



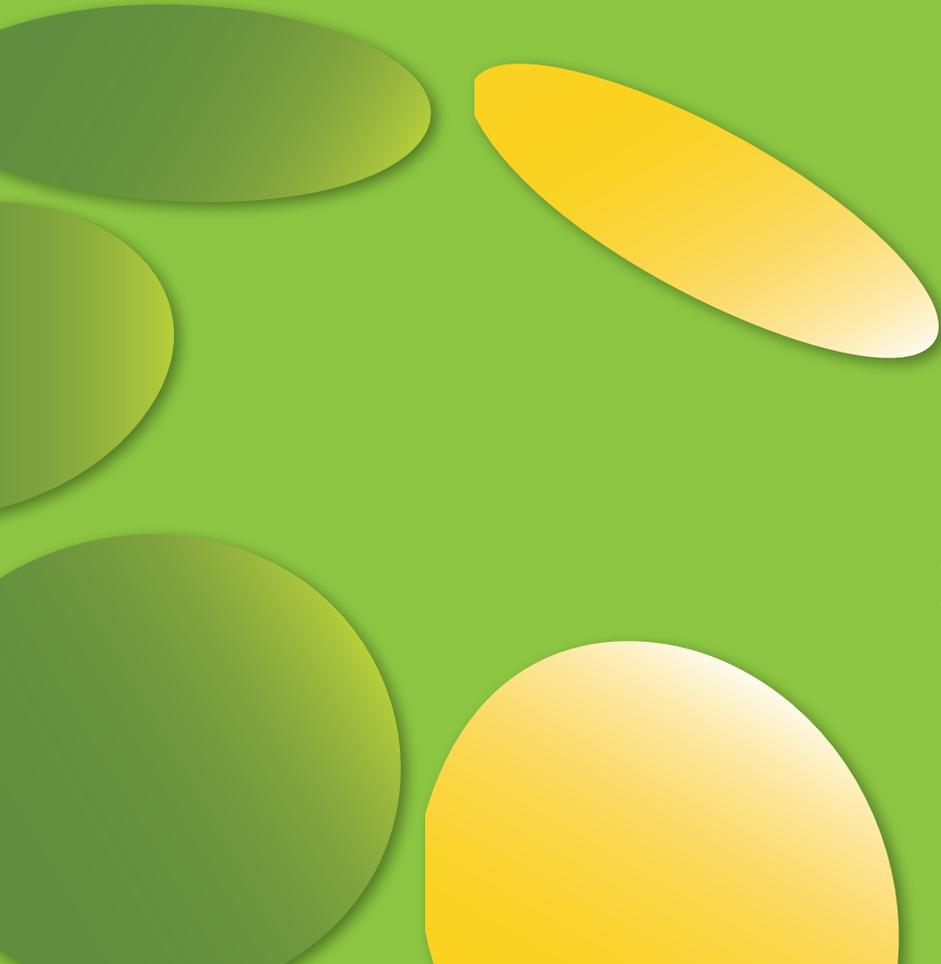
COURTS OF LAW:

**GUARDIANS OF THE PUBLIC INTEREST
OR OF INDIVIDUAL INTERESTS**

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POLICY PAPER

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COURTS OF LAW: GUARDIANS OF THE PUBLIC INTEREST OR OF INDIVIDUAL INTERESTS

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Content

	Executive Summary	7
	1 Introduction	9
	2 The Public Interest throughout the Principle of Publicity in Court Proceedings	11
	3 The Right to Freedom of Expression and its Restrictions – In or Contrary to the Public Interest?	13
	4 The Public Interest in the New “Special” Laws	15
	4.1. Law on Protection of Privacy	15
	4.2. Law on Protection of Whistleblowers	16
	5 The Public Interest in Court Proceedings	17
	5.1. Public Interest v. Freedom of Expression	17
	5.2. Right to Property	20
	6 The Public Interest in the Decisions of the Administrative Courts in the Republic of Macedonia	23
	7 The Public Interest in the Decisions of the Constitutional Court of Republic of Macedonia	27
	8 The Public Interest in the European Convention on Human Rights and in the Case-law of the European Court of Human Rights	33
	8.1. Article 1 of the Protocol 1 to the Convention	33
	8.2. Article 8 of the Convention	34
	8.3. Article 9 of the Convention	35
	8.4. Article 10 of the Convention	36
	8.5. Article 11 of the Convention	38
	9 Conclusions	41
	10 Addenda	43
	10.1. Article 15 of the Convention	43
	10.1.1. Article 1 of Protocol 7 of the Convention	44
	10.1.2. Article 2 of Protocol 4 of the Convention	44
	11 Sources	47
	About the publisher	49
	About the project	51
	About the authors	53



Executive Summary

This research deals with important issues relating to the public interest regarding the exercise of the fundamental rights and freedoms of citizens and legal entities in the Republic of Macedonia. Hence, its objective is to present different views on the role of the courts in maintaining the balance between individual rights and the public interest. The analysis shall identify situations wherein judges (should) give priority to the public interest, and when (if ever) the private interest should take priority over the public interest.

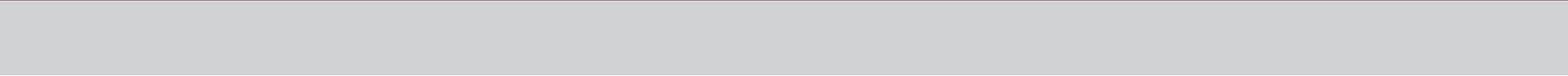
The prime focus of the document is on analyzing cases from the court practice of the Republic of Macedonia, as well as some of the most important cases in the case law of the European Court of

Human Rights. Further, part of the analysis deals with the theoretical aspects of protection of rights and freedoms against the public interest, and relevant legal solutions governing this segment.

Lastly, the document offers conclusions and recommendations for courts' effective and efficient management and decision-making on cases tackling issues of public interest.

The research is conducted under the project "*Voicing the Public Interest: Empowering Media and Citizens in Safeguarding the Public Policy in Macedonia.*"

The project is supported by the British Embassy Skopje.



1

Introduction

The public interest has always been an interesting topic for debate and polemics among the three branches of state government. The underlying reason is that the Legislative branch tries to shape and define the public interest, the Executive branch tries to implement and protect the public interest, whereas the most complex and perhaps the most difficult role is that of the Judicial branch that measures and assesses the public interest, as well as controls its excessive implementation by the Executive branch.

Regardless of how we treat and understand the concept of public interest, which itself seems quite complex and extensive to be defined, in its essence, it is necessarily connected to its origins - from Magna Carta Libertatum onwards, either in a historical or contemporary context – it covers human rights in all their forms and types, along with the various aspects of the relationship between the state and individuals. Hence, the public interest can be considered a legitimate restrictionist of the individual human rights and freedoms in a society.

In order to avoid getting the society into a state of severe restriction on individual rights and freedoms guaranteed by the Constitution, and the ratified international treaties and laws, the courts have the role of protecting individual rights, but also collective rights i.e. the public interest. Given this specific but crucial role of the courts, it should be noted that the public interest is subject to the discretion of all types and levels of courts, but with different representation and intensity.

Thus, on one hand, the criminal law traditionally protects the public interest in terms of safety,

public order and peace, and the criminal procedure is practically a tool for ensuring these interests. On the other hand, we equally recognize the public interest in the idea of protecting individual rights, especially if one takes into consideration the possibility for mistakes and abuses in the criminal proceedings, which essentially requires putting emphasis on the individual's right to a fair trial, protection of privacy, protection from torture, which despite once being considered individual interests, today, in the modern conception of the rule of law, it rose to the level of common interest which might even override the general interest of safety. The underlying reason is that almost the entire society benefits from adequate protection of the rights of citizens from the excessive power of the state.

Here, we also recognize one of the most important public interest dilemmas. Namely, when it comes to the PROTECTION of the public interest, it is crucial what constitutes a public interest. This is important from a practical rather than theoretical aspect, especially when someone will need to protect that public interest. The best example hereof is the current fear arising from terrorism and organized crime, and the need for tackling them by applying measures and tools which contribute to the erosion of individual rights and put the focus back on the common interests relating to safety, thereby reflecting on the growing application of special investigative measures, protection of witnesses, mass data collection etc.

Prof. G. Kalajdziev illustrates this issue by stressing that in the last several years we have witnessed government policy that persistently favors



Introduction

efficiency at any cost and undermines the legal state principles that guarantee law-abiding performance on the part of the police and other government bodies with special authorizations. Such manipulations that implied extensive use of special investigative measures and other intrusive methods of similar type as well as their abuse for political purposes negatively affected citizens' trust in state institutions and the potential for building a genuine legal state.¹

Hence, what is the public interest in this case? Is the public interest security or is it protection of individual rights? In this regard, if we treat both as public interests, how can we weigh in specific situations which one to protect against the other?

The same question arises in all other segments where the public interest is subject to courts' re-

view and decision-making. Does the construction of an infrastructural facility override the right to property? Does the health of the people override the freedom of movement? Do interethnic relations override the freedom of expression?

Thus, the courts' role to protect individual and collective rights leads to the obvious conclusion that the courts are the institutions that should provide solutions on how to achieve a balance between the community and the individual i.e. between collective and individual rights and freedoms.

The following text will present, through examples of court practice, the specific role of the courts in a variety of court proceedings regarding the protection of human rights against the public interest promoted by the state.

¹ G. Kalajdziev, On Fight against Organized Crime and the Rule of Law, Foundation Open Society – Macedonia

2

The Public Interest throughout the Principle of Publicity in Court Proceedings

The presence of the public in criminal proceedings provides an opportunity for the general public to control the operation of the courts and other participants in the proceedings, which affects the quality of the judiciary in general and the quality of the court decisions in particular because the court and the parties, knowing that a trial is being monitored by citizens, media and nongovernmental organizations, will diligently fulfill their mandates, which is also considered as public interest.

In this context, the Human Rights Committee treats the principle of publicity as “an important mechanism for protection of the interest of individuals and the interest of the society as a whole” (HRC, 1984). However, although it seems that the public character of the trial would be in favor of the defendant as it provides control over the proceedings and the judgment, sometimes this happens not to be the case.

Hence, the principle of publicity should not be absolute, but must be balanced against the interests and rights of the defense, the witnesses and the victim. It is important to emphasize that the right to a public trial is not only a right which guarantees the defendant a proper court proceedings, but in a democratic society, this right is considered a right of the public (Nowak, 1993). In other words, since justice is conducted on behalf of the people, the public has its own interest to oversee the proceedings. Regarding this, the texts of the International Covenant as well as the Human Rights Committee explicitly mention the press.

