Novinar koji je radio za Fajnenšl Tajms dobio je kopiju dokumenta koji je procurio iz jedne kompanije. Dokument je novinaru prenela nepoznata osoba. Mnoge druge novine i agencije dobile su isti dokument na isti način. Suština dokumenta ticala se firme koja je poslovala na tržištu i objavljivanje dokumenta pogodilo je vrednost njenih akcija na berzi. Dotična kompanija obratila se domaćem sudu sa zahtevom da donese odluku po kojoj se „podnosiocima naređuje da u roku od 48 sati ispostave izjavu svedoka sa imenima i adresama svakog lica od kojeg su dobili informacije. Visoki sud je naredio ispostavljanje dokumenata.[10] Apelacioni sud je potvrdio naredbu a Dom lordova je odbacio žalbu podnosilaca predstavki. Novine su se žalile Sudu u Strazburu. Sud je našao da je ometanje slobode izražavanja propisano zakonom i da ima legitiman cilj. Još jednom je ključno pitanje bilo da li je to neophodno u demokratskom društvu? Sud je presudio u korist podnosilaca predstavki i konstatovao povredu člana 10, ali je iznijansirao svoj stav. Sud se složio da bi princip neotkrivanja mogao biti nadjačan u okolnostima u kojima je „jedan izvor očigledno delao u lošoj veri i sa štetnim ciljem i svesno obelodanjivao falsifikovane informacije“. [11] Sud ništa od toga nije pronašao u činjenicama slučaja. Interes građana da budu informisani prevladao je nad interesima kompanije koja posluje na tržištu da spreči curenje poverljivih informacija iz svoje arhive.

[5] Paragraf 59. presude.
[6] Goodwin v. The United Kingdom, Reports 1996-II, paragraf 12.
[7] Paragraf 16 presude.
[8] Paragraf 45
[9] Financial Times Ltd. and Others v. The United Kingdom, app. no. 821/03 HUDOC (2009)
[10] Paragrafi 20-22 presude.
[11] Paragraf 63.

3. Pristup javnosti informacijama / insajderi

Curenje dokumenata bilo je u srži još dva slučaja kojima se Sud bavio poslednjih godina. Jedan od njih bio je *Štol protiv Švajcarske* (Stoll v. Switzerland).[12] Podnosilac je bio novinar koga je Savet za štampu na domaćem planu novčano kaznio zbog toga što je u štampi obelodanio poverljiv izveštaj švajcarskog ambasadora u Sjedinjenim Državama. Izveštaj se ticao strategije švajcarske vlade u pregovorima između Svetskog jevrejskog kongresa i švajcarskih banaka na temu odštete žrtvama Holokausta za uloge u tim bankama na koje niko ne polaže pravo. Treba napomenuti da je o tom slučaju prvo odlučivalo Veće od sedam sudija, koje je presudilo u korist podnosioca. Slučaj je kasnije podnet Velikom veću od sedamnaest sudija, koje je ukinulo odluku Veća većinom od dvanaest glasova prema pet.

Pristupajući uobičajenoj analizi Sud je došao do pitanja da li je ometanje prava novinara neophodno u demokratskom društvu. Da bi rešio tu dilemu, Sud se pozvao na sopstvenu praksu.[13] Glavni zaključak je bio da države ugovornice Konvencije mogu da se pozovu na polje slobodne procene kada je reč o usvajanju propisa sa ciljem „očuvanja poverljive ili tajne prirode nekih osetljivih informacija".[14] Da bi primenio taj pristup, Sud je uzeo u obzir razne okolnosti, kao što su interesi u datom slučaju, preispitivanje date mere pred domaćim sudovima, ponašanje podnosioca predstavke, kao i srazmernost mere koja mu je izrečena, s obzirom na cilj.[15] Globalni zaključak Suda bio je da „prilikom međusobnog vaganja relevantnih interesa u svetlu aktuelnih dokaza, domaći organi nisu prekoračili polje slobodne procene države". [16]

Sudije koje se nisu složile s ovakvom odlukom istakle su da je većina, prvo, prihvatila da se poverljivost diplomatskih izveštaja ne može štititi po svaku cenu, i drugo, da švajcarska Vlada nije uspela da dokaže da, zajedno sa umešanim bankama, nije bila u mogućnosti da pronađe odgovarajuće rešenje za problem zbog pomenutih članaka. Te sudije su smatrale da „potreba vlasti za diskrecijom nije bila dovoljna da pretegne nad slobodom novinara". [17]

Drugi slučaj bio je Guja protiv Moldavije (*Guja v. Moldova*), u kome je situacija bila drugačija i u kome podnosilac može da se označi kao „insajder" (*whistleblower*).[18] Sud, koji je ponovo zasedao u Velikom veću, razlikovao je taj slučaj od slučaja *Štol protiv Švajcarske*. Podnosilac predstavke u slučaju Guja bio je šef pres službe državnog tužilaštva. On je smenjen zbog toga što je novinama obelodanio pisma upućena zameniku glavnog tužioca. Pisma je slao pomoćnik ministra unutrašnjih poslova, a ista su se odnosila na neke tekuće krivične postupke. Pisma nisu bila označena kao poverljiva.[19] Podnosilac predstavke je pred domaćim sudom pokrenuo postupak vraćanja na pomenutu dužnost, ali je njegov zahtev na kraju odbio Vrhovni sud.[20]

Baveći se pitanjem da li je kazna izrečena podnosiocu predstavke bila neophodna u demokratskom društvu, Sud je razmatrao pitanje ponašanja podnosioca predstavke. Sud je u tom pogledu našao da je ovaj postupio u dobroj veri.[21] Sud je isto tako napomenuo da je podnosilac predstavke, time što je smenjen sa svoje funkcije, podvrgnut „najtežoj mogućoj sankciji" koja se, po mišljenju Suda, „teško može opravdati".[22] Stoga je Veliko veće jednoglasno presudilo u korist podnosioca, utvrdivši da je prekršen član 10. Konvencije.

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[12] Stoll v. Switzerland, ECHR 2007-V
[13] Paragraf 101-106 presude.
[14] Paragraf 107.
[15] Paragraf 112.
[16] Paragraf 162.
[17] Sudija Zagrebelski se nije složio s presudom, kao ni sudije Lorencen, Fura-Sandstrom, Jeger i Popović
[18] Guja v. Moldova, app. no. 14277/04 HUDOC (2008)
[19] Paragraf 8-14. presude.
[20] Paragraf 22-26.
[21] Paragrafi 92-94.
[22] Paragraf 96.

4. Saopštavanje informacija

Da bi šira javnost imala pristup informacijama, one im se moraju saopštiti. Saopštavanje informacija često je sama srž problematike u slučajevima koji se tiču audiovizuelnih medija. Brzi razvoj tehnologije određene aspekte koje je Sud razmatrao u nekim od svojih presuda može učiniti zastarelim. U slučaju *Gropera Radio AG i ostali protiv Švajcarske* (*Groppera Radio AG and Others v. Switzerland*), Sud je našao da nije povređen član 10. Konvencije.[23] Spor se vodio povodom zabrane koja je izrečena kompaniji osnovanoj po švajcarskim zakonima, čiji su pretplatnici bili svi u Švajcarskoj, da emituje program iz Italije. Sud je odlučio u korist Švajcarske i po njegovom mišljenju, polje slobodne procene države nije bilo prekoračeno.

U drugom slučaju protiv Švajcarske iz iste godine, Sud je našao da je prekršen član 10. Konvencije. Radilo se o slučaju *Otronik AG protiv Švajcarske* (*Autronic AG v. Switzerland*).[24] Podnosilac predstavke je bila firma koja je nameravala da sa sovjetskog satelita prenosi nekodirane programe namenjene gledaocima u Sovjetskom Savezu. Vlasti su odbile da daju dozvolu za takve prenose pozivajući se na norme Međunarodne konvencije o telekomunikacijama. Sud je presudio da „nema potrebe za zabranom prijema tih programa".[25]

Sa daljim razvojem međunarodnog prava saglasnost države postala je u ovakvim situacijama nepotrebna. Povrh toga, satelita danas ima mnogo i lako su dostupni.

