Data protection and media (1990)

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INTRODUCTION

1. It is becoming increasingly difficult to draw the parameters of data protection. It can no longer be regarded as a discrete legal discipline of sole relevance to specific applications of automation. It is now a fact that the collection, storage and processing of personal data characterises most activities today and inevitably comes into conflict with the legal regimes which govern these activities. Since data protection norms seek to regulate the various stages of data processing, it is the case that situations may be brought about where data protection competes with other legal norms for the purpose of dispute resolution in the context of these situations.

2. The application of competing norms to one particular legal issue is of course not a new phenomenon. By way of illustration, courts at the national and international levels have by now become quite accustomed to finding an appropriate balance between the claims of different fundamental human rights provisions to regulate particular legal problems. In fact, the drafters of the Convention for the protection of individuals with regard to automatic processing of personal data of 28 January 1981 were obliged to balance the right to private life against the freedom of expression so as to produce a harmonious approach to the issue of transborder data flows.

3. In the context of its sectoral approach to data protection issues, the intergovernmental Committee of experts on data protection has also accustomed itself to the need to allow for cohabitation between data protection principles and other legal concepts. For example, in the framework of Recommendation No. R (89) 2 on the protection of personal data used for employment purposes, reference may be made to the adjustment of national labour law and practice in the area of co-determination or employee consultation, so as to allow such principles as "fair and lawful collection", "purpose specification", etc., to be accommodated in the context of employer-employee relations. Again, in the framework of Recommendation No. R (87) 15 regulating the use of personal data in the police sector, the approach followed seeks to allow the law on police powers to be adjusted to the requirements of data protection.

4. Accordingly, the tension between data protection and other legal disciplines does not give rise to a new debate. However, as regards the media, it may be argued that the issues at stake assume greater proportions, since the media are premised on a fundamental human right expressed in Article 10 of the European Convention on Human Rights:

> *"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*
>
> *2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."*

5. Unlike Article 19 of the Universal Declaration of Human Rights, Article 10 of the European Convention on Human Rights does not specifically refer to the freedom of the press. However, the judgments of the European Court of Human Rights, as well as the decisions of the European Commission of Human Rights, leave no doubt that freedom of the press is an integral part of the protection envisaged in Article 10. Consider the view expressed by the European Court of Human Rights in the Lingens case (Series A no. 103):

> *"41. In this connection, the Court has to recall that freedom of expression, as secured in paragraph 1 of Article 10, constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society"... These principles are of particular importance as far as the press is concerned: ..."*

6. The role of the media in the context of Article 10 of the European Convention on Human Rights has also been spelt out in greater detail by the Committee of Ministers of the Council of Europe in its Declaration on the freedom of expression and information of 29 April 1982, in which the member States:

> *"I. Reiterate their firm attachment to the principles of freedom of expression and information as a basic element of a democratic and pluralist society;*

II. Declare that in the field of information and mass media they seek to achieve the following objectives:

a. protection of the right of everyone, regardless of frontiers, to express himself, to seek and receive information and ideas, whatever their source, as well as to impart them under the conditions set out in Article 10 of the European Convention on Human Rights;".

7. The problem is of course that data protection itself has its genesis in the fundamental right to private life which is guaranteed by Article 8 of the European Convention on Human Rights. In fact, data protection is recognised as a constitutional right per se by certain member States of the Council of Europe. This approach may be found for example in the Constitutions of Austria, the Netherlands, Portugal and Spain, all of which contain provisions guaranteeing the integrity of the individual against the abuse of data processing.

Even in the absence of express reference to a constitutional right to data protection, it may be the case that an enlightened interpretation of the classic right to private life laid down in other constitutions may give rise to a right to data protection. It is interesting to note that the European Court of Human Rights and the European Commission of Human Rights have both recently declared their readiness to read data protection into the fundamental right to private life laid down in Article 8 of the European Convention on Human Rights. For example, in application no. 9248/81, it was clearly reaffirmed by the European Commission of Human Rights that:

"The Commission has already held that data protection comes within the scope of Article 8 of the European Convention on Human Rights."