The European Court of Human Rights also places particular importance to the public character of the proceedings and considers that it protects parties from possible secret administration of justice with no public criticism and control. This method is also one of the possible ways to ensure confidence in the court, regardless whether it is a first instance court or a court of higher instance. By providing transparency in the process of justice administration, the public contributes to the fulfillment of a fair trial, which is one of the basic principles of any democratic society.²

Notwithstanding that the publicity of the court proceedings is a necessary condition for the transparency and accountability of the judiciary, that builds up public trust, the journalists are the ones that create the public opinion, yet they are restricted when it comes to classified information, protection of witnesses, collaborators of justice, minors, and they must be very careful so as to avoid defamation or libel charges or suit before the civil court (Dimovski/Ilievski/Dimitrievski, 2014).

Due to the importance of this principle, the law determines exactly when the main hearing can be declared secret and when the public can be excluded.

But, regardless of the legal regulation, practice shows otherwise. Namely, the use of special investigative measures without a particular reason is regularly treated as classified information whereupon the public is excluded from the trial during the presentation of these pieces of evidence, al-

2 Paragraph 21, *Preto and Others v. Italy*, Retrieved from: [http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#\[,\]fulltext\[:\]preto\[,\]documentcollectionid2\[:\]GRANDCHAMBER\[,\]CHAMBER\[,\]itemid\[:\]001-57561\[\]"\]](http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#[,]fulltext[:]preto[,]documentcollectionid2[:]GRANDCHAMBER[,]CHAMBER[,]itemid[:]001-57561[]).



The Public Interest throughout the Principle of Publicity in Court Proceedings

though it is not provided in the Code of Criminal Procedure. The public may indeed be excluded from a trial in order to guard a state or official secret, but pursuant to the Law on Classified Information, the process of classifying information as a state secret or any other level of classification applies to interests of national security, but not to any special investigative measures. It is also true

that the data on the people who implemented the measures are kept secret, but not the evidence derived therefrom. The exclusion of the public in cases wherein special investigative measures have been used, supposedly for protection of classified information, constitutes public control evasion which involves a real risk of political manipulation (Kalajdziev, 2015).

3

The Right to Freedom of Expression and its Restrictions – In or Contrary to the Public Interest?

The right to freedom of expression is a fundamental human right and also a right guaranteed by Article 10 of the European Convention. However, the freedom of expression is not an absolute right, which means that in many situations it may be restricted, primarily if required by the public interest. Passing on information for media coverage must be in compliance with the rights of the involved persons, as guaranteed by the European Convention on Human Rights and Freedoms, the constitution and the laws. Enjoying these freedoms, given that they also involve obligations, may be subject to formalities, conditions, restrictions or penalties, as it is prescribed by law and is necessary in one democratic society, *inter alia*, for preventing crime, protecting the reputation or rights of others, preventing disclosure of confidential information, or for maintaining the authority and independence of the judiciary.

However, on the other hand, the person who defends his/her right to freedom of expression may argue that his/her actions are in PUBLIC INTEREST, meaning that it is in the interest of the public and the common good to be allowed to speak or write the matter. Hereby, when the court accepts the thesis that someone has the right to say or write something, although it violates the rights of another person, provided the thing said is in the public interest, it means that freedom of expression overrides other rights.

The question of how we treat the right to freedom of expression mostly reflects on how we treat

defamation and insult liability. Namely, although defamation and insult are decriminalized and there is no possibility for criminal responsibility, the Law³ adopted in 2012 provides for an opportunity for civil liability for defamation and insult.

The sensitivity of this matter is evident, considering that, essentially, the question is closely linked to media freedom and the right to express certain things in interest of the public, which sometimes come into conflict with the right of individuals to protect his/her honor and reputation. Practically, the provision regulating defamation and insult care for the honor and reputation of individuals as opposed to the statements about him/her.

Hence, the Judge Gaber-Damjanovska is quite right when she says that every good national legislation must offer a reasonable balance between the need to protect and promote freedom of expression and the justified protection one's honor and reputation from defamation and insult, and that the application of the Law should not lead to self-censorship due to severe legal consequences, because it destroys critical journalism and the spirit of the democratic debate in the society.⁴

The Law on Civil Liability for Insult and Defamation guarantees freedom of expression and information as one of the basic foundations of a democratic society, and contains referential norms in Article 10 of the European Convention and the case law of the European Court concerning the restriction on freedom of expression and information. Namely, Article 10, paragraph 1 of the ECHR

³ Law on Civil Liability for Defamation and Insult (Official Gazette of RM no. 143/2012)

⁴ Separate opinion of the Judge Natasa Gaber-Damjanovska for the Initiative for evaluation of the constitutionality of the Law on Civil Liability for Defamation and Insult.



The Public Interest throughout the Principle of Publicity in Court Proceedings

provides that everyone has the right to freedom of expression. This right includes freedom to hold opinions and to receive and impart information and ideas without interference by a public authority. Expression involves a risk of causing damage and harm to the interests of others. Paragraph 2 of Article 10 of the ECHR regulates the system of restrictions on the right to freedom of expression, and states that the exercise of this freedom, since it involves 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.

The insult, as defined in the Law, constitutes a statement, behavior, publication or other expression of degrading opinion intended for another person, thereby violating the person's honor and reputation, with the intention to belittle him/her. The Law provides for exemption from liability for insult if someone presents degrading opinion for another person while defending the freedom of public expression or other rights or protecting the public interest or other legitimate interests, if: 1) the manner of expression or other circumstances suggest that it was not meant as an insult; 2) did not caused significant damage to the reputation of the person and 3) the opinion was not presented solely in order to humiliate the other person or to belittle his honor and reputation. Further, the

one who delivers degrading opinion of a public official in the public interest is not held liable for insult, if he proves that it is based on true facts or if he proves that he had grounds to believe in the validity of the information, or if the statement contains valid criticism or encourages discussion of public interest, or is given in accordance with the professional standards and ethics of the journalistic profession.

In assessing the conditions for exemption from liability, the court shall apply the criteria for justified restriction on the freedom of expression contained in the ECHR and the case-law of the European Court of Human Rights.

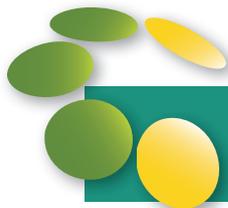
A person who discloses or disseminates *false* information to a third party that is harmful to the honor and reputation of another person with established or obvious identity, and in the process, knows or is obligated to and may know that is false, shall be held liable for defamation. The burden of proof falls on the defendant, who is obliged to prove the truthfulness of the facts contained in the claim. There is an exception in cases wherein the plaintiff as a public official has a legal duty to expound on concrete facts that are directly related or relevant to the performance of his/her function, provided the defendant proves that he had reasonable grounds for making the claim that is the public interest.

Also, due to the Initiative for evaluation of the constitutionality of the Law on Civil Liability for Defamation and Insult, the Constitutional Court decided not to initiate a procedure for evaluation of the constitutionality of the Law in general, nor of any separate provision disputed with the initiative.

4

The Public Interest in the New “Special” Laws

In November 2015, the Assembly of the Republic of Macedonia adopted the Law on Protection of Privacy and the Law on Protection of Whistleblowers. The initiation of the adoption of these two laws is in full correlation with the developments in the socio-political sphere regarding the exposure of the scandal over the mass illegal interception of communications. Both laws govern areas which directly affect the public interest, one in terms of protection of the privacy and the other in terms of the protection of individuals who can reveal actions that could jeopardize the fundamental rights and freedoms of citizens and business entities.



4.1. Law on Protection of Privacy

The Law on Protection of Privacy aims to fully regulate the privacy issues of the citizens of the Republic of Macedonia arising from the materials derived from the illegal interception of communications in the period from 2008 to 2015. Namely, the Law imposes an obligation to the holders of the abovementioned materials banning possession, processing and publication of the aforesaid materials and all other similar materials obtained through an unlawful interception of communications. The Law obliges the holders of the materials to hand in the materials obtained through unlawful interception of communications, within 20 days upon the date of Law’s entry into force. In addition, the Law envisages penalties for those who publish the aforementioned materials or introduce

other persons to the content of the materials except when a conversation or information is of public interest. The penalties range from one month to one year in prison for physical persons and competent persons of legal entities, as well as a fine for the legal entities. An interesting fact is that the Law provides for an obligation of the competent court to respect the ECHR and the case-law of the European Court of Human Rights. The Law envisages two restrictions, one for the scope of its application and one for its validity. Namely, the provisions of the Law do not apply to the published materials obtained through the unlawful interception of communications as of July 15, 2015, and it enters into force 6 months upon its publication in the Official Gazette of the Republic of Macedonia.

The Law on Protection of Privacy is not clearly constructed and is completely confusing. In addition, it is not in line with the Constitution as it envisages novelties that are contrary to the Constitution itself. Article 98 of the Constitution of the Republic of Macedonia provides for respect of the ECHR, whereas the part of the Law concerning the case law of the Strasbourg Court is in contravention of the same Article of the Constitution, pursuant to which “The courts decide on the basis of the Constitution, the laws and the international agreements ratified in accordance with the Constitution.” Hence, this Law introduces the case law of the Strasbourg Court as a source of the law, which judges should apply when deciding on cases wherein this Law is applicable. In terms of the public interest, the Law provides no definition and precision on what in this case would be and who would define the public interest, making this Law more confusing and difficult for application in the operation of the courts.

4.2. Law on Protection of Whistleblowers

The purpose of this Law is to regulate the protected disclosure, the rights of the whistleblowers, as well as the treatment and the obligations of the institutions i.e. the legal entities regarding the protected disclosure and the protection of the whistleblowers. The Law is important for the protection of the public interest, especially since protected disclosure is defined as a disclosure of reasonable belief or information of a criminal or other unlawful or wrongful conduct that has been committed, is being committed or is likely to be committed and violates or threatens the public interest. At the same time, the Law clarifies that the term public interest therein denotes protection of citizen’s basic human rights and freedoms recognized by the International Law and established by the Constitution, avoidance of risks to the health, defence and security, protection of the environment and nature, protection of property, protection of the free market and entrepreneurship, rule of law and fight against crime and corruption.

Protected disclosure can be carried out as a protected internal disclosure, protected external disclosure or protected public disclosure, in good faith and reasonable belief in the veracity of the information contained in the disclosure at the time of disclosing, whereby the whistleblower is not obliged to prove the good faith and the veracity of the disclosure. The whistleblower shall be afforded protection and guaranteed anonymity and confidentiality to the required extent and point in time. The right to remain anonymous may be restricted with a court decision whereof the whistleblower shall be informed forthwith.