Zabrana emitovanja izrečena na nacionalnom nivou desila se u slučaju turske radiotelevizijske stanice, u kome je Sudu predočen konkretan razlog po osnovu kog je zabrana izrečena. Ta stanica je uživo emitovala saopštenja jednog harizmatičnog islamskog lidera iz SAD, koji je objašnjavao uzroke zemljotresa u Turskoj. Po njegovom ubeđenju, zemljotres je bio Alahova kazna. Televizijskoj stanici je izrečena zabrana emitovanja u trajanju od šest meseci. Sud u Strazburu našao je da je zabrana u koliziji sa slobodom izražavanja i da zbog toga predstavlja povredu člana 10. Konvencije.[26]

Međutim, vlasti nisu pokušavale da ometaju saopštavanje informacija samo u slučajevima audiovizuelnih medija. U slučaju *Četin i ostali protiv Turske* (*Çetin and Others v. Turkey*) razmatrana je zabrana izdavanja i distribucije jednog lista u regionu u kome je bilo uvedeno vanredno stanje. Sud je konstatovao da je prekršen član 10. Konvencije na osnovu toga što pomenuta mera nije neophodna u demokratskom društvu, ali i zbog toga što nije bilo moguće obezbediti dovoljnu zaštitu od zloupotreba u domaćem zakonodavstvu.[27]

U jednom slučaju protiv Austrije takođe se radilo o saopštavanju informacija. Predmet spora u slučaju *Organizacija demokratskih vojnika Austrije i Gubi protiv Austrije* (*Vereinigung demokratischer Soldaten Österreichs and Gubi v. Austria)*[28] bilo je odbijanje ministra odbrane da odobri da se jedan časopis deli vojnicima i zabrana izrečena jednom regrutu da taj časopis deli u njegovoj kasarni. U obrazloženju izrečene zabrane koju je Sudu podnela austrijska vlada kaže se da „časopis, koji je kritične i satirične prirode, predstavlja pretnju po disciplinu i efikasnost vojske."[29] Sud je presudio u korist podnosilaca predstavki i konstatovao da je zabrana distribucije časopisa nesrazmerna legitimnom cilju te mere.[30]

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[23] Groppera Radio AG and Others v. Switzerland, Judgments and Decisions A 173 (1990.)
[24] Autronic AG v. Switzerland, Judgments and Decisions A 178 (1990.)
[25] Paragraf 63. presude.
[26] Nur Radio Ve Televizyon Yayinciligi A.S. v. Turkey, app. no. 6587/03 HUDOC (2008); tekst na francuskom.
[27] Çetin and Others v. Turkey, ECHR 2003-III, paragraf 66.
[28] Vereinigung demokratischer Soldaten Österreichs and Gubi v. Austria, Judgments and Decisions A 302 (1995)
[29] Paragraf 38 presude.
[30] Paragraf 40.

5. Zaključak

Sloboda izražavanja je jedna od osnovnih vrednosti demokratije. Društvo u kome danas živimo bez te slobode ne bi moglo pravilno da funkcioniše. Član 10. Konvencije pruža solidan osnov za zaštitu slobode izražavanja i njeno očuvanje. Upravo je jurisprudencija Suda ta u skladu sa kojom se tumači oblast garantovane slobode i nude uputstva u pogledu njenog obima. Potrebno je zato skicirati neke od najvažnijih karakteristika mehanizma zaštite slobode izražavanja kako bi se formulisao zaključak ovog teksta.

Sloboda izražavanja nije neograničena, ali su njene granice široke i, kao što smo imali priliku da shvatimo iz gore pobrojanih primera, ne mogu se ugroziti zbog zahteva za vojnom disciplinom, pa čak ni zbog vanrednog stanja.

Saopštavanje informacija ne tumači se samo kao pravo medija, već i kao pravo šire javnosti da bude informisana. To je proizvelo pozitivnu obavezu država ugovornica Konvencije da stvore okruženje koje će omogućiti slobodnu razmenu ideja i protok informacija. Pozitivna obaveza našla je sebi mesto u nekim presudama Suda, gde su pomenuti izrazi poput „prava javnosti da bude informisana“ ili „interes javnosti da ima informacije“.[31]

Pristup građana informacijama je jedna strana medalje. Druga je pristup novinara informacijama, jer se to ukazuje kao preduslov za prenošenje tih informacija široj javnosti. Evropsko pravo ljudskih prava se, između ostalog, pozitivno odnosi prema zaštiti *insajdera* i novinarskih izvora, kako bi novinari mogli da dođu do informacija koje su važne za javnost, da bi iste mogli da saopštavaju. Upravo u ostvarenju tog zadatka mediji igraju ulogu „psa čuvara demokratije“.

[31] V. Sürek and Özdemir v. Turkey, app. nos. 23927/94 and 24277/94 HUDOC (1999), paragraf 61 za prvi izraz i Guja v. Moldova, app. no. 14277/04 HUDOC (2008), paragraf 76, za drugi.

Evropski sud za ljudska prava
Informatori o sudskoj praksi[1]

Informator br. 153 /jun 2012

ČLAN 10 *Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda*

Pozitivne obaveze
Sloboda širenja informacija _____

Nedodeljivanje radiofrekvencije licenciranim TV emiterima: *povreda*

Centro Europa 7 S.r.l. i Di Stefano
protiv Italije – 38433/09
Presuda 7.6.2012 [GC]

Činjenice – Podnosioci predstavke su privredno društo i njegov zakonski zastupnik. Italijanske vlasti su u julu 1999. godine privrednom društvu, podnosiocu predstavke, dodelile dozvolu za zemaljsko televizijsko emitovanje sa nacionalnim pokrivanjem, i ovlastile ga da uspostavi analognu televizijsku mrežu kojom će pokriti 80% nacionalne teritorije. Po pitanju dodele frekvencija, dozvola se pozivala na nacionalni Plan raspodele frekvencija iz 1998. godine, obavezujući privredno društvo, podnosioca predstavke, da svoju mrežu upodobi zahtevima plana raspodele u roku od 24 meseca i uskladi sa „programom usklađivanja" donetim od Regulatorne agencije za komunikacije. Privredno društvo, podnosilac predstavke, je od 2000. godine podnelo više zahteva upravnim sudovima povodom propusta da mu se dodele bilo koje radiodifuzne frekvencije. U maju 2008. godine *Consiglio di Stato* je naložio vladi da razmotri zahteve za dodelu frekvencija. U januaru 2009. godine naložio je nadležnom ministarstvu da privrednom društvu, podnosiocu predstavke, isplati naknadu u iznosu od oko EUR 1,000,000 obračunatu na ime na zakonu zasnovanog prava na dodelu frekvencija.

Pravo – Član 10: Propust vlasti da dodeli frekvencije privrednom društvu, podnosiocu predstavke, lišila je njegovu dozvolu praktične svrhe, pošto je delatnost, na koju je dozvola ovlašćivala, faktički bilo nemoguće obavljati skoro deset godina. Stoga je postojalo mešanje u ostvarivanje prava privrednog društva, podnosioca predstavke, na širenje informacija ili ideja. Štaviše, pošto mu je bila dodeljena dozvola za emitovanje, mogao je razumno očekivati da će vlasti usvojiti, u roku od 24 meseca, akte potrebne za regulisanje njegove delatnosti, pod uslovom da je on unapredio svoju opremu. Međutim, plan raspodele frekvencija nije bio primenjen sve do decembra 2008. godine, a privrednom društvu, podnosiocu predstavke, dodeljen je kanal za emitovanje tek počev od kraja juna 2009. godine. U međuvremenu, više operatora nastavilo je, na privremenoj bazi, da koristi različite frekvencije koje je trebalo da budu dodeljene novim operatorima prema nacionalnom planu. *Consiglio di Stato* je smatrao da je ovo stanje uslovljeno zakonodavstvom. Niz zakona je naknadno produžio rokove u kojima su ranije postojeći emiteri mogli da nastave da emituju i na nacionalnom i na lokalnom nivou. Time su drugi operatori bili sprečeni da učestvuju u ranim fazama digitalne televizije. Ovi zakoni su bili neodređeni i odlagali su rokove za tranziciju, vezujući ih za događaje čije je nastupanje bilo nemoguće predvideti. Pored ovoga, Sud pravde Evropske Unije našao je da su mere zakonodavca, koje su podrazumevale uzastopne prelazne aranžmane, strukturisane da favorizuju postojeće mreže, što je za posledicu

[1] Izvodi iz zvaničnih „Informatora o sudskoj praksi" Evropskog suda za ljudska prava, dostupnih na Internet prezentaciji Suda; prevod uradila advokatska kancelarija „Živković&Samardžić", Beograd

imalo sprečavanje operatora bez frekvencija da pristupe televizijskom tržištu, iako su imali dozvolu. Shodno tome, nacionalnom zakonodavnom okviru nedostajala je jasnoća i preciznost i isti nije omogućio privrednom društvu, podnosiocu predstavke, da sa dovoljnom izvesnošću predvidi kada bi mogle da mu budu dodeljene frekvencije kako bi mogao da počne sa emitovanjem. Kao posledica toga, predmetni zakoni nisu ispunjavali zahteve predvidivosti. Konačno, vlasti nisu poštovale rokove određene u dozvoli, čime su osujetile očekivanja podnosioca predstavke. Vlada nije dokazala da je privredno društvo, podnosilac predstavke, imalo delotvorno sredstvo na raspolaganju kako bi naterao vlasti da se pridržavaju zakona i odluka Ustavnog suda. Shodno tome, privrednom društvu, podnosiocu predstavke, nisu pružene zadovoljavajuće garancije protiv arbitrarnosti. Ovaj nedostatak je, između ostalog, ograničio konkurenciju u audiovizuelnom sektoru. Dakle, došlo je do propusta od strane države u ispunjavanju svoje pozitivne obaveze da uspostavi odgovarajući zakonodavni i pravni okvir, koji će garantovati delotvoran medijski pluralizam.

***Zaključak*:** povreda (šesnaest glasova prema jednom).

Sud je takođe našao, sa četrnaest glasova prema tri, da je došlo do povrede člana 1 Protokola br. 1, smatrajući da legitimno očekivanje privrednog društva, podnosioca predstavke – uspostavljanje analogne televizijske mreže po osnovu dozvole – osnovano predstavlja „imovinu". Pošto je Sud već našao pod članom 10 da mešanje u prava privrednog društva, podnosioca predstavke, nije imalo dovoljno predvidiv zakonski osnov u smislu svoje sudske prakse, mogao je samo da zaključi isto i u odnosu na Član 1 Protokola br. 1.

Član 41: EUR 10,000,000 privrednom društvu, podnosiocu predstavke, na ime materijalne i nematerijalne štete.