8. The potential for conflict is rendered more acute with the increasing recourse to automation by the various organs of the media (press, broadcasting, television). It is the case that the specific legal regimes which govern the media - press law, media law, libel, personality rights, the right of reply, etc. - have all grown up in the context of a media world characterised by hard copy. Today, however, the broadcast news item or television image or the periodical is the end product of an automated process. Taking a simplistic view of things, automatic data processing may begin with the filing of the journalist's contribution on his electronic notebook, its subsequent transfer and storage on the publisher's computer, its reappearance in printed form, and its consignment to electronic archives where it can be summoned up at will within the news room or even accessed on-line from outside. As regards the audio-visual media, the tendency now is to store news items, film, broadcasts, etc., on a digitalised medium.

The sixth international Colloquy on the European Convention on Human Rights (Sevilla, 1985) also highlighted the extent to which data processing coupled with telecommunications has given rise to a totally new electronic environment for collecting, storing and disseminating information. In a key report, Professor M. Bullinger (Federal Republic of Germany) notes :

"Technical evolution is about to transform electronic media into a presslike variety of means for disseminating information and ideas. Interactive videotex by telephone cable permits the distribution of 'electronic leaflets' to the electronic 'letter boxes' of selected households, and the reception of these 'electronic leaflets' upon request. Non-interactive wireless teletext or cabletext, a relatively inexpensive cyclical transmission of 'magazines' composed of small rectangles with textual information, enables a subscriber to choose at a given moment a certain 'page' and make it visible on his television set, comparable to the consulting of a booklet or leaflet page. Broadband cable networks in connection with telecommunication satellites technically allow an almost unlimited number of video and sound programmes to be transmitted..."

9. If the information referred to in paragraph 8 refers to named individuals, then at first glance it seems to be the case that data protection norms are engaged at the stages of collection, storage and processing of personal data by the organs of the media. Accordingly, the data quality requirements articulated in Article 5 of Convention 108, the rights of the data subject as set out in Article 8, the need for safeguards for sensitive data laid down in Article 6 as well as the data security requirements specified in Article 7 should, in principle, apply. However, how are these data protection principles to be applied to a context which is governed by the principle of freedom of the press, as well as other basic legal norms such as professional (journalistic) secrecy, or to the well-established tradition of investigative journalism?

10. One aspect of the conflict between data protection and freedom of the press is well illustrated by the remarks made by a representative of the press at the Rome Conference on problems relating to the development and application of legislation relating to data protection in December 1982. In criticising the drafters of the first Italian Bill on data protection for having included media files within its scope, he stated:

"If this draft were to be adopted, it would prevent information belonging to the public domain from being tored (for example, the fact that Mr. Schmidt, Chancellor of the Federal Republic of Germany, stopped smoking, wears a pacemaker, and has now started to smoke again), either under certain conditions or from using this information (for example, from the moment when Mr. Schmidt retires)."

He continued:

"Another problem deserves consideration. There are 180 important press agencies in the world which transmit daily between 50,000 and 100,000 new pieces of information. This is equivalent to a total of 13.5 million words. How can it be possible to manage and update this mass of information without the help of data processing."

11. Two issues are posed by these comments: the possibility that data protection norms would prevent press agencies from collecting, storing and processing information - sometimes of a sensitive nature - on people in public life; the difficulties involved in updating the mass of personal data stored by the press, it being recalled that data protection legislation, in conformity with Article 5 (d) of Convention 108, requires data users to ensure that personal data are accurate and, where necessary, kept up to date.