The Law envisages protection of the data and identity of the whistleblower by forbidding disclosure or enabling of disclosure of the whistleblower’s identity, unless required by a court decision. Furthermore, the whistleblower and a person close to the whistleblower are afforded protection from any kind of infringement of rights or harmful action or threat of occurrence of harmful actions due to the protected internal or external disclosure, or the protected public disclosure. The whistleblower is entitled to legal protection before the competent court in accordance with the law.

Despite the well governed protection of whistleblowers, the Law contains several provisions the application whereof in practice might prove problematic.

The internal whistleblowers report suspicion or information of criminal wrongdoing that is being committed or will be committed to the institution i.e. the legal entity.

The external whistleblowers report to the Ministry of Interior, the competent Public Prosecution, the State Commission for Prevention of Corruption, the Ombudsman of the Republic of Macedonia, or other competent institutions.

However, external disclosure shall be valid only if several conditions are met. First, that the disclosure is against the legal entity where the whistleblower makes the disclosure. Second, that the whistleblower has not received any information on measures taken regarding the disclosure. Third, that no measures were taken or the whistleblower is not satisfied with the treatment, or suspects that no measures will be taken as a result of the disclosure. In any case, pursuant to the Law, the whistleblower must have made the first type of disclosure (internal disclosure) in order to make an external disclosure.

The manner of regulation of the protected public disclosure or making information publicly available regarding the realization that a criminal offence was committed, is being committed or is likely to be committed is highly problematic.⁵ In this type of disclosure, the protection of the whistleblower is provided only when the whistleblower has already conducted the first two types of disclosure (internal and external). If the whistleblower publicly discloses information without having conducted these two types of disclosure, then he is not entitled to protection from violation of the right of employment in the institution wherein the disclosure is conducted, nor is he/she entitled to legal protection before the competent court.

This contravenes the principles of protection of whistleblowers that many countries have incorporated in their jurisdictions. According to these principles, established by Transparency International⁶, whistleblowers should also enjoy legal protection (including protection from negative consequences in the workplace) in situations when they make public disclosure (in the media, citizens’ associations and other organizations).

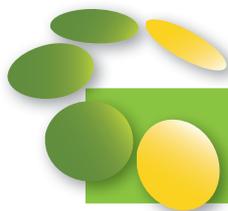
⁵ It violates or endangers the life of the whistleblower and a person close to the whistleblower, the health of the people, the safety, the environment, inflicts extensive damage, or if there is an imminent danger of destruction of evidence.

⁶ International Principles for Whistleblower Legislation, Best Practices for Laws to Protect Whistleblowers and Support Whistleblowing in the Public Interest.

5

The Public Interest in Court Proceedings

Civil courts are not as burdened with matters of public interest as administrative and criminal courts. Most of the cases handled in civil courts wherein the public interest is brought into question are primarily property cases as well as cases of protection of personal rights and freedoms. Namely, such treatment seems quite restricted at first, but taking into account that privacy rights cover a good part of the corpus of individual rights and freedoms, we can conclude that this part of the judiciary, despite that it partially handles the issue of public interest, is not so insignificant compared to the other parts of the Macedonian judiciary. In addition, the reputation and honor of individuals and legal entities were included in the corpus of rights and freedoms protected in civil proceedings with the adoption of the Law on Civil Liability for Insult and Defamation in 2012.



5.1. Public Interest v. Freedom of Expression

The court practice in the Republic of Macedonia and the numerous actions against journalists (and not just journalists) for insult or defamation reflect courts' perception of the public interest or the freedom of expression in terms of the public interest and the (im)balance between the general interest and the individual rights.

The reports of the Media Development Centre (MDC)⁷, which monitored court proceedings

brought under the Law on Civil Liability for Insult and Defamation in the period from February 2013 to June 2015, constitute a solid basis for drawing a conclusion of the lessons drawn from the court practice.

One of the main conclusions from the reports of MDC refers to the conclusion that in cases where there is no involvement of any government officials, judges consistently apply the case law of the European Court of Human Rights and the European Convention i.e. even though the court generally adheres to Article 6 of the ECHR, there are deviation from this behavior or there are court cases wherein the court acts differently, allows acceleration of the procedure, schedules hearings for a shorter period of time, and thus enables rapid completion of some court cases.

These “accelerations” are observed in cases wherein the plaintiffs are senior government officials. In this sense, MDC reports conclude that the double standard in the conduct of the judges, the unfounded full protection of the reputation of officials and the violation of the European Convention and the case law of the Strasbourg Court, seriously threaten freedom of expression in Macedonia, and questions the (in)dependence and (low) quality of the judiciary in the country.

The published decisions prove that the double standard in the trials is still present i.e. judges protect the freedom of expression only in cases that do not involve senior government officials, whereas in cases that involve officials, judges act in favor of

⁷ Monitoring defamation action cases



the government and do not comply with the European Convention on Human Rights, nor the case law of the Court in Strasbourg. Regarding defamation and insult, journalism remains the most sued profession. This situation arises primarily from the large number of cases brought against journalists or media outlets i.e. the trend of using court proceedings brought under the Law on Civil Liability for Defamation as one of the many mechanisms to control and pressure critical journalists and media outlets in Macedonia. In addition, one of the observations from the monitored cases and published reports is that the awarded compensation for non-pecuniary damages is high, despite being in accordance with the legal framework. Suchlike court decisions point to the existence of a negative and worrying practice in Macedonia, and instead of protecting the freedom of expression, the court further endangers it by protecting the government and government officials, on one hand, and punishing journalists, threatening the survival of the media and reinforcing fear and self-censorship, on the other hand (*Medarski, 2015*).

One of the most conspicuous court decision, which is going to be remembered for its controversy, is the decision in the case of ***Mijalkov v. Focus***, in which Mijalkov claims liability for defamation against the journalist Vlado Apostolov and the editor Jadranka Kostova, for publishing the statement of the former ambassador Igor Ilievski in the daily newspaper Focus saying that the former ambassador was forced to escape from the Czech Republic due to the pressure exerted by Mijalkov.

According to him, they put forward false information, and thus violated his honor and reputation as personal rights. The Court of Appeal, affirming the decision of the court of first instance, partially accepted the claim of the plaintiff Saso Mijalkov and decided to fine Vlado Apostolov with EUR 1,000, Jadranka Kostova with EUR 5,000 euros and Igor Ilievski with EUR 10,500 euros to be payed as compensation for non-pecuniary damages for violation of his honor and reputation, disregarding the defendants' claim that the information was published in order to encourage debate in public interest.

It seems highly controversial that the Constitutional Court rejected the claim for protection of rights and freedoms filed by the journalists Jadranka Kostova and Vlado Apostolov and considered that the Court of First Instance and Court of Appeal duly held that there were no grounds for exemption from liability of Apostolov and Kos-

tova. Namely, the Constitutional Court defended its decision by arguing that the article published in the newspaper Focus which conveys the statement of Ilievski, contained no information of public interest, but was released with the intention "to start rumors that seriously violate someone's right to honor and reputation".

The analysis of the court decision in these proceedings clearly shows that the court did not act in accordance with the Law on Civil Liability for Defamation and Insult, and even less in accordance with the case law of the European Court. Namely, the court wrongly found that the publication of the article is of no public interest, that the acquired information has an unreliable source and that journalist standards were not applied in the publication of the article. The court decided to partially accept the claim of the plaintiff, although the requirements for exemption from liability for defamation provided in Article 10, paragraph 1, item 4 of the Law on Civil Liability for Defamation and Insult were met, which allow for exemption from defamation liability provided the means of mass media disclose facts pertaining to matters of public interest, use reliable sources of accurate information, and manage the facts with the required extent of due diligence, in compliance with the professional standards of the profession.

First, the court should have recognized the public interest as indisputable, as it involves a public official, or more precisely, the Director of the Administration for Security and Counterintelligence. The court further held that the source of information is unreliable and irrelevant, although the claims of the journalist Vlado Apostolov come from Ilievski, a former ambassador to the Czech Republic. In addition, although, before the publication of the article, the journalist asked the plaintiff to state his opinion on the claims presented by Ilievski (the defendants also unsuccessfully referred to the Ministry of Foreign Affairs and asked for information on the allegations), the court held that the journalist and the editor in chief did not act in accordance with the journalistic standards and did not substantiate the claims made by Ambassador Ilievski. Moreover, given the amount of the damages award, the court didn't seem to consider the income and assets of the defendants.

The courts' perception of the public interest is evident in the court decision in the case of ***Nikola Gruevski v. Tito Petkovski***, wherein the court decided in favor the plaintiff and granted compensatory award of EUR 10,000, despite concerning

a matter of public interest to all the citizens in Republic of Macedonia – the name issue. It is evident that the court disregarded the practice of the European Court that politicians and public officials should have a high tolerance threshold, and did not appreciate that it is a matter of public interest that overrides the individual rights to honor and reputation, and that politicians enjoy a higher level of protection when they open a debate on issues of public interest.

On the other hand, in several other cases that do not involve officials, the courts adequately respect the public interest and decide according to the Law, the Convention and the case law of the ECHR, showing a worrisome tendency of having different criteria depending on the parties to the dispute. For instance, in the case of **Alex Jakimovski v. Snezana Lupevska** and the *Company for production, marketing and services Ltd. Trinity Plus Productions - Skopje*, wherein the plaintiff claims defamation liability, because in the show *KOD*, Lupevska, according to him, published false information concerning the plaintiff and his assets, thereby damaging his honor and reputation, the court duly held that the topic covered by the defendant is in the public interest, and did not intend to harm the reputation of the plaintiff.

Further, in the case **Toplifkacija v. Popovski**, wherein the plaintiff claimed liability for defamation from Popovski, who in his capacity as a host of the TV show *Iks nula* presented a series of negative views and opinions on the plaintiff, the court duly held that the show intended to encourage a debate on issue of public interest and presented them as opinions, not as facts, and as such are not subject to substantiation.

In the case of **Igor Serafimovski v. Ljubisa Arsic**, the plaintiff claims defamation liability due to an article published in the weekly magazine *Globus* under the title *With Mom and Dad in NATO*, in which Arsic stated that the new employees in the Ministry of Defense receive a salary on merit in the political party and connections in the government authorities, stating that the driver of the Deputy Minister Igor Serafimovski receives a salary of MKD 30.000, in the same amount as the salary of an assistant manager with higher education and at least 5 years of service. The court held that it was an issue of public interest, that Arsic acted in good faith on a subject of general interest and that he respected the obligations and responsibilities while exercising freedom of expression and that he maintained the journalistic standards.