Sloboda izražavanja _____

Apsolutna zabrana snimanja intervjua sa zatvorenikom unutar zatvora: *povreda*

Schweizerische Radio – und Fernsehgesellschaft
protiv Švajcarske – 34124/06
Presuda 21.6.2012 [V veće]

Činjenice – Podnosilac predstavke, radiodifuzno preduzeće, avgusta meseca 2004. godine zatražio je odobrenje za snimanje zatvorenika koji je izdržavao kaznu zbog ubistva, sa namerom da emituje intervju u prilogu o suđenju drugoj osobi optuženoj u istom predmetu. Konkretni zatvorenik, čiji slučaj je privukao veliku medijsku pažnju, pristao je da dâ intervju. Zahtev je odbijen, iz razloga koji su se ticali potrebe da se očuva mir, red i bezbednost u zatvoru i obezbedi jednak tretman zatvorenika. Podnosilac predstavke uložio je različita pravna sredstva protiv ove odluke, ali bez rezultata.

Pravo – Član 10: Odbijanje da se podnosiocu predstavke odobri snimanje unutar zatvora za potrebe televizijskog programa, i to snimanje intervjua sa zatvorenikom, predstavljalo je mešanje u slobodu izražavanja. Mešanje se zasnivalo na zakonu i imalo je za cilj sprečavanje nereda i zaštitu prava drugih. Međutim, pošto se radilo o slobodi izražavanja u kontekstu televizijskog emitovanja koje se ticalo stvari od posebnog javnog interesa, sloboda švajcarskih vlasti u procenjivanju potrebe za mešanjem bila je sužena. Na prvi pogled, postojao je osnov da se odbijanje zahteva podnosioca predstavke smatra neophodnim u demokratskom društvu – naročito u odnosu na pretpostavku nevinosti lica čije suđenje je predstojalo, kao i u odnosu na interes adekvatnog funkcionisanja pravosuđa. Međutim, domaće vlasti su bile dužne da valjano ispitaju

da li je odbijanje odobrenja za snimanje unutar zatvora, iz razloga bezbednosti i zaštite prava drugih zatvorenika, zaista bilo neophodno u ovom slučaju.

Posebno, trebalo je da uzmu u obzir ustupke koje je podnosilac predstavke bio spreman da učini, kao što su snimanje u vreme kada su ostali zatvorenici bili na poslu i ograničenje vremenskog trajanja intervjua. U pravnim sredstvima koja je podnosilac predstavke koristio, sugerisao je da je intervju mogao da bude snimljen u sobi za posete, koja je mogla da ostane zatvorena tom prilikom. Izgleda da domaće vlasti nisu uzele u obzir ove argumente. Zbog ovoga, tvrdnja da bi snimanje remetilo privatne živote drugih zatvorenika, nije izgledala ni primerena, niti dovoljna da opravda mešanje u slobodu izražavanja privrednog društva, podnosioca predstavke. Što se potrebe za održavanjem reda i bezbednosti u zatvoru tiče, niti domaće vlasti, niti Vlada, nisu pružale objašnjenje o tome kako bi u praksi mogli da budu ugroženi red i bezbednost u zatvoru, posebno u slučaju da je intervju bio sniman uz ograničenja predložena od podnosioca predstavke, sa jednim kamermanom u pratnji jednog novinara, čije prisustvo verovatno ne bi ometalo funkcionisanje institucije, niti ugrožavalo bezbednost.

Dalje, član 10 štiti ne samo sadržinu izraženih ideja i informacija, već i način na koji se one prenose. Stoga nije bilo na domaćim sudovima, niti na ovom Sudu, da medijima nameće svoja sopstvena viđenja o tome koju tehniku izveštavanja novinari treba da primenjuju. Stoga, činjenica da je telefonski intervju sa zatvorenikom bio emitovan od strane podnosioca predstavke u programu koji je bio dostupan na njegovoj Internet stranici, nije bila relevantna: različita sredstva i tehnike su korišćene za intervju, te on nije imao tako neposredan uticaj na gledaoce i bio je emitovan u okviru drugog programa. Shodno tome, emitovanje intervjua nije ni na koji način ispravilo mešanje koje je nastalo uskraćivanjem dozvole za snimanje u zatvoru.

Istina je da su domaće vlasti u boljem položaju od Suda da odlučuju o tome da li i u kojoj meri odobravanje pristupa zatvorima licima sa strane jeste u skladu sa tamošnjim redom i bezbednošću. Međutim, imajući posebno u vidu krajnje paušalno obrazloženje domaćih vlasti i nedostatak, u njihovim odlukama, istinskog odmeravanja suprotstavljenih interesa u pitanju, one su propustile da na ubedljiv način dokažu da je apsolutna zabrana, koja je nametnuta privrednom društvu, podnosiocu predstavke, da snima u zatvoru, bila srazmerna ciljevima kojima se težilo.

***Zaključak*:** povreda (pet glasova prema dva).

Član 41: nema naknade.

INTRODUCTION

An overview of the situation in the media sector, based on the legal monitoring of the Serbian media scene and the findings of the ANEM's expert monitoring team on what characterized the media situation in the period July – December 2012, may well serve as a starting point for the introduction to this Publication.

The past six months has been the time lost for the media sector, at least when it comes to the much needed reforms and improving the position of the media and journalists. The new government has done almost nothing on that front so far. There are many indicators of this. The number of threats, pressures and attacks on the media and journalists has not been reduced, the journalists were subjected to serious intimidation by throwing explosive devices into their homes, perpetrators of most of these offenses have not been found, while persons ordering these attacks have never even been included in investigations. The courts have continued with the practice of passing controversial verdicts in media cases, as a result of disregard or unawareness of specificities of freedom of expression and media freedom as well as European standards and practice in this field. However, certain courts have raised standards of freedom of expression in the country with some verdicts, but it seems that other courts have not been willing or capable to follow their example. Media regulatory framework did not see much of a change, but the new government did show a great interest in this issue, including those bodies that are not originally competent for it. The new Ministry of Culture and Media has formed a working group, whose mandate has caused a lot of confusion and controversy, since the statements of the Minister has not made it quite clear if the working group will be working on the revision of the Media Strategy, or its implementation and the development of key media laws foreseen by this strategic document. While this dilemma is still present, some other state authorities have created, with their draft laws and bills of non-media related laws, the conditions for a considerable impact on the position of media and journalists, both positive and negative. In fact, a positive impact may only be seen in abolishing defamation as a criminal offense, provided for in the amendments to the Criminal Code, while retaining insult as a criminal offense, especially deleting provisions that stipulate stringent punishment for threats to journalists in connection with the work they do, causing four times lower legal minimum for penalties against perpetrators of these threats, is certainly not good. In addition, the proposed amendments to the Law on Copyright and Related Rights have given privilege to one group of users of copyright works and protected objects of related rights, while the fundamental problems of electronic media, caused by bad provisions on determining the tariff of fees, have not been considered or regulated with the proposed amendments at all. However, the most dramatic negative effect on the media system may have the proposed Law on Public Companies, which, contrary to the Media Strategy and existing media legislation, creates the possibility to establish new public companies in the field of information. The extent to which the issue of withdrawing of the state from ownership in media is a challenge for the new government, even though its support is declarative, is visible in some controversial statements of the competent minister, as well as some cases in practice, showing how hard it is to give up mechanisms of control over the media, even when the state is only partly a media owner. Yet another non-media law, the Law on compensation for the use of public resources, whose Draft has not yet been made available to public, could have a serious ill-effect on the electronic media, but also on the independence and funding of regulatory bodies, if announced solutions are adopted, namely decision to abolish payment of regulatory fees and to introduce fees that would be paid by broadcasters directly to the state budget under control of Tax Administration Office, while the regulatory body would receive only some of this money from the budget. In parallel with this type of indirect pressure on the media, the direct pressure certainly is an economic crisis and excessive fees that less and less media in Serbia are able to bear. Nearly 15% of electronic media with valid broadcasting licenses are facing shutdown due to non-payment of regulatory fees, and many are in such position because of the high fees for the use of authors' musical works, as well as other fees and charges that must be paid. Print media is not in any better situation. With that, the principles governing the media marketing space, favoring certain

media at the expense of others by abusing marketing budgets of public and of state companies, cartel agreements and abuse of dominant position in the advertising market, the absence of effective mechanisms for control of spending budget funds and state aid control in the media sphere, seriously hamper the (dis)functioning of the media market. Therefore, it does not come as a surprise that some journalists are demanding the annulment of privatization, recognizing the media they work for will hardly survive in the current market and that the easiest way for them is to return to the state budget financing. Similarly motivated are the demands of some public media companies, urging the state to give up on the privatization of the media, or at least to establish regional public services, in the hope that they will be one of them, and that they will get significant financial help from the state. At the same time, the existing public service broadcasters are experiencing problems with the collection of the TV subscription fee and steady funding too, which was particularly in focus in this period, clearly indicating the necessity to redefine the issue of financing of the public service broadcasting, but also, its role, responsibilities, supervision of its work and necessary conditions for its editorial independence. The above more than clearly indicates the necessary reform of the regulatory framework, the withdrawal of the state of ownership in media, redefining of public service broadcasting, state aid control, monopoly control on the media and related markets, such as the advertising market and the market of distribution of media content. The government should work on all this simultaneously. These developments in the media sector may seriously jeopardize the success of the process of digitalization of TV program broadcasting, for which is now more than obvious that it has not moved much away from the beginning. However, what is encouraging, when it comes to digitalization, are concrete activities that a new Ministry has already taken and visible willingness to cooperate with all stakeholders in this process, including the media, which has not been the case so far.