Beyond these two issues, other difficulties in applying data protection norms to data processing by the media may be identified:

i. Although this study is primarily concerned with automatic data processing by the media (as with the Data Protection Convention), is it nevertheless the case that manual processing techniques are also included within the scope of some national data protection laws. Accordingly, the "world of hard copy" referred to previously in paragraph 8 may also have to be addressed in formulating a data protection policy for the media. In addition, analysis of the issues raised by data protection and the media may not simply be confined to the collection, storage and processing of personal data. Certain countries extend their data protection laws to legal persons. Quite simply, these two issues (manuel files and legal persons) create further difficulties for what is already a complicated domain.

ii. How does the principle of "fair and lawful collection" (Article 5 (a)) apply to techniques of investigative journalism?

iii. How are the rights of the data subject to be exercised when his personal data have been collected and stored by the media? Is he to be allowed to rectify erroneous reports which are stored in electronic archives, with the danger that in so doing history may be rewritten?

iv. Is the digitalisation and storage of film or broadcasts to be considered as giving rise to personal data files which must be registered/declared/notified in accordance with domestic data protection legislation?

v. How is on-line access by the public to press data bases to be regulated? Is this to be considered as part of the freedom of the press even though the members of the public may constitute their own files for purposes not linked to publishing?

vi. Is it necessary to consider transborder dissemination of personal data by the media from the point of view of Article 12 of the Data Protection Convention, bearing in mind that the Convention only guarantees free flow of personal data between and among Contracting Parties. Moreover, if one Contracting Party has excluded the media from the scope of its data protection law, would this fact justify another Contracting Party from

restricting data transmission to it on the basis that equivalent protection for personal data files kept by the media is not guaranteed by it. This issue is important in view of the new technological possibilities for shifting instantaneously image, text, data, sound, etc., (and in massive quantities) between organs of the media situated in different countries (and in different continents). The transborder data flow issue must also be discussed against the background of those major international news and pictures agencies whose very function is to collect, store and disseminate information around the world for use by national media and ultimate public consumption.

12. The difficulties may not be as acute as they appear, given the fact that Article 9.2.b. of Convention 108 envisages the possibility of States making a derogation to the basic data protection principles, where such derogation is provided for by law and constitutes a necessary measure in a democratic society in the interests of "protecting the data subject or the rights and freedoms of others". According to the explanatory report, the "rights and freedoms of others" is taken to cover the freedom of the press. In other words, the drafters of the Convention sought to avoid the possibilty of conflict between data protection legislation and the freedom of the press by allowing the Contracting Parties to exclude data processing by the media from the scope of their implementing legislation. As it will be seen, some countries have followed this approach. On the other hand, other countries have decided to extend their data protection legislation to personal data files kept by the media. It is this latter approach which requires reflection on the need to allow data protection to cohabit with norms governing press freedom. However, even in the context of the former approach, that is to say, the exclusion of media files from the scope of data protection legislation, reflection is still required on the need to devise countervailing rights for the data subject, given that he is denied rights of access, rectification and erasure and that the media are not obliged to respect the data quality requirements imposed on other data users.

THE SITUATION IN THE MEMBER STATES

13. The following picture can be drawn of the law and practice of certain member States in regard to personal data files managed by the media.

a. Austria

The 1988 version of the Austrian Data Protection Act excludes from its scope data processing by the media while at the same time extending certain of the legislative provisions to such files. For example, in accordance with Section 54 of the Act, the principles regarding data security shall apply to personal data files held by the media.

b. Belgium

The Belgian Data Protection Bill of 1985 envisages no exception being made for files kept by the media.

c. Denmark

The 1987 Danish Private Registers (Consolidated) Act states quite specifically in Section 7 that "the Act shall not apply to electronically processed registers exclusively storing data published in a periodical paper". However, subsequent sub-sections make it clear that data processing by the press will not entirely escape the reach of the law. For example, electronically processed press registers are subject to prior notification to the data inspection authority which may lay down regulations to secure the privacy of individuals. In addition, Section 7 (h) provides that personal data shall not be communicated without the consent of the data subject or any party acting on his behalf except where this is provided for in the law or where the communication is carried out by publication in a periodical. The right of access of the data subject applies to the data stored.

d. France

The French law of 1978 states that the provisions of the law, with the exception of Sections 24 (transborder data flow authorisation), 30 (processing of certain categories of data) and 31 (processing of sensitive data) shall not apply to personal data processed by press or broadcasting organisations under the laws governing them if application of those sections would have the effect of restricting freedom of expression.

e. Federal Republic of Germany

The data protection legislation of the Federal Republic of Germany only subjects files kept by the media to the requirements of data security, where such files are used exclusively for media purposes. The Act will apply to the media to the extent that they use data from press and radio archives for other purposes, for example communication to third parties.