In this regard, we would like to present the case brought before the Court of First Instance Skopje 2, in Skopje, in which the plaintiff I.G. from Skopje filed a claim against the defendant A.N. from Skopje claiming liability for defamation committed during interviews given by the defendant for *TV A1* on 13.05.2011 as well as for the newspaper *Focus* on 03.06.2011. The plaintiff argued that the information contained in the statements of the defendant in respect of the plaintiff concerned the involvement of the plaintiff in two cases that were subject of an investigation and criminal proceedings against organized crime.

This court decision is interesting for analysing in terms of the protection and promotion of the public interest as the Court, apart from quoting Article 10 of the European Convention on Human Rights, looks deeper into what constitutes public interest. Namely, in the elaboration of the decision, the court states that the condition for exemption from defamation liability under Article 9, Paragraph 5 of the Law on Civil Liability for Defamation and Insult was met, because the stated by the defendant is in public interest as it involves reporting of criminal offences that harm the economy of the Republic of Macedonia, and the defendant proved that he had grounds to believe in the content of the criminal charges against the plaintiff and his statements for *TV A1* and the newspaper *Focus*.

Moreover, “it also met the condition for exemption from liability for defamation under Article 10, paragraph 1, item 1 of the same law as the claim of the defendant was already contained in documents in a state body, in the files of the cases in the Basic Public Prosecutor’s Office - Skopje and Basic Public Prosecutor’s Office - Organised Crime and Corruption - Skopje, established as cases upon criminal charges filed by the defendant” (Court Decision 80.P4-61 / 13). Unlike this decision, none of the other court decisions subject to analysis look deeper into determining the public interest.

The decision of the Court of Appeal, Skopje GZ-1940/14, rejecting the applicant’s appeal against the ruling that rejected his claim for liability for defamation by the defendant, states that “the Court of First Instance rightly held that, in the present case, there is no liability for defamation in the actions of the defendant, all the more so considering the dispute and disagreements between the parties, the capacity in which the defendant acted and for what purpose, with what purpose and

where the statement was given, having also regard to Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which clearly states that everyone has the right to freedom of expression, which includes freedom to hold opinions and to receive and impart information without interference by public authority and regardless of frontiers” (Decision GZ-1940/14).

An even more controversial decision is the decision in the criminal proceedings of the journalist **Tomislav Kezarovski**. In this case, the court found Kezarovski guilty of committing a crime Unauthorised release of information and data about witnesses, collaborators of justice and victims who appear as witnesses and persons close to them under Article 42, paragraph 1 of the Law on Witness Protection. The court held that Kezarovski as an editor of the periodical “Reporter 92” revealed the true identity of the person under the pseudonym *Breza* who testified as a threatened witness in the case under consideration. Although he was obliged to treat the data as classified information under Art. 270-b of the Law on Criminal Procedure as the author of articles published in “Reporter 92”⁸, Kezarovski, after he received a copy from an NN person of the hearing of the threatened witness, published that the threatened witness was transferred from the prison in Skopje to the prison in Stip. Afterwards, he published the first and the fourth page of the record as well as his name. Hence, the court held that he revealed against the law the true identity of the witness, thus endangering his life, health, liberty and physical integrity. Kezarovski was initially sentenced to four and a half years in prison, but afterwards, the Court of Appeal reduced his sentence to two years.

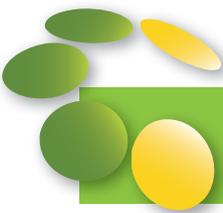
The court reached this decision despite the very fact that the person charged with the offense is a journalist and is prosecuted for published articles, which in itself constitutes direct restriction on the freedom of expression, especially, if you bear in mind that the purpose of the articles was doing his job as a journalist by making available to the public information on false witness, and expressing his position on certain actions of individuals from the Ministry.

The gravity of the situation became evident with the detention of Kezarovski, which sparked serious reactions both from international organi-

zations and from the civil and NGO sector in the country. After a series of dubious decisions by the court and the prison governor, Kezarovski was released in January 2015, after serving nearly two years in prison. On January 15th, 2015, the Court of Appeal reduced the initial sentence to two years in prison, whereupon Kezarovski was immediately taken into custody to serve his sentence. However, on January 20th, the day when around 3,000 people held a protest march in Skopje demanding his release, the prison governor decided to release Kezarovski by “reason of health”. On January 22nd, two days after he was released for health reasons, the Criminal Court released Kezarovski from further detention, upon recommendation of the warden of the prison.

The Public Prosecutor’s Office for Organized Crime and Corruption filed an appeal against the decision of the Criminal Court, on ground of error of fact. The Court of Appeal dismissed the appeal and upheld the decision of the Criminal Court to accept the proposal of the governor of the prison to release Kezarovski on probation, which ended on June 27th, 2015.

Meanwhile, the legal representatives of Kezarovski submitted to the Supreme Court a request for extraordinary review of both decisions in which Kezarovski was found guilty and sentenced to prison. The Supreme Court has not yet reached a decision on the case.



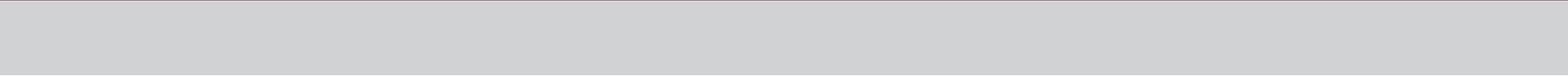
5.2. Right to Property

In addition to the proceedings regarding protection of honor and reputation, the public interest often appears in civil proceedings in terms of restriction on the right of property. Namely, in the case wherein the plaintiff S.B. from the village of Velgosti sued JSC E. Skopje, for placing a substation on a plot in ownership of the plaintiff without respecting a building procedure and without concluding a contract for the location, the Court of First Instance in Ohrid ruled that although the defendant indicated that the substation is in public interest as it supplies the whole village of Velgosti with electricity, it shall be dislocated from the plot

⁸ From 20.11.2008 under the title “Case Oreshe – MIA Swears by Burglars” with the subtitle “Economists from the Agency for Security and Counterintelligence and Breza Frame the Brothers Gjeorgjievski”, and from 4.12.2008, under the title “Case Oreshe Acquired a New Dimension”, with the subtitle “Zlatko from Stip is changing his mind?!”.

of the plaintiff. The courts' elaboration of the decision, P1-1388/12 from 22.04.2013, goes into interpretation of the public interest and its significance. Namely, the Court stated that although the defendant presented "*that the substation is in public interest, it did not influence the outcome of the decision as even objects of public interest need a construction approval*" (Court Decision P1-1388/12).

As it will be discussed below in the text, the representation of the public interest in civil court proceedings largely overlaps with its representation in cases handled before the European Court of Human Rights, where it is subject to discussion and decision under Article 8, Article 9, Article 10 and Article 11, as well as Article 1 of Protocol 1 of the Convention.





The Public Interest in the Decisions of the Administrative Courts in the Republic of Macedonia

Unlike the civil courts, which rarely encounter legal issues concerning the public interest, the administrative courts, the Administrative Court of the Republic of Macedonia and the High Administrative Court often deal with issues related to the public interest in the scope of operation. The underlying reason is that the State or the Executive branch appears as the defendant in all cases before the administrative courts, either through state bodies or agencies, at both national and local level. Hence, given the executive government is the one that decides what falls under the protection of the public interest, within the framework of the laws, it is only logical for administrative courts to decide on issues that affect the public interest.

Taking into consideration that the administrative courts decide on the legality of the actions of the state administration, the Government, other state authorities, municipalities, the City of Skopje, organizations established by law, as well as legal persons and other entities carrying out public authorizations (holders of public authorizations), when deciding on rights and obligations in individual administrative matters, as well as action of those bodies subject to infringement proceedings (Law on Administrative Disputes), it is evident that they evaluate whether the actions of these bodies are in accordance with the authorizations granted to them by the laws.

Hence, the administrative courts have a clear role when it comes to controlling and correcting the implementation of measures and actions arising from the needs imposed by the public interest in different areas of the social trends. Due to the

growing necessity for wider control of the legality of the actions of the executive branch, the Administrative Court of the Republic of Macedonia was established in 2006, as the first and sole specialized court in the judicial system with general jurisdiction. Thus, the Administrative Court replaced the Supreme Court of the Republic of Macedonia by claiming jurisdiction for administrative disputes.

In this context, we would like to point out that the High Administrative Court was established in 2010 with amendments to the Law on Administrative Disputes that were initiated with the Decision of the Constitutional Court of the Republic of Macedonia U.no. 231/08 from 16.09.2009, and started its operation in 2011. In the period following the decision of the Constitutional Court until the commencement of operation of the High Administrative Court, the Supreme Court of the Republic of Macedonia was appointed as competent to handle complaints against decisions of the Administrative Court. This is important as in that short period of time, in which the Supreme Court handled complaints, it took positions regarding the public interest in different segments unique for this Court.

The analysis of court cases indicates that the public interest is most frequently found in cases of expropriation and denationalization, while less prevalent in other areas of the jurisdiction of administrative courts. Hence, it is clear that the administrative courts exclusively respect the public interest, for example, within the framework of the Law on Expropriation⁹ and the Law on Denationalisation¹⁰, not going into a broader interpretation thereof in cases that fall under their jurisdiction.

⁹ Article 9 of the Law on Expropriation.

¹⁰ Article 10 of the Law on Denationalisation.



The Public Interest in the Decisions of the Administrative Courts in the Republic of Macedonia

For example, in the Decision of the Administrative Court U-2.no.2079/2011 from 09.01.2014, wherein the plaintiffs are A.F, I.F, and P.K, while the defendant is the Minister of Finance and the subject of the administrative dispute is restitution of expropriated property in 1947, the Administrative Court rejected the claim of the plaintiff. The reason for rejecting the claim was the stance of the Administrative Court that the Ministry of Finance objectively decided against full restitution of the claimed property as one part of the property was planned for realization of contents of public interest i.e. construction of primary schools and streets. Despite the fact that the plaintiffs challenged the decision of the Minister of Finance with the argument that the purpose of the seizure was not realized and the property was still an undeveloped construction land, the Administrative Court concluded that the *“envisaged construction of roads and primary school is a legal obstacle for restitution of the property subject to denationalization claims”*.¹¹ Namely, as mentioned above, the Administrative Court in this case considered only the legality, but not the essence of the legal matter, which is evident in the fact that it did not consider whether the facility of public interest was constructed nor when it was planned to be constructed.