Bearing in mind that the media situation has not changed much over this period and that the same issues are still important, ANEM has decided to include in this, seventh issue of the Monitoring Publication, in addition to texts about these media issues, the ones treating still important and much present themes. For this issue of Publication, texts were written by: *Kruna Savović, attorney at law,* about the reasons for and against the establishment of regional public service broadcasting; *Slobodan Kremenjak, attorney at law,* about the necessity to regulate cable distribution and broadcasting of television programs; *Rodoljub Šabić, the Commissioner for Information of Public Importance and Personal Data Protection*, about the state and the media in the function of realizing citizens' right to information; *Dragoljub Popović, Judge at the European Court of Human Rights,* about access to information in the European human rights law. The fifth text is a brief summary of two judgments of the European Court of Human Rights, relating to the application of Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms: the *first* refers to freedom to impart information – failure to allocate radiofrequencies to licensed TV broadcasters, and the *second*, referring to freedom of expression – an absolute prohibiton on filming an interview with an inmate inside prison.

In Belgrade, December 2012

The Reasons For and Against the Establishment of Regional Public Service Broadcasting

Kruna Savović, attorney at law[1]

As early as back when the Media Strategy was adopted in September 2011, it could have been assumed that some of the concepts contained therein would be strongly contested. This particularly pertains to the part of the Strategy addressing the issue of regional public service broadcasting (RPSB), the formation of which was and still is opposed by the largest associations from the media sector. We remind that RPSB were not even mentioned in the version of the Media Strategy that was tabled for public discussion by the then Ministry of Culture, Media and Information Society. On the contrary, the concept of RPSB appeared in the document unexpectedly, as a result of an intervention by the working group set up by Prime Minister Mirko Cvetkovic. That working group, with the exception of media associations' representatives, was of the opinion that the RPSB would constitute a mechanism that would enable all the citizens, living on the territory of the Republic of Serbia, to equally realize their rights to receiving information. At that, the initial assumptions of the Media Strategy remain unquestionable. Unquestionable is also the right of citizens to receive timely and accurate information at the local and regional level, specific for the community/region they live in. The same applies to the obligation of the state to ensure that the citizens remain fully informed at all times and to contribute to constant improvement of the quality of media content. What is problematic, though, is the mechanism.

How the Government or the working group of PM Cvetkovic have opted for six regional public service broadcasters is questionable too – why not five or seven, or any other number? The impression is that they were actually counting the regional centers, where the parties of the then ruling coalition were on power at the local level, which further compromised the mere idea of enabling these future RPSB to be independent in terms of management, programming and finances.

Another question mark is the fact that the Strategy foresees the regional public service broadcasters to operate on the same principles as the two existing public service broadcasters (PSBs) – RTS and RTV. The latter are, however, far from being models to emulate, as evidenced by the conclusions of the Report compiled by Civil Rights Defenders, ANEM, NUNS, NDNV and Local Press (based on the Council of Europe's indicators for media in a democracy) released in mid-2012 under the title „Serbian Media Scene vs. European Standards". That Report says that the low collection rate of the television subscription fee, low productivity, excessive number of employees and unreasonable expenditures, have turned RTS and RTV into loss-making companies in the last couple of years. That fact is obviously an impediment to financial independence and makes the two broadcasters vulnerable to external influence. In the part about managerial independence of RTS and RTV, the Report says that the managing boards of these PSBs fell short of demonstrating the required autonomy for running the business. On the contrary, the Report says, the role of those managing boards has been reduced to supporting the decisions of general managers and senior managerial and editorial teams. This has created a situation where the main role in achieving managerial independence of PSBs is assumed by their general managers. Unfortunately, the Report concludes, until 2011, RTS and RTV general managers were not being appointed from the ranks of independent individuals resistant to political interference. Opinions differ as to whether and to what extent this has led to the PSB being under the influence of politics. The RTS itself evokes high ratings and the fact that its central news bulletin attracts twice the number of viewers than similar programs on any commercial station. However, independent programming

[1] Law office "Živković&Samardžić", Belgrade

research has shown the political reporting of the PSBs to be biased in favor of the government, while lacking dissenting tones and avoiding ever questioning the government's responsibility for key social problems.

Finally, disputable is also the fact that the Media Strategy stipulates that the RPSB shall be established by the means of open competitions, falling short of detailing anything about that procedure and neglecting completely the need to analyze the effect of such new broadcasters on the market and competition and to assess if a similar or substitute offer exists or is possible to obtain on commercial media.

In this context, it seems that even those supporting the concept of forming of RPSB see the latter as a business model aimed to ensure the survival of some of the still not privatized public media companies, enabling their employees to keep their jobs. They probably also perceive this concept as a means for the local governments to retain the mechanisms to influence the public opinion at the local and regional level, rather than a means for fulfilling the democratic and cultural needs of society. This explains the fact that we will not hear from the proponents of RPSB about the need to prevent the overpayment of PSBs, to introduce effective mechanisms of their external financial control, to have the PSBs behave competitively on the market, or to avoid having public funds misused for restricting market access and stifling commercial competition.

Why do we have such situation and why many in Serbia today do not see a sustainable business model for regional electronic media, apart from the wrongly perceived concept of public service broadcasting, perceived as the green light for low productivity, too many employees and unreasonable expenditure of budget money?

Why hasn't the Media Strategy at least tried to recognize the causes of the unfavorable environment for the operation of local and regional electronic media? Truth be told, the Media Strategy was not expected to end the global economic downturn and increase the marketing budgets of advertisers in Serbia, but it would well have boosted the consolidation of the markets for local and regional electronic media. The latter is currently fragmented and impoverished to such extent that the stations cannot even earn the money to pay the regulatory fees.

In September and October 2012 alone, the RBA initiated 67 procedures for revoking broadcasting licenses due to unpaid broadcasting fees. The first 35 procedures were initiated in early September, while the remaining 32 were put in motion in late October. Since the public media companies are exempted from paying the fees to the RBA, all those media, subject to the aforementioned procedures, are commercial stations. Such a crackdown on commercial electronic media in Serbia (especially local and regional stations) is a direct consequence of the failure of the public media policy to create a better environment for them to operate.

In addition to encouraging the consolidation of the market for local and regional electronic media, a step forward in creating a more favorable environment could be made by insisting on more transparent and responsible expenditures of public money. This would entail consistent enforcement of state aid control regulations. These regulations should prevent the state from undermining competition by subsidizing economically inefficient entities, thereby discriminating against stations with lower operating costs and better product. The control of state aid should put an end to this practice by precisely defining what the state can subsidize and how. A prerequisite for the latter is to have a clear definition of the public interest that may be financed by the state, as well as clear and predefined parameters for calculating the amount of the aid to be awarded. This idea has been tackled by the Media Strategy, but it has not been elaborated on any further more than a year after the Strategy's adoption.

Another way to make the life of local and regional broadcasters easier would be to prevent the vertical integration on media-related markets, such as the vertical integration of mediators on the advertising markets with production companies, or telecom operators for the distribution of

media content with the media. The afore stated goal could also be achieved by putting greater emphasis on protecting competition on the media market and related markets by suppressing the omnipresent restrictive practices.

In the absence of such measures, the establishment of RPSBs would not be anything more than cementing the as-is situation, where local and regional commercial media, namely those who assumed that status after privatization, as well as those that were originally commercial, will continue to struggle and disappear. Several "survivors" would formally change their status and be transformed into PSBs, without having any of their problems solved. The example of RTS and RTV shows that there is no magic wand to make them financially and managerially independent and unbiased in their reporting. Such a state of affairs and the failure to introduce a comprehensive set of measures to create a more favorable environment for the business of local and regional electronic media would result in the opposite situation from the one envisaged by the Media Strategy as a motive for establishing RPSB. Instead of receiving timely and accurate information specific for local and regional communities, the citizens would be left at the mercy of politically biased reporting, without any alternative sources of information. If the goal of the new government is to achieve the latter, it does not need to establish RPSB; it is enough to just keep financing the existing public media companies and obedient commercial media without any transparency and control – the results will be the same. If they, however, want to change and offer a choice to the citizens, they should try putting the RTS and RTV in order and insist on consistence adherence to the obligation to produce and air content intended for all segments of society, without discrimination, including regional discrimination of the inner Serbia's viewers. At the same time, commercial local media and regional electronic media deserve a market that will enable economically efficient enterprises, as well as those offering the best product, to survive, instead of favoring the media that are arbitrarily subsidized by the state, working not for the benefit of the citizens but for their own petty political ends.

The Necessity to Regulate Cable Distribution and Broadcasting of Television Program

Slobodan Kremenjak, attorney at law[1]

The Law on Electronic Communications from 2010 (Official Gazette of the Republic of Serbia No. 44/2010) has liberalized the market for electronic communications in Serbia. This practically means that the activity of electronic communications is now performed under the general authorization regime, while the licenses regime covers only the use of numeration, as well as the use of radio frequencies, in the cases where the Allocation Plan has determined that, in a specific radio-frequency band, the radio frequencies are used on the basis of a license. Players on such a liberalized market are the providers of the service of media content distribution. According to RATEL's Overview of the Telecommunications Market for 2011, seventy-six cable operators and two IPTV operators operated in Serbia last year. There were also three satellite DTH operators. According to the same source, the penetration of cable, IPTV, namely satellite DTH service in Serbia amounts to 53% of the total number of households, while the number of subscribers has been up by 6.7% compared to 2010. The biggest operator is Serbia Broadband – Srpske kablovske mreže d.o.o. (SBB), which controls more than 50% of the market. The top 7 operators (SBB, JP PTT, Telekom Srbija, Kopernikus, IKOM, Digi SAT and Radijus vektor) account together for 88% of that market.