As regards the Land of Hessen, two specific provisions in the Data Protection Act of 1987 refer to the media. In the first place, Section 3 (6) states that only the provisions of Section 10 (technical and organisational measures) and Section 37, shall apply to personal data processed by the Hessian Broadcasting Corporation exclusively for its own journalistic/editorial purposes. Section 37 states that the data subject should have the right to have a contradictory reply included in the data stored by the media in question, and for the same period of time as those

data. In addition, a data protection officer is to be appointed by the Broadcasting Corporation, who shall investigate complaints brought by individuals when their rights have been infringed at the time of processing of their data for journalistic/editorial purposes.

f. Finland

Finland's Personal Data File Act contains a provision to the effect that it shall not affect the right to publish printed matter. The Act does not prevent the media from collecting and processing personal data for publishing or broadcasting purposes. Nevertheless, it is clear from the proceedings leading to the enactment of the Personal Data File Act, that the Act applies to personal data files - both automated and manual - which are kept as organised background data and are used as part of broadcasting or publishing activities. The regulations on exceptions to the prohibition of storing sensitive data do not include the personal data files kept by the media (even though this was considered a possibility at one stage).

g. Greece

The most recent version of the Greek Data Protection Bill provides for derogations to the data protection provisions contained in the Bill in the case of files kept by press agencies and radio and television broadcasting corporations. In particular, prior authorisation in writing from the Data Protection Commission is not required for such files even if they contain confidential or sensitive data. However, when such data files undergo automatic data processing the situation changes. In such cases, a written declaration must be submitted beforehand to the Data Protection Commission which is empowered to prevent processing of the data if it is thought that this would not be in accordance with the law. Finally, the remaining provisions in the Greek Bill, such as those concerning the collection of data and the exercise of the right of access, will apply fully to personal data files kept by the media, whether or not they are automated.

h. Iceland

The Icelandic Data Protection Act applies fully to files kept by the mass media.

i. Ireland

The Irish Data Protection Act applies fully to personal data files kept by the media.

j. Luxembourg

The 1979 Luxembourg Act on the use of computerised personal data applies fully to personal data files kept by the media.

k. Netherlands

The 1988 Data Protection Act states quite clearly in Section 2 (1b) that the Act will not apply to "personal data files which are solely intended for use in public supply of information by the press, radio or television".

l. Norway

The Norwegian Data Protection Act applies to personal data files stored by the mass media. Certain exemptions from the registration requirement have been made for such files which are for internal use only. However, if the personal data files kept by the mass media may be accessed on-line from the exterior, then a licence must be sought from the Data Inspectorate.

m. Sweden

The Swedish Data Act applies fully to personal data files kept by the media.

n. Switzerland

Although the current Swiss Data Protection Bill applies in principle to the media, its provisions do not apply to personal data published by the organs of the media. It is felt that the right of reply offers sufficient protection to the aggrieved individual. In addition, the media will have the right to deny a data subject the right to access his data as long as they have not published the data.

o. United Kingdom

The 1984 Data Protection Act applies in full to data processing by the media and grants no specific exemptions in this regard.

Conclusion

14. It follows from this analysis that certain countries exclude or intend to exclude the media from the scope of their data protection legislation. The Netherlands and Switzerland are good examples of this approach. Other countries, while excluding the

media as a general principle, nevertheless require the media to respect certain data protection requirements, in particular data security. This seems to be the situation in Austria, France and the Federal Republic of Germany. Then again, some countries, while applying their legislation to the media, seek to adapt the bureaucratic requirements of their laws, or proposed laws, to the media, for example, Greece, Denmark and Norway. Finally, there are some countries which make no exemptions at all for data processing by the media - Iceland, Luxembourg, Sweden and the United Kingdom may be cited in this regard.