In case U-2.no. 33/2014, the plaintiff J.V.Z filed a complaint for administrative dispute against the decision of the Minister of Transport and Communications for expropriation of 1/10 of his property to the benefit of the Republic of Macedonia, for construction of sports recreation center. The plaintiff challenged the legality of the expropriation decision as he considered that the public interest is not determined with certainty because the Detailed Urbanisation Plan that encompassed the disputed plots did not envisage construction of sports stadiums and arenas as the defendant stated in the expropriation decision. The Administrative Court in this case, unlike the aforementioned case, assessed the justification for expropriation, whereupon concluded that the evidence presented did not show that the *“disputed plots owned by the plaintiff were envisaged for construction of facilities, i.e. they were not included in the Detailed Urbanisation Plan.”*¹² Therefore, the Administrative Court reached a decision that upheld the claim of the plaintiff as founded, and annulled the expropriation decision and returned the case for retrial.

The Administrative Court reached a similar decision in the case U-2.6p.485/2013 in which upheld the plaintiff's claim and annulled the decision on denationalisation of the Minister of Finance. The subject of the administrative dispute was restitution of land allegedly in the public interest as it was in the area of ARM and contained a water treatment plant and a green area. The Administrative Court decided that the Minister of Finance had not given sufficient justified reasons that the disputed property is of public interest, which was also confirmed by the Ministry of Defence which informed the Administrative Court that the property is not used by ARM nor is of public interest. Additionally, the Administrative Court raised the question on how the property could be of public interest when, on one hand, a part of it has been used by the plaintiffs, and on the other hand, it has not been used by ARM. Hence, the Administrative Court ordered the defendant, the Minister of Finance, in a repeated procedure to inspect the site and take into account the General Urbanisation Plan or Detailed Urbanisation Plan that covers the disputed plots.¹³

Similarly to the Administrative Court, the High Administrative Court, looking at the appeals against the decisions of the Administrative Court, requires the state authority to determine the public interest. Namely, in the case UZ.no.232/2012, the High Administrative Court rejected the appeal of the State Attorney of the Republic of Macedonia against the Decision of the Administrative Court U.no.4346/2009 that annulled the decision for denationalisation of the Minister of Finance in favor of the claimants. In the explanation of the decision, the High Administrative Court states that in the specific case *“the facts of decisive importance have not been fully established for proper decision on the request for denationalisation and that the stance of the Administrative Court was correct ... it will have to be determined whether the disputed property was of public interest in a retrial before the administrative bodies with additionally obtained evidence”*.¹⁴

In the case UZ.no.3/2008 from 20.03.2008, the Supreme Court decided upon an appeal against the decision of the Administrative Court that rejected the request for an interim measure for postponing the execution of the conclusion and the decision of the Governor of NBRM, thereby

11 Decision of the Administrative Court U-2.no. 2079/2011 from 09.01.2014.

12 Decision of the Administrative Court U-2.no. 33/2014 from 04.09.2014.

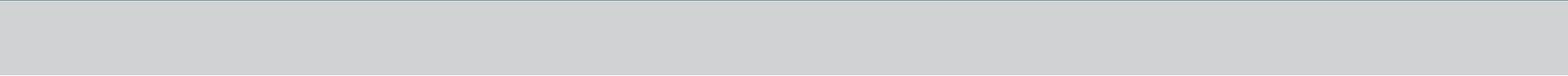
13 Decision of the Administrative Court U-2.no. 485/2013 from 29.01.2014.

14 Decision of the High Administrative Court UZ.no.232/2012 from 26.03.2012.

rejecting the request of the plaintiff for initiating a procedure for obtaining approval for eligible participation in the W. Bank i.e. will not be able to become a shareholder with eligible participation in the W. Bank. The Administrative Court, as a reason for rejecting the request for an interim measure, stated that the execution is not likely to inflict irreparable damage to the plaintiff and that the postponement of the execution is not contrary to the public interest.

The Supreme Court stated that in this case, *the public interest is an essential reason for rejecting the request for an interim measure, which would consist of postponing the execution of the contest-*

ed conclusion and the decision of the Governor of the N. Bank. According to the Supreme Court, the contested administrative acts were adopted to protect the safety and stability of the bank and its creditors, thus the stability of the financial system as a whole, which is of public interest. For that reason, the Supreme Court of Republic of Macedonia held that the adoption of interim measures in this specific case would have been contrary to public interest, and therefore, rejected the appeal as unfounded. Hence, the Supreme Court stated the following „When deciding on the request for adoption of interim measure, always assess whether the postponement of the execution of the administrative act is contrary to the public interest.“¹⁵





The Public Interest in the Decisions of the Constitutional Court of Republic of Macedonia

The Constitutional Court of Republic of Macedonia has a unique role in the Macedonian legal system as it controls the work of the executive authority pertaining to the compliance of the laws with the Constitution, but it also remedies the violations of limited corpus of rights and freedoms guaranteed by the Constitution.¹⁶ This responsibility is particularly interesting for this analysis due to the fact that among the limited corpus or rights are the freedom of thought and public expression of thought, which we discuss in one of the cases that follow, and are always under the watchful eye of the public.

Unlike the regular courts, the Constitutional Court decides on a very limited corpus but its decisions have a common effect, i.e. apply to all the citizens and legal entities in the Republic of Macedonia. Therefore, the positions and opinions of the Constitutional Court in the decisions on issues directly or indirectly concerned with the public interest are interesting for analysis.

Namely, in the Decision U. no. 120/1998-0-1 from 10.03.1999, at the initiative of the Association for Protection of the Interests of the Owners of Seized Property - Skopje, the Constitutional Court repealed article 2, article 9 paragraph 1 items 5 and 6, article 11 paragraph 1, article 22 paragraph 2, article 23, article 28 paragraphs 1 and 2, article 29 and article 34 paragraph 2 in the part “are not subject to interest charges” and article 38 from the Law on Denationalization (Official Gazette of

Republic of Macedonia n. 20/98) as unconstitutional. The underlying reason is that the Constitutional Court considered that these legal provisions relating to non-restitution, i.e. *granting compensation for property that is in public function without specific determination of the public interest* are contrary to article 30 of the Constitution of Republic of Macedonia which envisages protection of property. In the elaboration of the public interest, the Constitutional Court took a stand that “*the public interest is in close correlation with the term general interest and constitutes a clear determination of the range of objects on which such a relation can be established. That interest could not be covered by a single law and its determination, when it comes to objects, should clearly identify the objects by their nature that require exercise of a right over these objects from a wider group of legal entities and other beneficiaries. Furthermore, it should be clear why these objects have such a character. It may be a particular object, but also it may be globalized on various objects or that interest may be determined by type. Starting here and moving towards the constitutional framework relating to the public interest, it may be concluded that the determination not to return the property, but to give compensation for the property that is in public function without a specific determination of the public interest, as prescribed in the provisions of article 9 paragraph 1 items 5 and 6 from the Law, restricts the right to property, hence, the Court concluded that these provisions are not in accordance with article 30 of the Constitution*”.¹⁷

¹⁶ Article 110, item 3 of the Constitution of Republic of Macedonia.

¹⁷ Decision by the Constitutional Court of Republic of Macedonia U. no. 120/1998 from 10.03.1999.



The Public Interest throughout the Principle of Publicity in Court Proceedings

Upon the initiative by the persons M.G. and S. and V.A., with the Decision U. no. 200/2007-0-1 from 11.02.2009, the Constitutional Court repealed article 3 paragraph 1 item 3 of the Law on Expropriation (Official Gazette of Republic of Macedonia n. 33/1995, 20/1998, 40/1999 and 31/2003) and articles 1 and 2 of the Law on Changes and Amendment to the Law on Expropriation (Official Gazette of Republic of Macedonia n. 46/2005), because they are contrary to the Constitution of the Republic of Macedonia.

The disputed legal provisions concerned the reasons carrying out an expropriation, more precisely, expropriation in cases of construction of facilities and performing other activities of public interest, as well as on the priority right to the construction and the manner, conditions and the procedure for acquiring the priority right to construction. The Constitutional Court found that neither in article 30 nor in any other article of the Constitution is there a precise definition of the public interest, *“on the basis of which criteria it is defined by law, the Court considers that despite the discretionary right of the legislator to define public interest, that discretionary right must extend to certain degree, that is, it should not be without a reasonable ground. Namely, it does not suffice only to note in the Law on Expropriation that there is public interest and to enumerate the types of facilities for the construction of which expropriation is made. It is necessary to define what public interest is realized in, what it consists of and what is the reasonable ground that imposes the need to interfere into the private sphere through expropriation. Otherwise, through failure to observe the said elements, the Court found that expropriation as a final, necessary and useful measure will lose its sense.”*¹⁸

If the above decisions of the Constitutional Court of Republic of Macedonia are taken into account, it is obvious that its function of controlling the powers of the legislature is entirely fulfilled, due to the fact that in addition to repealing the disputed legal provisions, it gave benchmarks that the Assembly should follow when defining public interest so as to be in accordance with the Constitution. It is apparent that in this part the Constitutional Court attempted to partially implement the test that is always used by the European Court of Human Rights when trying to balance the interferences of state in

the right to privacy and family, freedom of expression, freedom of assembly, freedom of movement, right to property, etc., which will be further discussed in the part dedicated on the case-law of the European Court of Human Rights.

However, the Constitutional Court is not always inclined towards defining the public interest as in the previous decisions. Namely, with the Resolution U.no:201/2008-0-0 from 13.05.2009, the Constitutional Court decided not to instigate a procedure for appraisal of the constitutionality of article 2 paragraph 3 and article 3 paragraph 4 of Law on Expropriation (Official Gazette of Republic of Macedonia n. 33/1995, 20/1998, 40/1999, 31/2003, 10/2008 and 106/2008) upon the initiative of the legal entity M AD S. and the physical person M.G, the disputed provisions referred to restriction on property of already built installations, or more precisely, the construction of gas pipelines, oil pipelines and other pipelines.