Such a situation on the market imposes serious questions about the protection of the interest of the media, namely the producers or providers of media content vs. network operators/providers of the service of media content distribution, but also the issue of public interest, which needs to be protected. We remind that, under the Media Strategy, adopted in late September 2011, one of the goals of public policy in that domain was the preservation and improvement of media pluralism. According to the Strategy, the Government intends to support and help the realization of that goal by taking measures that will enable the citizens to access different sources of information, opinions and media content. The latter will help them to form their own opinion and resist the influence of the dominant opinion created in centers of power. Since the penetration of cable, IPTV and DTH service in Serbia amounts to 53% of the overall number of households, whereas one particular operator controls more than 50% of that market, while seven largest operators jointly account for about 88%, the ambitions of the state to preserve and improve media pluralism, but also to achieve other interests, such as boosting creativity in broadcasting in the Republic of Serbia (Article 3, Paragraph 1, Subparagraph 7 of the Broadcasting Law), or ensuring maximum benefit for the users of electronic communications and the possibility to freely receive information at one's free choice (Article 3, Paragraph 1, Subparagraph 8 of the Electronic Communications Law) depends on the mechanisms of regulation which are at disposal in the concrete case. These mechanisms have unfortunately proven to be very limited.

In only one instance (Article 101), the Law on Electronic Communications stipulates that the Republic Electronic Communications Agency (RATEL) may, at the request of the Republic Broadcasting Agency (RBA), determine the operator of the electronic communications network for the distribution and broadcasting of media content, which is required to transmit one or several radio or television channels at the national, provincial, regional or local level:

- when a significant number of end users utilizes the electronic communications network of that operator as the sole or primary way or receiving media content; and

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- when it is necessary, in order to realize clearly defined goals of general interest, which is determined by the RBA in accordance with the principles of proportionality and transparency.

RATEL has adopted only two such decisions, including one last March, ordering SBB to distribute the program of four television stations based in in Novi Sad and the second, ordering again SBB to distribute the programs of two local stations in that city.

If we bear in mind that, according to RATEL's Overview of the Telecommunications Market for 2011, the base package of IPTV and digital KDS in 2011 contained 66 television channels; the base DTH package contained 41 channels, while the base package of the analog KDS had in average 51 channels, one may rightfully ask what are these programs, since the average number of programs far exceeds the existing offer in terrestrial broadcasting. The second question is whether licenses are issued (if yes, how) for cable, IPTV or satellite DTH broadcasting, namely are cable, IPTV and satellite DTH platform operators becoming more powerful market players than the regulator itself – the RBA? Under the Broadcasting Law, the licenses for cable and satellite broadcasting are issued without an open competition, at the request of the distribution system operator. Relieved from the obligation to possess a license are programs to which the RBA has issued a terrestrial broadcasting license, in an area the license applies to, provided that the operator airs free of charge the programs of public service broadcasters (PSBs), as well as those that may be received through a free (decoded) satellite broadcast on the territory of Serbia.

We should add to that Article 4 of the ratified European Convention on Cross-border Television, under which the contracting countries, including Serbia, will guarantee freedom of reception and shall not restrict on their territory the re-broadcasting of program services that are in line with the provisions of the Convention. At that, the "program service" is what we typically call "individual television channel" or "program", a set of packages aired on that program or channel.

The key question remains what constitutes re-broadcasting of program services under the Convention and what does not, especially regarding localized foreign TV channels abounding in local cable, IPTV or satellite DTH offers (both in base and premium packages), which are increasingly overpowering local terrestrial channels. The definition of re-broadcasting, regarding author's works, exists in the Law on Copyright and Related Rights. Article 29 says that re-broadcasting of an author's work constitutes the public communication of the entire and unaltered broadcast work, simultaneously, by another operator (not the one that originally airs the author's work), including public communication by cable, as well as in the situation where the work is originally aired from another state. If we transfer all this from the level of individual author's works to that of the overall program service or channel, the key fact seems to be if the channel is re-broadcast in its entirety, simultaneously and in an unaltered form. Only in that case one may refer to re-broadcasting of program services that may not be restricted by states signatories of the Convention. However, if the program services are re-broadcast in an altered form, different from the source form, in other words, if they are localized for the Serbian market or with interruptions for local commercial advertising intended for viewers in Serbia, then we may hardly speak of re-broadcasting provided for by the European Convention on Cross-border Television.

The market of media content distribution in Serbia today is much more competitive and larger than at the time when the Broadcasting Law from 2002 was adopted. Serbia cannot afford anymore to neglect the regulation of cable, IPTV and satellite DTH distribution as it did 10 years ago. Because, if a decade ago terrestrial broadcasting was a rule and cable and satellite the exception, RATEL's market overviews today show that the latter have become a mode of distribution requiring a responsible approach and proper regulation, both in the interest of preserving and improving media pluralism and for the sake of the development of creativity in the area of television in the Republic of Serbia. Otherwise, creativity will be reduced to subtitling foreign programs and inserting localized commercials during the breaks.

The State and the Media in the Function of Realizing Citizens' Right to Information

Rodoljub Šabić[1]

The main characteristic of the relationship between the state and the media in Serbia in general and especially in the context of the realization of the citizens' right to information is probably the multiple controversies surrounding it. The examples are many, but we will present here only two. One concerns the formal obligation to provide information to the citizens, namely the public. The second pertains to the right to withhold certain information.

Already at the highest, constitutional level, Article 51 of the Constitution of the Republic of Serbia, one of the key factors for the topic of this text historically and content wise, illustrates the above described claim.

"Everyone is entitled to receive accurate, complete and timely information about matters of public interest and means of public information are required to respect that right".

Everyone is entitled to have access to data that is in the possession of state authorities and organizations vested with public powers, in accordance with the Law".

The "history" is significant due to the fact that the first version of the draft of the current Constitution, which appeared in the summer of 2006, did not contain a provision guaranteeing the right to free access to information of public importance. The latter notwithstanding the fact that the said right had already been determined not only by the Law on Free Access to Information of Public Importance (regardless of the questionable meaningfulness of the laws of the then State Union of Serbia and Montenegro), but also at the "constitutional" level, in the so-called "Little Charter". The Commissioner for Information of Public Importance had to publicly voice an opinion about that topic and address a letter to the members of the Constitutional Committee and the Speaker of the Parliament, in which he pointed out that it that was necessary to ensure constitutional guarantees for the aforementioned right. The above-described provision was included in the Constitution only after the Commissioner's intervention.

It is a good thing that such constitutional guarantee of the right to free access to information of public importance was secured with this, but it could have been arranged in a much better way. The content of that provision is interesting also in terms of how it deals with the correlation of rights and obligations. Whose obligations are correlated to everyone's right to "receive accurate, complete and timely information about matters of public interest"? Is it logical and justified to determine that "the media are required to respect that right" and stop short of providing for any obligation of the state/government whatsoever in that respect?

The obligation of the state, namely state authorities in the context of "the right to be informed", regardless of any dilemmas about the scope and reach thereof, must be unquestionable.

In the context of contemporary concepts of the right to free access to information of public importance, the obligation of the state/government should involve more than merely a satisfactory attitude towards the requests for information by journalists/the media. These obligations should entail the obligation to proactively release as much information as possible, without waiting for someone to request it.

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[1] Commissioner for Information of Public Importance and Personal Data Protection, Republic of Serbia

In that respect, the provisions of the Law on Free Access to Information of Public Importance are worthy of note, as are those of the Instruction for the Drafting and Release of the Information Booklet on the work of State Authority passed by the Commissioner in accordance with his competences stemming from the aforementioned Law, which were aimed at improving the transparency of work.

The provisions of the Law and the Instruction, provided they are strictly adhered to, would enable the media to have at their disposal, on daily basis, a large quantity of serious information, relevant for the realization of the citizens' right to information. Namely, thousands of government authorities are obligated to keep the following information available online for journalists' convenience: basic information about the state authority in question and the Information Booklet; organizational structure; job description of the head/ high official of the authority; description of the rules concerning transparency of work; list of the most requested information of public importance; description of competencies, powers and obligations; description of procedures entailed by these competencies, powers and obligations; list of regulations; services that the state authority in question provides to interested parties; procedure for the provision of services; overview of data about the services provided; data on revenues and expenditures; data on public procurement; data on state aid; data on salaries, wages and other earnings; data on equipment…

Although it is seemingly an unquestionable obligation, here is some recent information about the actual attitude of some of the highest government authorities towards it.

In the procedure of enforcing the Law on Free Access to Information of Public Importance and the Instruction for the Drafting and Release of the Information Booklet on the work of State Authorities, with regard to the application of the prescribed measures for improving the transparency of state authorities, the Commissioner sent a memo in October to all ministries, reminding them of the obligation to make the Information Booklet on the work. The Commissioner namely discovered that the websites of the newly formed ministries contained the Information Booklets of the previous ministries (which, in most cases were not updated) and that several ministries did not release Information Booklet at all. At that, the Commissioner is not required to remind the authorities of their legal obligations, but he nevertheless did, in view of the turmoil the ministries went through over the changes in competencies and internal organization. The Commissioner also highlighted the responsibility of the ministries, as the highest bodies of the executive branch, to serve as a positive example when it came to fulfilling legal obligations and obligations towards the public.