As regards countries which include media files within the scope of their data protection legislation, few problems have arisen in practice, although there is evidence to suggest that there is the potential for problems to arise. The following issues have recently arisen in Sweden, in regard to the media: to what extent does the right of rectification apply to radio broadcasts which have been stored in electronic archives? According to the Data Inspection Board, the provisions contained in the Swedish Data Act regarding rectification of personal data are to be understood as not giving rise to an obligation to correct, delete, complete or alter if the information stored in the archives accurately reflects the statements as they were presented in the radio broadcast. On the other hand, if the contents of the radio programme have been given an interpretation or have been the subject of a subjective judgement by a person doing a summary of the programme or if incorrect facts have been put across, then rectification will be possible in the opinion of the Data Inspection Board.

In addition the following issue concerning archives kept by newspapers has arisen. Two newspapers have required the permission of the Data Inspectorate to set up and keep electronic archives. The archives contain all the information that has been published in the newspapers, for example, name and information of anyone who is suspected of, or has been convicted of a crime or has served a sentence or has incurred any other penalty for a crime; illness; state of health; and so on (information considered sensitive according to Section 4 in the Swedish Data Act). All words in the published material are keys to the archives, for example the name of a person. To preclude the risk of undue encroachment upon personal privacy, the Inspectorate has decided that five years after the information has been published, the only key to sensitive data (in accordance with Section 4) that should be used is the date of publication of the information.

The Data Inspectorate has also issued the following regulation concerning rectification of personal data: when information in the archives should normally be corrected, deleted, completed or altered according to the Data Act (Sections 8 and 9), the keeper of the file should make a note in the file in such a way that the text cannot be used without notification of these circumstances. The newspapers have appealed against the decisions of the Inspectorate to the Government, demanding that the regulations should be annulled. The Government has not yet taken a decision.

There is an intense debate in Sweden right now on the problems that arise as a result of the application of the data protection legislation to media files. The media consider that the rules in the Data Act limit the rights of the Freedom of the Press Act. The

Commissioner mandated to review the whole of the Data Act has been requested to pay special attention to the problems concerning data protection and the media.

In addition, the first annual report of the Data Protection Registrar of the Isle of Man (which has its own Data Protection Act) refers to a recent problem concerning the media and data protection. In the Isle of Man, it used to be common practice for the police to disclose to the media details of persons involved in road accidents, including information about the passengers in the vehicles involved. It has now been suggested that the communication of passenger information, as opposed to details concerning the driver, may very well constitute a breach of a data protection principle. The Man police as well as the Registrar share this view and the police have informed the media of their new policy in regard to non-communication of passenger information. Not unnaturally the local press and radio take a different view. Significantly, in his annual report, the Data Protection Registrar for the Isle of Man comments (page 8 of the report):

> *"This is a good example of the conflict between the right to privacy on the one hand and the need for freedom of information on the other. In the Data Protection Act we have legislation which sets out to protect an individual's privacy, but we have no counterbalancing legislation to ensure freedom of information."*

ALTERNATIVE REMEDIES FOR THE DATA SUBJECT

15. If considerations relating to freedom of expression lead countries to exclude, wholly or in part, the media from the scope of their data protection laws, it is necessary to determine whether or not countervailing remedies are provided for the data subject who is denied the rights which traditionally flow from data protection legislation. Analysing the remedies accorded by the aforementioned States, it emerges that a whole range of civil and criminal law remedies attach to an aggrieved individual. For example, the countries in question allow the individual to have the usual remedies which arise out of the law of libel and slander. This may sometimes be a civil remedy or it may give rise to criminal sanctions imposed on the media. In addition, certain countries (for example, Belgium, Greece, France, Sweden) provide for a right of reply in favour of an individual who believes that the media have unjustly criticised him or made inaccurate statements concerning him. Certain countries have created ethical review boards or press councils so as to maintain standards within the media (Luxembourg, Netherlands, Sweden and the United Kingdom). Other countries recognise either within their Constitution or within their civil codes rights of privacy or personality rights, the breach of which may be litigated in courts.