The petitioner in the initiatives tried to explain that through these provisions that expand the list of beneficiaries of the expropriation (legal entities that transmit electricity, or natural gas), instead of expropriation, the state actually attempts a *de facto* nationalization to the benefit of the public enterprises, which is not recognized as a legal category by the Constitution of Republic of Macedonia, whereby the nature of the expropriation itself is changed. This is because instead *“for construction of facilities of public interest it was used on built facilities for performing activities of public interest or on facilities for which the construction was already expropriated”*.¹⁹ Upon the submitted initiatives, the Constitutional Court held that *“expropriation as an administrative-legal institute is carried out not only for the purposes of constructing facilities, but also for the purposes of performing other matters of public interest, from where the Court found that the statement in the initiatives that the legislator obviously linked the existence of public interest with the construction of facilities and plants, and not with already built, constructed facilities and plants, as well as with the pipelines for electricity and natural gas, is unfounded.”*²⁰

According to the Court, *“the purpose is fast and unobstructed continuation of the activities of transmission of electricity and natural gas, if after a legally conducted procedure the perform-*

¹⁸ Decision of the Constitutional Court of Republic of Macedonia U. no: 200/2007-0-1 from 11.02.2009.

¹⁹ Decision of the Constitutional Court of Republic of Macedonia U. no: 201/2008-0-0 from 13.05.2009.

²⁰ Ibid.

ers of the activity are taken their license away, and the building of a completely new system for a short period of time is practically impossible.²¹

The Resolution of the Constitutional Court was adopted by a majority vote, and the judge Ingilizova-Ristova issued a Separate Opinion that was contrary to the opinion of the majority. In the Separate Opinion, the judge Ingilizova-Ristova states that in this case *“there is a violation of the guaranteed right to ownership of property, especially since the intervention of the state between two legal subjects in the concrete provisions overcomes the framework of what is the essence of expropriation, since continued work of the energy system between the two legal entities (the former holder of the license and owner of the energy system for transmission and distribution and the new holder of the license) may be ensured also through the existing legal instruments for obligations, where both sides will determine their economic interest, and at the same time the public interest would be ensured, expressed through continued supply of both types of energy”*.²²

When it concerns the issue of public interest, the Constitutional Court is not always clear and precise in its opinions and decisions. Namely, in Decision U.no:27/2013-0-1 from 16.04.2014, the Constitutional Court rejected the request by N.S. the President of AJM and journalists N.S., F.F., S.L., B.B. and T.A., represented by the Law Firm Medarski from Skopje, for protection of the rights and freedoms of article 110, line 3 of the Constitution of the Republic of Macedonia for violation of freedom of public expression.

The petitioners are journalists that along with other colleagues attended the assembly gallery in the Assembly of Republic of Macedonia on 24.12.2012 and followed the session on the adoption of the 2013 Budget of the Republic of Macedonia. The public was particularly interested about the adoption of the Budget as there was a major conflict between the positions of the MPs of the ruling party and the opposition regarding the question whether the legal procedure for adoption of the 2013 Budget was followed. At one point during the session, the members of the security of the Assembly entered the gallery where the petitioners were staying and without any notice or information started emptying the gallery of the assembly

hall, whereupon some of the journalists reacted against such actions, claiming that they must report on the developments in the Assembly due to the developments in the assembly hall, and the public should be informed without any interference for all current and further developments.

However, the security of the Assembly removed all journalists and the ones who resisted were violently thrown out by using physical force. After this incident, the petitioners addressed the President of the Assembly of Republic of Macedonia with request for information on the person who ordered the intervention, but did not receive a reply. After their request was submitted, the Cabinet of the President of the Assembly issued a public statement expressing regret and additionally noted that removing the journalists from the gallery was ordered for the purpose of preventing a larger incident.

AJM and the petitioners also addressed the Ministry of Interior which informed that the President of the Assembly was evacuated due to the imposed risk and that he authorized the police officers in charge of security in the Assembly to restore the order and to ensure conditions for holding the plenary session. The Ministry of Interior also informed that while restoring the order and securing the conditions no excessive force or overstepping of authorities of the officers responsible for security of the Assembly was determined.

AJM and the petitioners also had addressed the Ombudsman who replied that he is not competent to decide upon their request.

Therefore, the petitioners addressed the Constitutional Court for protection of the freedom of public expression that is provided in a special procedure in article 110, line 3 of the Constitution of the Republic of Macedonia.

The Constitutional Court accepted the petitioners' claim, whereupon it reached a decision that rejected the claim. In the elaboration of the decision, the Constitutional Court gave contradictory judgments and opinions, as, first, it stated that *“according to the assessment of the Court, the removing of the journalists from the assembly gallery is an interference with the right of journalists to freely perform their work and inform the public*

21 Ibid.

22 Ibid, Separate Opinion of the Judge Liljana Ingilizova-Ristova.



The Public Interest throughout the Principle of Publicity in Court Proceedings

on the event that is undoubtedly important for the citizens of Macedonia - developments in the Assembly regarding the adoption of the 2013 Budget, the monitoring and reporting whereof was of great public interest,”²³ and below in the same decision it was stated that “The stated implies that the presence of journalists in the Assembly gallery and live broadcasting by itself does not make the assembly session public, because there are several ways in which the Assembly enables transparency in its operations that were applied in the present case. The physical removal of the journalists from the assembly gallery, in the specific situation of escalating chaos and disorder in the hall, was intended to protect them and to ensure order in the Assembly session, but not to unable them to perform their work - inform the public nor to restrict freedom of expression.”

As evident above, the Constitutional Court did not give any interpretation on what was the public interest in this case, though it is of a complex nature, and getting into all segments of the public interest and the public’s need to know what happened and why the journalists and some members of the Assembly were physically removed from the gallery during the Assembly plenary session for adoption of the 2013 Budget.

The decision for rejecting the claim was made with a majority vote. The Judge Gaber-Damjanovska disagreed with the majority of the judges in the Constitutional Court and delivered her separate opinion²⁴ in which she first expressed regret that the decision was made without participation of professional public despite the fact that by default the decision should have been made at a public hearing, but since it was not held, the actual situation on the event was not fully and appropriately determined. Judge Gaber-Damjanovska emphasized the freedom of expression through public policies and views of the European Court of Human Rights, first referring to the role of the journalists in a democratic society, calling them “bearers of the freedom of expression” and cases of restriction on freedom of expression, underlining that the European Court of Human Rights carefully considers whether the restriction in a particular case was proportionate to the legitimate objective and whether the explanation provided by the national authorities was relevant and satisfying.

Regarding the public interest in context of this case, the Judge Gaber-Damjanovska stated that “it is a duty of the journalists to convey information and ideas for all matters of public interest in a manner and in accordance with their obligations and responsibilities and the public has a right to receive them. Otherwise, journalists would not be able to perform its role of a “public supervisor”, critic and guardians of progress and democracy”.²⁵

The significant issue for the Judge Gaber-Damjanovska, that the Constitutional Court had to clarify in this case was the issue concerning the justification of the assessment that led to the removal of the accredited journalists from the gallery exactly at the time when the questions of public interest were discussed, and which - after the removal of the journalists - was not covered by the media. Regarding this assessment, Judge Gaber-Damjanovska raised skepticism about the suitability of this action, because if the journalists were removed due to concerns for their safety in the gallery, how come the journalists in the halls and the Assembly press-centre were not removed at the same time.

At the end of her separate opinion, Judge Gaber-Damjanovska emphasized the importance of informing the public on issues of public interest as was the case here. “Undoubtedly, the freedom of public expression seen through the aspect of the role that media has in its practical realization, is one of the main pillars of open, democratic, transparent and accountable society. Citizens have a right to information that allows them to realize their civic rights and duties, to participate in the social processes of their country, and, among other things, to keep up with the activities of the MPs who legitimately represent them in the Assembly and participate in the decision-making process. In fact, through the media, as an information transmitter, the citizens are the ones who initially own that right, which in its essence is a right of the civic public, not of the media itself, which realize it on their behalf.”²⁶

After the adoption of the Decision of the Constitutional Court, petitioners appealed to the European Court of Human Rights whereupon a case was established. In September 2015, a communication upon this case was initiated with the Government of Republic of Macedonia.

²³ Decision of the Constitutional Court of the Republic of Macedonia U.no.27/2013-0-1 from 16.04.2014.

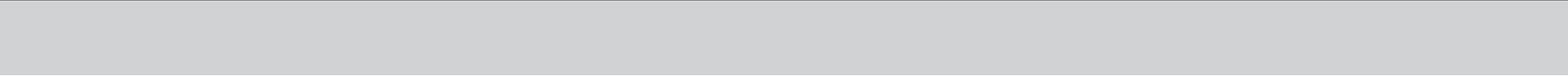
²⁴ Ibid, Separate Opinion of Judge Natasa Gaber-Damjanovska.

²⁵ Ibid.

²⁶ Ibid.

Unlike the other courts, i.e. the regular judiciary, the role of the Constitutional Court is evident, especially in the interpretation of certain issues important to citizens and the society including the public interest. The scarce interpretation of the public interest and the related issues in the regular courts raise the question whether these courts decide strictly by the letter of the law without doing the hardest part of the role of a judge. This means

that they are obliged to embody the law in real-life situations through the standards promoted by the basic documents for protection of human rights and freedoms at international and regional level by the Universal Declaration of Human Rights, the Covenants of the United Nations and the European Convention on Human Rights, as well as at national level by the Constitution of the Republic of Macedonia.



8

The Public Interest in the European Convention on Human Rights and in the Case-law of the European Court of Human Rights

The European Convention on Human Rights (hereinafter, the Convention) has been a pillar of the human rights and freedoms in European countries and beyond for almost 65 years. The Convention constitutes a “living instrument²⁷” that protects the human rights and freedoms, which implies that it must be interpreted in the light of the conditions of today. Hence, the Convention follows the evolution of the law in the signatory countries, meaning that it should be applied and interpreted simultaneously with the development of the human rights and freedoms. The European Court of Human Rights (hereinafter, the Court), is an instrument for protection of the rights and freedoms prescribed and guaranteed by the Convention, that through its work, or more precisely its judgments, makes the Convention a powerful “living” instrument that consolidates the rule of law and the democracy in Europe.²⁸

The Convention regulates partial areas of the public interest in several crucial segments. Namely, the public interest in the Convention is mentioned in the section on protection of the right to own property, Article 1 of Protocol 1 of the Convention, as well as Article 8 (Right to respect for private and family life), Article 9 (Freedom of thought, conscience and religion), Article 10 (Freedom of expression) and 11 (Freedom of assembly and association).



8.1 Article 1 of the Protocol 1 to the Convention

As mentioned above, the public interest is primarily defined in the limits of right to property regulated by Article 1 of Protocol 1 of the Convention.

This article provides for the protection of property i.e.

1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. 2) The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.²⁹

As can be seen from the text of this article, the public interest reappears as a restriction of the rights and freedoms prescribed by the Convention.