The Commissioner's office conducted in October a repeated analysis of the situation related to releasing the aforementioned Information Booklet. The Commissioner again issued a press release, saying that several ministries had released the Information Booklet with the proper content (as prescribed by the Instruction), but that other ministries still did not have Information Booklet whose quality, content updated data would meet the demands from the Instruction and expectations of the public.

In spite of the Commissioner's insistence, the last analysis of the state of affairs in November showed that two ministries had fallen short of fulfilling that obligation, while several ministries fulfilled it only partially.

Since the failure of a state authority to make Information Booklet with the prescribed details about its work constitutes an infraction under Article 47 of the Law on Free Access to Information of Public Importance and in view of the fact that the Commissioner is not empowered to initiate infraction proceedings on his own against the responsible persons, he addressed the Ministry of Justice and State Administration, which is entitled and obligated by Law to submit a request with the competent court for the initiation of infraction proceedings.

In relation to the above, I wish to remind that, back in 2011, the Administrative Inspectorate of the Ministry did not file a single request for infraction proceedings in spite of a large number of infractions committed in breach of the Law on Free Access to Information of Public Importance. I will also reiterate that such a stance and the failure to take the prescribed legal measures is akin to sending an invitation to breach the law and shun the obligations directly related to the right of the citizens to be informed.

Another phenomenon is "neuralgic" in relation to the attitude of the state/government to the realization of the citizens' right to be informed – "secrecy". In the described relationship, both sides invoke the right to secrecy.

When it comes to media freedom, the said right is absolutely fundamental; the right to withhold and not disclose data about the source of information. In that respect, on the normative level, there seems to be no problems whatsoever, on the contrary. The right to secrecy is very well regulated by the provisions of the Public Information Law, under which the journalist and/or the media is not obligated to disclose such data unless it concerns a criminal offense subject to a minimum of five years in prison and/or the perpetrator of such criminal offense. Since such minimum penalty is provided for a very few serious felonies, it is a seemingly solid guarantee, which has never been, at least in the formal sense, threatened in practice. In reality, however, things have not always been smooth.

A good example for that is the case where the Basic Public Prosecutor's Office in Novi Sad raised an indictment against a journalist of the "Nacionalni gradjanski" weekly for the breach of secrecy.

"Nacionalni gradjanski" released confidential material in the form of the "Report about the State of the Preparations for Defense", which was discussed on a closed session of the Serbian Parliament.

Sensing that for many reasons, such a decision by the Prosecutor would be viewed by many as a threat to the freedom of press and the right of the public to know, I publicly warned that (if there was a legitimate reason for this at all) those responsible for the breach of secrecy should not be sought for among journalists, but among state officials and civil servants.

With all due respect for the independence of the Prosecutor, I believe it was my obligation to warn that some disturbing inferences about the freedom of press and the right of the public to know might be drawn in the light of such an act.

Doing only their job, the journalists have written about the poor condition of certain defense resources, while citing concrete data from a confidential report.

A well-intentioned observer would probably infer that journalists wanted to contribute to efforts to remedy the described shortcomings and improve the defense resources and not to do something harmful.

Furthermore, they most definitely are not those that are responsible for the breach of secrecy. Namely, the content of the document that was, for good reason or not, marked as confidential, was leaked by somebody else – an official person. And the journalists, even if they knew who that person was, were not required by Law to reveal their source of information.

Insisting on the journalists' responsibility was probably inspired by the conviction that they were responsible for a breach of secrecy by merely having the idea that they could in such a way be forced to reveal their source of information. A similar conclusion could be drawn from similar conduct of the authorities in an earlier case, when the daily "Borba" released a "secret" about the payment of a million US dollars of taxpayers' money in the case of Miladin Kovacevic. In any case, such an attitude towards the media, while at the same time failing to insist on the responsibility of

other stakeholders that are clearly responsible and regardless of the intentions of the prosecutor or the police, has objectively produced harmful effects for freedom of press and the right of the public to know.

Naturally, the other party – the state/government – is entitled to secrecy. But, how are things really standing in that respect?

The Law on Classified Data came into force on December 24, 2009 and has been enforced since January 1, 2010. That Law "regulates the unified system for processing and protecting classified data relevant for national and public security, defense, internal and foreign affairs of the Republic of Serbia, protection of foreign classified data, access to classified data and the expiration of the secrecy thereof, the competencies of the authorities and oversight of the enforcement of the law, as well as responsibility for the failure to fulfill obligations, as well as other matters relevant for data secrecy".

The implementation of this Law would require the adoption of a large number of bylaws within the legally prescribed deadline, which would enable full application of the Law. This circumstance is something that should have been seriously criticized *ab initio*. Firstly, because it is not good in principle to bring down the regulation of a large number of issues that are *materia legis* to the level of bylaws. And secondly, because the hitherto practice of applying a great majority of "transition" laws has shown that in similar situations, the competent authorities, in particular the Government and the ministries, intolerably often "forget" their obligation to pass the proper bylaws.

The government has indeed passed several of these bylaws. However, only one of these acts was passed in the proper time frame, while the rest were adopted with some delay.

The greatest, fundamental problem, however, is the fact that the Government has failed to pass the most important bylaws for the application of the Law. Hence, it has failed to pass detailed criteria for setting the degrees of secrecy "state secret" and "strictly confidential" under Article 14, paragraph 3 of the Law. This has resulted in the Government's inability to pass the detailed criteria for determining the degrees of secrecy "Confidential" and "Internal" at the proposal of the competent minister, or a head of a public authority.

Such a situation and the lack of all expected effects after more than two years of the "implementation" of the Law are worrying in several aspects. It should not be tolerated either from the aspect of general legal safety or from that of security/realization of the right to free access to information of public importance and public information, namely the realization of the function of the media.

One of the effects that have not happened resulted in seriously restricted media/public access to a potentially interesting source of information. According to Article 105, paragraph 2 of the Law, the high officials of public authorities were required, within two years from the coming into force of the Law (December 24, 2011), to review the degree of secrecy of documents and data determined on the basis of earlier regulations. Due to the absence of any oversight, there is no concrete data if/how this obligation has been fulfilled and to what degree. It is very unlikely, however, that the expected results have been achieved. The latter could have been assumed, in view of the manner in which the norm was articulated, which was supposed to allow the declassification of a large quantity of documents that are formally still confidential, although there is no genuine need for such confidentiality. It was namely provided for without any sanction for the failure to fulfill the related obligation, as well as without the *ex lege* declassification after the expiration of the determined deadline.

The assessment that the Law on Classified Data exists as a mere fiction and not as a real and relevant element of the legal order is system is confirmed by another specific phenomenon.

Namely, the Law on Classified Data provided for a single, more or less standard nomenclature of classified data – internal, confidential, strictly confidential, state secret. Thus, the Law (which "regulates a single system for determining and protecting secret data") has seen the removal of "military secret" and "official secret", as relicts of the old "security culture". However, these terms are still very present in the press and television talk shows. This should not come as a surprise, since both the Government (that proposed the Law on Classified Data in the first place) and the Parliament that adopted the Law have continued very intensively, in their legislative practice, using the "eliminated" terms. There are quite a few laws that have been amended after the coming into force of the Law on Classified Data, which contain the terms and classification that do not exist in the said Law.

In view of the above, it may be concluded that, almost three years after its adoption, the Law on Classified Data has failed to contribute to better and more substantial resolution of matters relevant for the realization of the right to access to information. Furthermore, in relation to other issues, which the Law directly or indirectly pertains to, the enforcement thereof is weak. All the major mechanisms provided for in the Law are functioning poorly, or not working at all. That fact will surely yield negative consequences. Some of these consequences will inevitably affect the realization of the citizens' right to information.

Access to Information in European Human Rights Law

Dragoljub Popović[1]

1. Media as the Watchdog of Democracy

The European Court of Human Rights stated in its judgment in *Goodwin v. The United Kingdom* that the press had a special goal in the society. Its task was, as the Court put it, to assume "the vital public-watchdog role".[2] The commentators had first highlighted the Court's stance while exposing on the role of the press exclusively, but they slowly moved in the direction to interpret it in a broader manner, so as to apply to media in general.[3] The media are always on guard, they take notice of events, they inform and by informing they provide significant aid to the citizens. The latter can better decide, make their choices and preferences and shape their attitudes towards social factors. The functioning of a modern democracy is therefore hardly imaginable without the media fulfilling their task as the watchdog. To be able to perform the task the media, i.e. journalists must have access to information, but it is also the public at large that must be granted access to those and in order to achieve such a twofold goal the information must be imparted.

2. Journalists' Access to Information

Journalists' access to information has appeared in the Court's jurisprudence as issues of access to sources and of protecting journalists' sources. The former was at stake in the case of *Observer and Guardian.*[4] Two English dailies filed with the Court complaining under Art. 10 of the Convention that their freedom of expression had been violated. The complaint was based on the injunctions issued by a domestic court in England, prohibiting publication of memoirs of a former British secret service agent, revealing illegal practices of the service while performing its duty. The book of memoirs had a significant title – "Spycatcher". The measures at domestic level were issued upon request of the Attorney General who had instituted proceedings for breach of confidence. The Court's finding was that the interference with applicants' rights was prescribed by law and had a legitimate aim. Pursuing its analysis further on the Court posed the question whether it was necessary in a democratic society.