16. It will be noted that the remedies referred to in paragraph 15 are *ex post facto*. The damage has already been sustained and the law reacts *a posteriori* so as to allow the individual to seek compensation, or to make a contradictory statement, or to punish the behaviour of the media vis-à-vis the individual. The question may be asked as to whether such rights and remedies whether laid down in the common law, civil codes, statutes, etc., sufficiently counterbalance the loss of data protection rights laid down in data

protection laws or compensate for the exemptions given to the media from the data quality requirements. It is after all the case that data protection norms intervene at an early stage so as to prevent the abuse of data processing. For example, the basic requirements that personal data should be obtained and processed "fairly and lawfully" or that personal data should be "accurate" and, where necessary, "kept up to date", or that the data should only be used in accordance with the legitimate purpose for which they were collected are of a pre-emptive nature. Similarly, the rights of the data subject to access his data, to rectify the data if they are inaccurate or to have them erased, may also be considered as pre-emptive and continuing rights which allow the data subject to supervise the use and quality of the data stored on him.

CONSTRUCTING A DATA PROTECTION POLICY FOR THE MEDIA

17. Countries which exclude the media from the scope of their data protection legislation are invoking the derogation envisaged under Article 9 (2) of Convention 108. From the point of view of the European Convention on Human Rights, they are also derogating from Article 8 to the extent that they interfere with the right to private life (which as illustrated above includes the right to data protection) and they do so in accordance with the law (the exclusion expressly stated in their domestic data protection legislation) on the basis that this is necessary for the "protection of the rights and freedoms of others" (press freedom).

On the other hand, countries which include the media within the scope of data protection legislation have agreed to take on board the principles laid down in Convention 108. In so doing, such countries are also giving full effect to the provisions of Article 8 § 1 of the European Convention on Human Rights without invoking the derogation "for the protection of the rights and freedoms of others" (press freedom) envisaged in paragraph 2 of Article 8. At the same time, however, these countries are arguably derogating from Article 10 § 1 of the European Convention on Human Rights by restricting by law the exercise of that freedom in favour of "the protection of the reputation or rights of others" as envisaged in paragraph 2 of Article 10.

It will be recalled that the sort of derogations discussed above must be in accordance with the law and must be necessary for the protection of the two types of interests at stake - press freedom and data protection/right to private life. It is worth focusing further on the concept of "necessary" measures. As regards exclusion of the media from the scope of data protection legislation, it may be argued on the basis of the judgments of the Court of Human Rights (for example, the Sunday Times case, Series A no. 30) that such measures must be proportional to the legitimate aim pursued. In other words, there can be no open-ended derogation from the right to privacy/data protection. Similarly, as regards inclusion of the media within the ambit of data protection legislation, there cannot be a total disregard of the notion of press freedom.

It is felt that the issue of the media in the context of data protection and vice versa can be approached on the basis of existing legal instruments adopted within the framework of

the Council of Europe. At the outset, it is worth repeating the words of Paul Sieghart, rapporteur at the Rome Conference, who when replying to the remarks made by the journalist regarding the inclusion of the media within the scope of the Italian Data Protection Bill, quoted earlier, stated:

> *"But I think the ultimate guarantee that new and good data protection laws will not interfere with freedom of the press lies in the fact that both freedom of the press and data protection are central concerns of the Council of Europe."*

It is believed that the principles laid down by (i) the Parliamentary Assembly of the Council of Europe in Resolution 428 (1970) containing a Declaration on mass communication, media and human rights, as well as (ii) Resolution (74) 26 of the Committee of Ministers on the right of reply - position of the individual in relation to the press - could usefully inform the approach taken by national policy makers as well as the data protection authorities in the area of data protection and the media.