²⁷ Tyrer v. United Kingdom, (Appl No. 5856/72) Judgment of 25 April 1978, Series A no. 26, para 31

²⁸ <http://www.echr.coe.int/Pages/home.aspx?p=home&c>

²⁹ Article 1 from Protocol 1 of the Convention

³⁰ The Former King of Greece and Others v. Greece (no. 25701/94)



The Public Interest in the European Convention on Human Rights and in the Case-law of the European Court of Human Rights

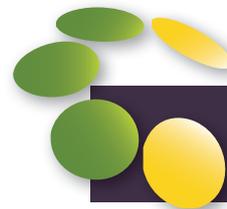
An interesting case that the Commission on Human Rights brought before the Court is the *Former King of Greece and others v. Greece*³⁰, which was initiated upon an application lodged by the former King of Greece against the Hellenic Republic. Namely, with the political overthrow in Greece, the property of the royal family had a specific treatment, and it was dispossessed with several property laws and decrees by the government of the day. The final intervention in ownership was made with a law passed in 1994 by the Hellenic Republic. Due to the property dispossession, the royal family headed by King Constantine brought a case before the Human Rights Commission, which was afterwards proceeded to the European Court of Human Rights. During the trial, the state attempted to prove among other things that the majority of the private property of the royal family is a gift from the Greek state. Also, the state presented arguments that the property enjoyed exemption from property tax as well as from inheritance tax, and that no matter how each of the contested estates had been acquired, the land, which included constitutionally protected forests, historical and archaeological sites, had only been kept wholly intact and unspoiled because of the privileges attached to the monarchs' public status.

Upon the court proceedings, the Court held that there has been a violation of Article 1 of Protocol No. 1, due to the lack of any compensation for the deprivation of the applicants' property and the lack of fair balance between the protection of property and the requirements of public interest. In this part, the Court gave a reasoned interpretation of whether the intervention was in accordance with the public interest, stating that "*the notion of 'public interest' is necessarily extensive. In particular, the decision to enact laws expropriating property will commonly involve consideration of political, economic and social issues. The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature's judgment as to what is 'in the public interest' unless that judgment is manifestly without reasonable foundation ... The same applies necessarily, if not a fortiori, to such*

fundamental changes of a country's constitutional system as the transition from a monarchy to a republic."³¹

In this particular case, the Court held that "*there is no evidence to support the Government's argument on the need to protect the forests and archaeological sites. On the other hand, it does not doubt that it was necessary for the Greek State to resolve an issue which it considered to be prejudicial for its status as a republic. The fact that the constitutional transition from a monarchy to a republic took place in 1975, namely almost twenty years before the enactment of the contested Law, might inspire some doubt as to the reasons for the measures, but it cannot suffice to deprive the overall objective of Law no. 2215/1994 of its legitimacy as being 'in the public interest'*"³².

As stated above, the articles 8-11 of the Convention also go into the segment of public interest because they refer to rights and freedoms that go deeply into the human integrity. Similarly to the previous provisions of the Convention, the public interest appears as an exception, not as a rule, to the protection of this corpus of rights and freedoms as well.



8.2. Article 8 of the Convention

In the case of *Dickson v. United Kingdom*³³, the applicants are a couple in which the husband or the first applicant has been serving a life sentence for murder since 1994, whereas the wife or the second applicant is a former prisoner. In accordance with the received sentenced, the earliest expected release date of the first applicant is 2009. The applicants met in 1999 through a prison pen-pal network, and communicated until she was released from prison in 2001, whereupon the applicants married. Since the applicants wished to have a child, in October 2001 the first applicant applied for facilities for artificial insemination and in December 2002 the second applicant joined

³⁰ The Former King of Greece and Others v. Greece (no. 25701/94)

³¹ Ibid, para. 87

³² Ibid, para. 88

³³ Dickson v. United Kingdom (no. 44362)

this application. They relied on the length of their relationship and the fact that, given the first applicant's earliest release date and the second applicant's age, it was unlikely that they would be able to have a child together without the use of artificial insemination facilities.

In May 2003, the Secretary of State refused their application because it was not in compliance with the established Policy, whereupon, the applicants sought leave to apply for judicial review of the Secretary of State's decision. In July 2003, the High Court refused leave on the papers, whereupon the applicants renewed their application and on 5th of September 2003 leave was again refused after an oral hearing. The applicants then applied to the Court of Appeal for leave to appeal and in September 2004 their application was unanimously rejected by the Court of Appeal.

Afterwards, the applicants lodged an application to the Court for violation of Article 8 of the Convention. The Court judgment of the Grand Council of 4th of December 2007 held that the State violated the right to respect for private and family life of the applicants. The Court in the reasoning of the judgment stated that "*Article 8 is applicable to the applicants' complaints in that the refusal of artificial insemination facilities concerned their private and family lives, which notions incorporate the right to respect for their decision to become genetic parents*"³⁴. The Court also stated that "...it is prepared to accept as legitimate for the purposes of the second paragraph of Article 8 that the authorities, when developing and applying the Policy (of the Secretary of State), should concern themselves as a matter of principle with the welfare of any child: conception of a child was the very object of the exercise. Moreover, the State has a positive obligation to ensure the effective protection of children. However, that cannot go so far as to prevent parents who so wish from attempting to conceive a child in circumstances like those of the present case, especially as the second applicant was at liberty and could have taken care of any child conceived until such time as her husband was released."³⁵ Lastly, the Court stated that it considers that "*if the applicants' Article 8*

complaint was before the Secretary of State and the Court of Appeal, the Policy set the threshold so high against them from the outset that it did not allow a balancing of the competing individual and public interests and a proportionality test by the Secretary of State or by the domestic courts in their case, as required by the Convention".³⁶



8.3 Article 9 of the Convention

In the case of *Buscarini and Others v. San Marino*, the Court held that is a violation of Article 9 regarding right to religion.

Namely, the applicants were candidates for members of the General Grand Council (the Parliament) of the Republic of San Marino in the elections held in May 1993, and rejected the mandates given by the citizens. Upon their election, the applicants requested permission from the Captains-Regent (The Prime Minister), to take the oath to receive the parliamentary mandate without making reference to any religious text, although the Electoral Act from 1909 requires MPs to solemnly swear on the Holy Gospel. In support of the requested exception, the applicants referred to Article 4 of the Declaration of Rights of 1974 and Article 9 of the Convention. Nonetheless, the applicants took the oath in writing, in the form of words laid down in the Decree of 1909 save for the reference to the Gospels, which they omitted. At the same time, the first applicant drew attention to the obligations undertaken by the Republic of San Marino when it became a party to the European Convention of Human Rights.

In July 1993, the Secretariat of the General Grand Council gave an opinion, at the request of the Captains-Regent, on the form of the oath sworn by the applicants, to the effect that it was invalid. Afterwards, the General Grand Council adopted a resolution proposed by the Captains-Regent ordering the applicants to retake the oath, this time on the Gospel, or risk losing their parlia-

34 Ibid, para. 66
35 Ibid, para. 72
36 Ibid, para. 82



The Public Interest in the European Convention on Human Rights and in the Case-law of the European Court of Human Rights

mentary seats. The applicants complied with the Council's order and took the oath on the Gospels, albeit complaining that their right to freedom of religion and conscience had been infringed.

The applicants lodged through the Commission on Human Rights application to the Court which in February 1999 reached a judgment that held that the State violated Article 9 of the Convention. In terms of the public interest, in this judgment, the Court stated that *"it considers it unnecessary in the present case to determine whether the aims referred to by the Government were legitimate within the meaning of the second paragraph of Article 9, since the limitation in question is in any event incompatible with that provision in other respects ... Undoubtedly, the laws in San Marino guarantees freedom of conscience and religion"*.³⁷

However, the Court held that *"in this specific case, however, requiring the applicants to take the oath on the Gospels was tantamount to requiring two elected representatives of the people to swear allegiance to a particular religion, a requirement which is not in compliance with Article 9 of the Convention"*.³⁸ Hence, the Court held that *"the limitation subject to application cannot be regarded as "necessary in a democratic society"*³⁹.



8.4. Article 10 of the Convention

Similarly to the other article, in Article 10 of the Convention which as usual attracts a lot of attention in the public, the Convention envisages certain restrictions, especially when it comes to *"restrictions 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."* This wide spectrum of grounds for restricting the freedom of expression, which *inter alia* includes the freedom of expression and freedom of receiving and impart information and ideas, is interesting from legal and socio-political aspects.

Namely, in the case of ***Guja vs. Moldova***⁴⁰, the applicant was employed as a civil servant at the Prosecutor General's Office of Republic of Moldova, and because he published, i.e. gave two letters from the Cabinet of Prosecutor General's Office to the newspapers, was dismissed. The letters were sent by representatives of political elites through which the Prosecutor General was pressured not to pursue proceedings against the police officers who were accused for inhuman treatment and unlawful detention of individuals, who were under suspicion for criminal offenses related to the parliamentary elections in February, 2002.

Criminal investigation was initiated against the police officers on charges of the aforementioned offences, whereupon, in June 2002, the four police officers wrote letters, which they signed jointly, to President Voronin, Prime Minister Tarlev and the Deputy Speaker of Parliament, Mr Mişin, seeking protection from prosecution. Mr Mişin forwarded the letter he had received, with an accompanying note, to the Prosecutor General's Office, asking is the Deputy Prosecutor General fighting crime or the police. Furthermore, he stated that the suspected policemen were part of the best team in the Ministry of the Interior, but due to the proceedings were kept from doing their job. At the end of the note, Mr. Mishkin asked the Prosecutor General to intervene in this case and solve it in strict compliance with the law, and after several months the criminal proceedings against the police officers were discontinued.

A few days after Mr Voronin made his call to fight corruption, the applicant sent to a newspaper, the *Jurnal de Chişinău*, copies of two letters that had been received by the Prosecutor General's Office, including the letter from Mr. Mishkin. The letters were published under the title "Vadim Mishkin intimidating prosecutors".

After the publication of the letters, the applicant was summoned by the Prosecutor General to explain how the two letters ended up in the daily press, after which the applicant wrote a letter where he admits that he sent the letters to the newspaper, and he did that as a reaction to the declarations made by the President of the Republic concerning the fight against corruption. After this, first, the prosecutor who was suspected of having furnished the letters to the applicant was dismissed, after which in March 2003 the appli-

³⁷ Buscarini and others v. San Marino (no. 24645/94)

³⁸ Ibid, para. 39

³⁹ Ibid, para. 40

⁴⁰ Guja v. Moldova (no. 14277/04)

cant was dismissed as well. The letter of dismissal stated that the disclosed letters were secret and that he had failed to consult the heads of other departments of the Prosecutor General's Office before handing them over, in breach of the Internal Regulations of the Press Department. Afterwards the applicant brought a civil action against this decision, but it was rejected, after which he appealed before the Supreme Court of Justice, but he was rejected again, and he was not allowed to return to his workplace. Neither the Prosecutor General, nor any of the senders of the letters, contested the authenticity of the letters. In the end, the applicant appealed to the European Court of Human Rights, which in February 2008 at a session of the Grand Chamber decided that there was a violation of article 10 of the Convention.