To resolve the issue and give a proper answer to the question the Court stated it was "incumbent on the press to impart information and ideas on matters of public interest".[5] In this regard the Court underlined the role of the press that has already been mentioned in this text at its

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[1] Judge at the European Court of Human Rights, Strasbourg

[2] Goodwin v. The United Kingdom, Reports 1996-II, para. 39. For the purpose of brevity of expression the European Court of Human Rights will hereinafter be referred to as Court and the European Convention on Human Rights as Convention.

[3] For the more restrictive approach, see Jacobs, White & Ovey, The European Convention on Human Rights, Oxford – New York 2010, 432-433. For the extensive approach: J. Casadevall, El Convenio europeo de Derechos humanos, el Tribunal de Estrasburgo y su jurisprudència, Valencia 2012, 367.

[4] Observer and Guardian v. The United Kingdom, Judgments and decisions A 216 (1992)

[5] Para. 59 of the judgment.

beginning, namely the role of public watchdog. The Court took account of the interests of national security and eventually ruled for the applicants on proportionality ground. The measures issued at domestic level did not seem to be proportionate to their aim after the moment the book appeared in the United States. The injunctions nevertheless were not lifted and the prohibition to publish in the United Kingdom remained in force.

Injunctions and orders issued by an English court of law were at issue in *Goodwin* as well, although the substance of the injunction was different from the one mentioned in the previous case. The facts were the following. The applicant was a British journalist who had received information from an unknown person by telephone. The information received concerned a company active in the market and facing financial troubles at the material time. The domestic court of first instance issued an interim injunction prohibiting publication of "any information derived from the corporate plan".[6] The injunction of the first instance court was followed by an order of the Court of Appeal, requiring the applicant "either to disclose his notes to [the company in question] or to deliver them to the Court of Appeal in a sealed envelope with accompanying affidavit".[7] The journalist was thus ordered to disclose its source of information. The Court concluded once again there had been interference with the applicant's freedom of expression, committed in pursuing a legitimate aim. Eventually it came to the same question we met in the previous case – whether the interference was necessary in a democratic society? The Court held that revealing the source of information was indeed not sufficient "to outweigh the vital public interest in the protection of the applicant journalist's source".[8] This is what made the Court conclude that requiring the journalist to reveal his source gave rise to a violation of his right to freedom of expression under Art. 10 of the Convention.

In the case of *Financial Times Ltd. and Others v. The United Kingdom* the same issue reappeared.[9] A journalist who worked with Financial Times received a copy of a document that had leaked from a company. It was communicated to the journalist by an unknown person. Many other newspapers and news agencies got hold of the same document in the same way. The substance of the document concerned a firm active in the market and its publishing affected the value of the firm's shares in the stock exchange. The company concerned sought an order in domestic proceedings "requiring the applicants to serve within 48 hours, a witness statement setting out the names and addresses of every person who had provided them" with information. The High Court ordered delivery up of the documents.[10] The Court of Appeal sustained the order and the House of Lords refused the applicants leave to appeal. The newspapers filed application with the Court in Strasbourg. The Court found interference with the applicants' freedom of expression was prescribed by law and had a legitimate aim. The crucial question once again was whether it was necessary in a democratic society? The Court ruled for the applicants and held there was a violation of Art. 10, but it nuanced its stance. The Court agreed the principle of non-disclosure of sources could be overridden in circumstances "where a source was clearly acting in bad faith with a harmful purpose and disclosed intentionally falsified information".[11] The Court found nothing of the kind in the facts of the case. The interest of the public at large to be informed prevailed over the interest of a firm competing in the market to prevent leaks of confidential information from its archives.

[6] Goodwin v. The United Kingdom, Reports 1996-II, para. 12.
[7] Para. 16 of the judgment.
[8] Para. 45
[9] Financial Times Ltd. and Others v. The United Kingdom, app. no. 821/03 HUDOC (2009)
[10] Paras 20-22 of the judgment.
[11] Para. 63

3. Public Access to Information / Whistleblowers

Leaking of documents was at the origin of two cases the Court has dealt with in recent years. One of them was *Stoll v. Switzerland.*[12] The applicant was a journalist who had been fined by the Press Council at domestic level for having disclosed in the press a confidential report by the Swiss ambassador to the United States. The report concerned the strategy adopted by the Swiss government in negotiations between the World Jewish Congress and Swiss banks on the subject of compensation due to Holocaust victims for unclaimed assets deposited in Swiss Banks. It is worth noting that the case had first been given judgment by a Chamber of seven judges, who ruled for the applicant. The case was later presented to the Grand Chamber of seventeen judges who reversed the stance and overruled the Chamber judgment, by a majority of twelve votes to five.

Pursuing its usual analysis the Court came to the question whether the interference with the journalist's rights was necessary in a democratic society. To resolve the issue the Court reiterated its previous case-law.[13] Its main conclusion was that the Contracting States of the Convention could claim a margin of appreciation as regards adopting rules aimed at "preserving the confidential or secret nature of certain sensitive items of information".[14] To apply this approach the Court took account of various circumstances, such as the interests at stake, the review of the measure by domestic courts, the applicant's conduct, as well as the proportionality of the measure imposed on the applicant.[15] The Court's overall conclusion was that "in weighing the interests at stake against each other in the light of the relevant evidence the domestic authorities did not overstep their margin of appreciation".[16]

The dissenting judges remarked that the majority accepted first that the confidentiality of diplomatic reports could not be protected at any price, and second that respondent Government did not succeed to prove that the articles in question prevented it and the banks involved to find a solution to the problem. They were of opinion that "the authorities' interest in discretion [was] not sufficient to outweigh the journalist's freedom".[17]

The other case was *Guja v. Moldova,* in which the situation was different and the applicant could be qualified as whistle blower.[18] The Court, sitting in the Grand Chamber again, distinguished the case from *Stoll.* The applicant in *Guja* was the Head of the Press Department of the Prosecutor General's Office. He was dismissed from post for having disclosed to the newspapers letters addressed to the deputy prosecutor general. The letters were sent by the deputy Home Minister and their contents referred to certain criminal proceedings that had been in course. The letters were not marked as confidential.[19] The applicant brought reinstatement proceedings at domestic level, but his case was finally dismissed by the Supreme Court of Justice.[20]

While dealing with the question of whether the impugned measure imposed on the applicant was necessary in a democratic society the Court considered the issue of the applicant's conduct. The Court found the applicant had acted in good faith.[21] The Court also noted that, being dismissed from job, the applicant faced "the heaviest sanction possible", which the Court found "difficult to

[12] Stoll v. Switzerland, ECHR 2007-V
[13] Paras 101-106 of the judgment.
[14] Para. 107
[15] Para. 112
[16] Para. 162
[17] Judge Zagrebelsky dissenting, joined by judges Lorenzen, Fura-Sandström, Jaeger and Popović
[18] Guja v. Moldova, app. no. 14277/04 HUDOC (2008)
[19] Paras 8-14 of the judgment.
[20] Paras 22-26
[21] Paras 92-94

justify".[22] On those grounds the Grand Chamber ruled unanimously in the applicant's favour, finding a violation of Art. 10 of the Convention.

4. Imparting Information

If the public at large is to have access to information the latter must be communicated to them. Imparting information is often at stake in cases concerning audiovisual media. Fast developments of technology may render outdated certain aspects considered by the Court in some of its judgments. In *Groppera Radio AG and Others v. Switzerland* the Court found no violation of Art. 10 of the Convention.[23] The issue was a ban imposed on a company incorporated under Swiss law, whose subscribers were all in Switzerland, to broadcast from Italy. The Court found for the respondent Government. The margin of appreciation was not overstepped in the Court's view.

In another case against Switzerland of the same year the Court found a violation of Art. 10 of the Convention. The case was *Autronic AG v. Switzerland*.[24] The applicant was a firm that intended to transmit programs from a Soviet satellite uncoded broadcasts prepared for television viewers in the Soviet Union. The authorities refused to give authorisation to such broadcasting invoking the rules of International Telecommunication Convention. The Court ruled "there was no need to prohibit reception of these broadcasts".[25] Further developments of the international law rendered the consent of the State unnecessary. Besides satellites are numerous nowadays and easily accessible.

A ban to broadcast at national level occurred in a case of a Turkish radio and TV station in which the Court had to face a specific reason on which the ban was founded. The TV station broadcast live statements of a charismatic Islamic leader from the US, who explained the origin of an earthquake that happened in Turkey. In his perception the earthquake was Allah's punishment. The TV station was imposed a ban to broadcast for six months. The Court in Strasbourg found the measure to be in collision with the freedom of expression and therefore in breach of Art. 10 of the Convention.[26]

However it is not only in cases of audiovisual media that the authorities may have tried to hinder the imparting of information. In *Çetin and Others v. Turkey* a ban on the publication and distribution of a newspaper in a state of emergency region was at stake. The Court found a violation of Art. 10 of the Convention on the grounds that the measure was not necessary in a democratic society, but also because there were no sufficient safeguards to protect against abuse in national law.[27]

In a case against Austria imparting of information was also at stake. The case was *Vereinigung demokratischer Soldaten Österreichs and Gubi v. Austria.*[28] The case originated in the refusal of the Minister for Defence to have a magazine distributed to servicemen and a prohibition imposed on a conscript preventing him from distributing it in his barracks. The respondent Government submitted to the Court that "the periodical, which was critical and satirical, had represented a threat to discipline and to the effectiveness of the army".[29] The Court ruled for the applicants

[22] Para. 96
[23] Groppera Radio AG and Others v. Switzerland, Judgments and Decisions A 173 (1990)
[24] Autronic AG v. Switzerland, Judgments and Decisions A 178 (1990)
[25] Para. 63 of the judgment.
[26] Nur Radio Ve Televizyon Yayinciligi A.S. v. Turkey, app. no. 6587/03 HUDOC (2008); the text in French.
[27] Çetin and Others v. Turkey, ECHR 2003-III, para. 66
[28] Vereinigung demokratischer Soldaten Österreichs and Gubi v. Austria, Judgments and Decisions A 302 (1995)
[29] Para. 38 of the judgment.

finding the ban to distribute the periodical disproportionate to the legitimate aim pursued by the measure.[30]

5. Conclusion

Freedom of expression is one of the basic values of democracy. The society we nowadays live in could not properly function without it. Art. 10 of the Convention provides solid grounds for the protection of the freedom of expression and its maintenance. It is indeed the Court's jurisprudence based on Art. 10 which construes the area of the freedom guaranteed and offers guidance as to its scope. Some of the most important features of the mechanism of protection of the freedom of expression should therefore be outlined in order to make a concluding remark to this text.