RELEVANT EXTRACTS FROM RESOLUTION 428 (1970)

> *"...*
>
> *A.2. The right to freedom of expression shall apply to mass communication media.*
>
> *A.3. This right shall include freedom to seek, receive, impart, publish and distribute information and ideas. There shall be a corresponding duty for the public authorities to make available information on matters of public interest within reasonable limits and a duty for mass communication media to give complete and general information on public affairs.*
>
> . . .
>
> *C.1. There is an area in which the exercise of the right to freedom of expression may conflict with the right to privacy, protected by Article 8 of the Convention on Human Rights. The exercise of the former right must not be allowed to destroy the existence of the latter."*

Comment

The Parliamentary Assembly clearly recognised the possibility of conflict between press freedom and privacy. It then goes on to suggest certain ways to allow press freedom and privacy to cohabit.

> *"...*

B. It is the duty of the press and other mass media to discharge their functions with a sense of responsibility towards the community and towards the individual citizens. For this purpose, it is desirable to institute (where not already done):

(a) professional training for journalists under the responsibility of editors and journalists;

(b) a professional code of ethics for journalists; this should cover inter alia such matters as accurate and well balanced reporting, rectification of inaccurate information, clear distinction between reported information and comments, avoidance of calumny, respect for privacy, respect for the right to a fair trial as guaranteed by Article 6 of the European Convention on Human Rights."

Comment

It is felt that (b) is a good mechanism for making the media aware of the data quality requirements set out in Article 5 of Convention 108, through allowing the professional bodies representing the various organs of the media to provide the necessary ethical framework for their own members, free from government involvement.

"...

C.3. A particular problem arises as regards the privacy of persons in public life. The phrase "where public life begins, private life ends" is inadequate to cover this situation. The private lives of public figures are entitled to protection, save where they have an impact upon public events. The fact that an individual figures in the news does not deprive him of a right to a private life."

Comment

At an earlier stage in the text the issue was raised as to the processing of personal data on public figures. The Parliamentary Assembly recognises this issue and suggests that freedom of the press can to some extent override the privacy claimed by public personalities. This reasoning is also consistent with the judgment of the Court of Human Rights in Lingens v. Austria (Series A no. 103):

"The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance. No doubt Article 10 § 2 enables the reputation of others - that is to say, of all individuals - to be protected, and this protection extends to politicians too, even when they are not acting in their private capacity; but in such cases the requirements of such

protection have to be weighed in relation to the interests of open discussion of political issues."

> *"...*
>
> *C.4. Another particular problem arises from attempts to obtain information by modern technical devices (wire-tapping, hidden microphones, the use of computers, etc.), which infringe the right to privacy. Further consideration of this problem is required."*

Comment

The Parliamentary Assembly here alerts us to the need to ensure that personal data may only be collected by the media in a fair and lawful manner. Unlawful data collection by technical devices has also been condemned by the European Court of Human Rights in the cases of Klass and Others v. Federal Republic of Germany (Series A no. 28) and Malone v. United Kingdom (Series A no. 82).

> *"...*
>
> *C.6. ... national law should provide a right of action enforceable at law against persons responsible for such infringements of the right to privacy."*

Comment

The Committee of Ministers in Resolution (74) 26 provides further guidelines on what could constitute an appropriate right of action.

RELEVANT EXTRACTS FROM RESOLUTION (74) 26

> *"The Committee of Ministers,*
>
> *Considering that the right to freedom of expression includes the freedom to receive and to impart information and ideas without interference by public authority and regardless of frontiers, as laid down in Article 10 of the European Convention on Human Rights;"*

Comment

As with Resolution 428 (1970) of the Parliamentary Assembly, the Committee of Ministers emphasised the importance of the freedom of the press.