Freedom of speech is not unlimited, but its frontiers are vast and as we have realised from some of the examples mentioned above they can not be put hindrance by a demand for military discipline or even the state of emergency.

Imparting information has not been perceived only as a right of the media, but also as a right of the public at large to be informed. This has led to a positive obligation of Contracting States to the Convention to create such an environment to enable free trade of ideas and floating of information. The positive obligation has found place in some of the Court's judgments, where expressions like "public right to be informed" or "the interest of the public in having the information" have been mentioned.[31]

Public access to information has been one side of the coin. The other is the access of journalists to information, for it appears to be a prerequisite for their imparting among the society at large. The European law of human rights has *inter alia* approved of whistle blowing and protecting journalists' sources in order to enable the journalists to get hold of information that are important for the public, so that they can subsequently communicate them. It is in performing such a task that the journalists and the media play the role of watchdog of democracy.

[30] Para. 40

[31] See: Sürek and Özdemir v. Turkey, app. nos. 23927/94 and 24277/94 HUDOC (1999), para. 61 for the former expression and Guja v. Moldova, app. no. 14277/04 HUDOC (2008), para. 76, for the latter.

European Court of Human Rights
Information Notes on the Court's Case-Law[1]

Information Note no. 153/June 2012

ARTICLE 10 *European Convention for the Protection of Human Rights and Fundamental Freedoms*

Positive obligations
Freedom to impart information

Failure to allocate radiofrequencies to licensed television broadcaster: *violation*

Centro Europa 7 S.r.l. and Di Stefano
v. Italy - 38433/09
Judgment 7.6.2012 [GC]

Facts – The applicants are a company and its statutory representative. In July 1999 the Italian authorities granted the applicant company a licence for nationwide terrestrial television broadcasting, authorising it to install and operate an analogue television network covering 80% of national territory. As regards the allocation of frequencies, the licence referred to the 1998 national frequency allocation plan, stating that the applicant company should bring its installations into line with the requirements of the "assignment plan" within twenty-four months and should conform to the "adjustment programme" drawn up by the Communications Regulatory Authority. From 2000 onwards, the applicant company made several applications to the administrative courts, complaining about the failure to allocate it any broadcasting frequencies. In May 2008 the *Consiglio di Stato* ordered the Government to deal with the request for the allocation of frequencies. In January 2009 it also ordered the appropriate ministry to pay the applicant company approximately EUR 1,000,000 in compensation, calculated on the basis of its legitimate expectation of being allocated frequencies.

Law – Article 10: The authorities' failure to allocate frequencies to the applicant company had deprived its licence of all practical purpose since the activity it authorised had been *de facto* impossible to carry out for nearly ten years. There had therefore been interference with the applicant company's exercise of its right to impart information or ideas. Furthermore, having been awarded a broadcasting licence, it could reasonably have expected the authorities to adopt, within twenty-four months, the instruments needed to regulate its activities, provided that it upgraded its installations. However, the frequency allocation plan had not been implemented until December 2008 and the applicant company had been allocated a single channel to broadcast its programmes, with effect only from the end of June 2009. In the meantime, several operators had continued on a provisional basis to use various frequencies that were supposed to have been allocated to new operators under the national plan. The *Consiglio di Stato* had held that this state of affairs was due to essentially legislative factors. A series of laws had successively extended the period during which the existing "over-quota" channels could continue to broadcast at both national and local level. The other operators had therefore been prevented from participating in the early stages of digital television. Moreover, these laws, which were couched in vague terms, had postponed the expiry of the transitional scheme with reference to events occurring on dates

[1] Excerpts from the official documents of the European Court of Human Rights, available on its web site

which were impossible to foresee. In addition, the Court of Justice of the European Union had noted that these measures by the national legislature had entailed the successive application of transitional arrangements structured in favour of the incumbent networks, and that this had had the effect of preventing operators without broadcasting frequencies from accessing the television broadcasting market even though they had a licence. Accordingly, the domestic legislative framework had lacked clarity and precision and had not enabled the applicant company to foresee with sufficient certainty when it might be allocated the frequencies in order to start broadcasting. As a result, the laws in question did not satisfy the foresee ability requirements. Lastly, the authorities had not observed the deadlines set in the licence, thereby frustrating the applicant company's expectations. The Government had not shown that the company had had effective means at its disposal to compel the authorities to abide by the law and the Constitutional Court's judgments. Accordingly, the applicant company had not been afforded sufficient guarantees against arbitrariness. This shortcoming had resulted, among other things, in reduced competition in the audiovisual sector. It therefore amounted to a failure by the State to comply with its positive obligation to put in place an appropriate legislative and administrative framework to guarantee effective media pluralism.

***Conclusion*:** violation (sixteen votes to one)

The Court also held, by fourteen votes to three, that there had been a violation of Article 1 of Protocol No. 1, finding that the applicant company's legitimate expectation – notably the operation of an analogue television network by virtue of the licence – had had a sufficient basis to constitute a "possession". Given that the Court had already held under Article 10 that the interference with the applicant company's rights had not had a sufficiently foreseeable legal basis within the meaning of its case-law, it could only reach the same finding in relation to Article 1 of Protocol No. 1.

Article 41: EUR 10,000,000 to the applicant company in respect of pecuniary and non-pecuniary damage.

Freedom of expression _____

Absolute prohibition on filming an interview with an inmate inside prison: *violation*

Schweizerische Radio- und Fernsehgesellschaft SRG
v. Switzerland - 34124/06
Judgment 21.6.2012 [Section V]

Facts – In August 2004 the applicant, a radio and television broadcasting company, requested mission to film a prisoner serving a sentence for murder, with a view to broadcasting the interview in a feature on the trial of another person accused in the same case. The prisoner concerned, whose case had attracted a great deal of media interest, had agreed to the interview. The request was refused, for reasons concerning the need to maintain peace, order and security in the prison and to ensure equal treatment among the prisoners. The applicant company lodged various appeals against the decision, but to no avail.

Law – Article 10: The refusal to authorise the applicant company to film inside a prison for a television programme, notably to interview a detainee, had amounted to interference with freedom of expression. The interference had been provided for by law and pursued the aims of preventing disorder and protecting the rights of others. However, as freedom of expression in the context of a television broadcast devoted to a subject of particular public interest was in issue, the margin of appreciation open to the Swiss authorities in determining whether or not the offending measure met a "pressing social need" had been narrow. There had, on the face of it, been grounds

to consider that the rejection of the applicant company's request was necessary in a democratic society – in particular with regard to the presumption of innocence of a person whose trial was imminent, and the interests of the proper administration of justice. However, the domestic authorities should have properly examined whether, for reasons concerning security and the rights of the other detainees, the refusal of permission to film inside the prison had been actually and effectively necessary in the present case.

In particular, they should have taken into consideration the concessions the applicant company had been prepared to make, such as filming at a time when the other detainees were working, and keeping the interview short. In its appeals the applicant company had suggested that the interview might be filmed in the visiting room, which could have been kept closed for the occasion. The domestic authorities did not appear, however, to have taken these arguments into account. That being so, the argument that the filming would have interfered with the private lives of the other detainees appeared neither relevant nor sufficient to justify the interference with the applicant company's freedom of expression. Concerning the need to maintain order and security in the prison, neither the domestic authorities nor the Government had explained how, in practice, order and security in the prison could have been effectively threatened, especially if the interview had been filmed in the restricted conditions proposed by the applicant company, by a single cameraman accompanied by one journalist, whose presence would hardly have been likely to disturb the functioning of the establishment or threaten security there.

Furthermore, Article 10 protected not only the substance of the ideas and information expressed but also the means by which they were conveyed. It was therefore not for the domestic courts or for the Court to substitute their own views for those of the media as to what technique of reporting journalists should adopt. Thus the fact that a telephone interview with the prisoner had been broadcast by the applicant company in a programme that was available on its web site was not relevant: different means and techniques had been used for the interview, it had not had such a direct impact on viewers and it had been broadcast in the framework of another programme. Accordingly, broadcasting the interview had not in any way remedied the interference caused by the refusal of permission to film in the prison.

It was true that the national authorities were better placed than the Court to decide whether and to what extent allowing outsiders into a prison was compatible with order and security there. However, having regard in particular to the rather summary reasoning given by the national authorities and the absence in their decisions of any real balancing of the interests involved, they had failed to demonstrate convincingly that the absolute ban imposed on the applicant company's filming in the prison had been strictly proportionate to the aims pursued.

***Conclusion*:** violation (five votes to two).

Article 41: no award.

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