> *"...*

Considering that it is desirable to provide the individual with adequate means of protection against the publication of information containing inaccurate facts about him, and to give him a remedy against the publication of information, including facts and opinions, that constitutes an intrusion in his private life or an attack on his dignity, honour or reputation, whether the information was conveyed to the public through the written press, radio, television or any other mass media of a periodical nature;"

Comment

As with Resolution 428 (1970) of the Parliamentary Assembly, the Committee of Ministers recognises that freedom of the press carries with it duties and responsibilities, in particular with regard to the rights and freedoms of others.

"...

1. In relation to information concerning individuals published in any medium, the individual concerned shall have an effective possibility for the correction, without undue delay, of incorrect facts relating to him which he has a justified interest in having corrected, such corrections being given, as far as possible, the same prominence as the original publication.

2. In relation to information concerning individuals published in any medium, the individual concerned shall have an effective remedy against the publication of facts and pinions which constitute:

i. an interference with his privacy except where this is justified by an overriding, legitimate public interest, where the individual has expressly or tacitly consented to publication or where publication is in the circumstances a generally accepted practice and not inconsistent with law;

ii. an attack upon his dignity, honour or reputation, unless the information is published with the express or tacit consent of the individual concerned or is justified by an overriding, legitimate public interest and is a fair criticism based on accurate facts."

Comment

These ideas are given further precision in a series of minimum rules regarding the right of reply to the press, the radio, and the television, as well as to other periodical media, namely:

i. Any natural and legal person, as well as other bodies, irrespective of nationality or residence, mentioned in a newspaper, a periodical, a radio or television broadcast, or in

any other medium of a periodical nature, regarding whom or which facts have been made accessible to the public which he claims to be inaccurate, may exercise the right of reply in order to correct the facts concerning that person or body.

ii. At the request of the person concerned, the medium in question shall be obliged to make public the reply which the person concerned has sent in.

iii. Publication of the reply must be without undue delay and must be given, as far as possible, the same prominence as was given to the information containing the facts claimed to be inaccurate.

iv. Any dispute as to the application of the above rules shall be brought before a tribunal which shall have power to order the immediate publication of the reply.

The right of reply has more recently been solemnised in the context of Article 8 of the European Convention on Transfrontier Television (ETS No. 132). Bearing in mind that the Convention is only concerned with the medium of television, Article 8 provides :

> *"1. Each transmitting Party shall ensure that every natural or legal person, regardless of nationality or place of residence, shall have the opportunity to exercise a right of reply or to seek other comparable legal or administrative remedies relating to programmes transmitted or retransmitted by entities or by technical means within its jurisdiction, within the meaning of Article 3. In particular, it shall ensure that timing and other arrangements for the exercise of the right of reply are such that this right can be effectively exercised. The effective exercise of this right or other comparable legal or administrative remedies shall be ensured both as regards the timing and the modalities.*
>
> *2. For this purpose, the name of the broadcaster responsible for the programme service shall be identified therein at regular intervals by appropriate means."*

CONCLUSION

18. It is felt that countries which have excluded the media from the scope of their data protection legislation should consider whether or not their legislation relating to the press and the remedies which are available to aggrieved individuals correspond to the principles which are set out in the two Resolutions discussed above. Similarly, those countries which have included the media within the scope of their data protection legislation could usefully consider whether or not these principles could be used in the framework of a sectoral approach to the media. For example, it may be possible to consider implementation of the principle of the right of reply as advocated by the Committee of Ministers in Resolution (74) 26 as a valid reflection of the principle of subject access. Again, the duties incumbent upon the media set out in Resolution 428

(1970) so as to secure their responsibility vis-à-vis individuals could be examined so as to determine whether or not they are compatible with data quality requirements.

Given the possible conflict which can arise between freedom of the press and implementation of data protection norms, it is essential that policy makers as well as supervisory authorities acting within the framework of data protection laws take a sensitive approach to this issue. It just may be the case that the principles outlined in the two Resolutions could provide the key to such an approach.