Deciding on this case, the Court gave great attention to the part of public interest, particularly focusing on the enjoyment of freedom of expression of civil servants. Namely, the Court stated that: "... in view of the very nature of their position, civil servants often have access to information which the government, for various legitimate reasons, may have an interest in keeping confidential or secret. Therefore, the duty of discretion owed by civil servants will also generally be a strong one".⁴¹ The Court also stated that this case is specific due to the fact that "to date, however, the Court has not had to deal with cases where a civil servant publicly disclosed internal information. In this respect, the Court notes that a civil servant, in the course of his work, may become aware of in-house information, including secret information, whose divulgence or publication corresponds to a strong public interest. The Court thus considers that the signaling by a civil servant or an employee in the public sector of illegal conduct or wrongdoing in the workplace should, in certain circumstances, enjoy protection".⁴²

In confirming his position, the Court quoted also a statement from the Explanatory Report to the Council of Europe's Civil Law Convention on Corruption: "In practice, corruption cases are difficult to detect and investigate and employees or colleagues (whether public or private) of the persons involved are often the first persons who find out or suspect that something is wrong".⁴³

Regarding the public interest and the interferences in the freedom of expression, the Court offered more details, stating that other factors also should be taken into account in this case. According to the Court "...particular attention shall be paid to the public interest involved in the disclosed information. The Court reiterates that there is a little scope under Article 10 paragraph 2 of the Convention for restrictions on debate of questions of public interest. In a democratic system, the acts or omissions of government must be subject to close scrutiny not only of the legislative and judicial authorities but also of the media and public opinion. The interest which the public may have in particular information can sometimes be so strong as to override even a legally imposed duty of confidence."⁴⁴

The Court further stated that "the second factor relevant to this balancing exercise is the authenticity of the information disclosed. It is open to the competent State authorities to adopt measures intended to react appropriately and without excess to defamatory accusations devoid of foundation or formulated in bad faith. Moreover, freedom of expression carries with it duties and responsibilities and any person who chooses to disclose information must carefully verify, to the extent permitted by the circumstances, that it is accurate and reliable".⁴⁵

On the other hand, "the Court must weigh the damage, if any, suffered by the public authority as a result of the disclosure in question and assess whether such damage outweighed the interest of the public in having the information revealed. In this connection, the subject matter of the disclosure and the nature of the administrative authority concerned may be relevant".⁴⁶ Finally, the Court noted that the motive for disclosing the confidential or in-house information is also important to be determined.

Namely, according to the Court, "it is important to establish that, in making the disclosure, the individual acted in good faith and in the belief that the information was true, that it was in the public interest to disclose it and that no other, more discreet, means of remedying the wrongdoing was available to him or her".⁴⁷

41 Ibid, para.

42 Ibid, para.72

43 Explanatory Report to the Council of Europe's Civil Law Convention on Corruption, Strasbourg, 4.XI.1999

44 Guja v. Moldova (no. 14277/04), para.74

45 Ibid, para. 75

46 Ibid, para. 76

47 Ibid, para. 77

8.5. Article 11 of the Convention

Similar to the previous cases under Articles 8, 9 and 10 of the Convention, Article 11 on Freedom of assembly and association, provides for restrictions on the exercise of the guaranteed freedom of association. In fact, Article 11 paragraph 2 stipulates that the freedom of association may be limited only with “restrictions prescribed by law as necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others”⁴⁸. In addition, in the same paragraph provides that “This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State”⁴⁹.

In the case of **Association of Citizens Radko & Paunkovski v. the Former Yugoslav Republic of Macedonia**, the applicants lodged an application to the Court for violation of Article 11 of the Convention. Namely, on 24 May 2000, ten Macedonian nationals, including the second applicant, founded the Association in the city of Ohrid. In June 2000, the Ohrid Court of First Instance registered the Association in the register of associations of citizens and foundations under the following name: “Association of Citizens Radko-Ohrid”. Afterwards, an incident occurred at the official launch of the Association in a hotel in Skopje, for which the Court of First Instance Skopje 1 convicted 2 persons, one of which was a member of the Association of the first applicant – Radko, of causing grievous bodily injury and sentenced them to three months of imprisonment.

In the meantime, there was a strong media campaign before and after the promotion of the Association, condemning its foundation and functioning as contrary to the Macedonian national identity. The first applicant was described as fascist, whose goal was rehabilitation of the terrorism and fascism of Vančo Mihajlov – Radko.

In October 2000, three lawyers from Skopje, together with a political party and the Association of War Veterans from the Second World War filed petitions before the Constitutional Court challenging the compliance of the Association’s Statute and Programme with Article 20 of the Constitution. They also challenged the lawfulness of the Ohrid Court’s decision to register the Association. In January 2001, the Constitutional Court made a decision to initiate a procedure for assessment, and on 21st of March 2001, the Constitutional Court declared the Association’s Articles and Programme null and void, on the ground that they were directed towards violent destruction of the constitutional order and incitement to national or religious hatred or intolerance. On 10 April 2001, the Constitutional Court’s decision was published in the “Official Gazette of the Republic of Macedonia” and became final and enforceable.

On 16 January 2002, the Ohrid Court of First Instance *ex officio* decided to terminate the activities of the Association, whereupon the applicants appealed the latter decision. On 11 February 2002, the Bitola Court of Appeal dismissed the appeal as ill-founded. It found that the association of citizens would cease to exist *ipso jure* when the Constitutional Court had declared its Articles and Programme unconstitutional. As the Constitutional Court’s decision had been published in the Official Gazette and had accordingly entered into force, the Court of Appeal upheld the lower court’s decision.

Following this decision, the applicants appealed to the European Court of Human Rights. In January 15, 2009, the Court decided there has been a violation of the freedom of association of the applicants i.e. violation of Article 11 of the Convention.

This case is interesting from the perspective that the first applicant had already been established and commenced operation, and then its foundation was annulled by the State. The Court first stated that “*Notwithstanding its autonomous role and its particular sphere of application, Article 11 of the Convention must also be considered in the light of Article 10. The protection of opinions and the freedom to express them is one of the objectives of the freedoms of assembly and association as enshrined in Article 11*”.⁵⁰

48 Article 11, paragraph 2 of the Convention

49 *Ibid.*

50 Association of Citizens Radko & Paunkovski v. the Former Yugoslav Republic of Macedonia (no. 74651/01), para. 6

In the explanation of the judgment with respect to the necessity in a democratic society, the Court stated that “Freedom of expression 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 pluralism, tolerance and broadmindedness without which there is no “democratic society”⁵¹, and thus also stated that “The exceptions to the rule of freedom of association are to be construed strictly and only convincing and compelling reasons can justify restrictions on that freedom. Any interference must correspond to a “pressing social need”. It is in the first place for the national authorities to assess whether there is a “pressing social need” to impose a given restriction in the general interest. While the Convention leaves to those authorities a margin of appreciation in this connection, their assessment is subject to supervision by the Court, going both to the law and to the decisions applying it, including decisions given by independent courts”.⁵²

Lastly, the Court stated that “it reiterates its case-law, under which a State cannot be required to wait, before intervening, until an association had begun to take concrete steps to implement a policy incompatible with the standards of the Convention and democracy. However, sweeping measures of a preventive nature to suppress freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles – however shocking and

unacceptable certain views or words used may appear to the authorities, and however illegitimate the demands made may be – do a disservice to democracy and often even endanger it”.⁵³ Hence, the Court considered that “the reasons invoked by the authorities to dissolve the Association were not relevant and sufficient. The restrictions applied in the present case, accordingly, did not pursue a “pressing social need”. Being so, the interference cannot be deemed necessary in a democratic society. Hence, the measure infringed Article 11 of the Convention”.⁵⁴

It is evident that when it comes to restricting the freedoms and rights, as in the abovementioned cases, the Court has consistently used the test that contains the following questions: 1) Is the interference of the state in accordance with or provided by law? 2) Is interference intended to achieve one or more legitimate aims and, 3) Is the interference necessary in a democratic society, taking into account all the circumstances?

If we consider that one of the basic and most significant principles of the European Convention on Human Rights is the principle of subsidiarity, in accordance with the undertaken obligations, the Republic of Macedonia is obliged to fully comply. It should clearly direct this principle to the courts that protect the rights and freedoms guaranteed by the Convention, which largely⁵⁵ overlap with the fundamental rights and freedoms guaranteed by the Constitution.

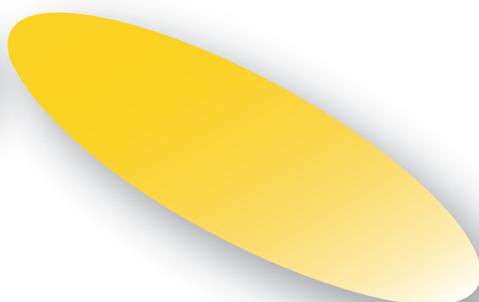
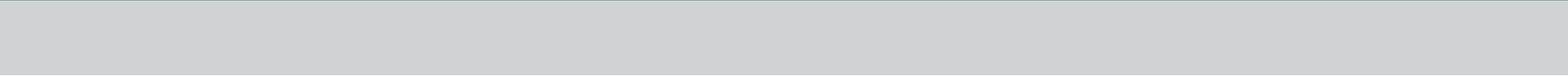
51 Ibid, para. 63

52 Ibid, para. 65

53 Ibid, para. 75

54 Ibid, para. 77

55 For instance, the right to fair trial is not guaranteed by the Constitution of the Republic of Macedonia.





Conclusions

As a result of the conducted research on the work of the courts in the Republic of Macedonia and the EU, the analysis of the case-law of Macedonian courts and the case-law of ECHR, as well as the analysis of a large number of subject-related domestic and international documents, we present the conclusions and recommendations on how the courts can protect the public interest in the Republic of Macedonia in the best possible way:

1. Inconsistent management of defamation and libel cases has been observed, especially when it involves senior government officials. The pressure on the judges is not only reflected on the outcome of the disputes but also in the high amounts of the awards for non-pecuniary damages.
2. The judges completely neglect the importance of the libel and defamation as institutes for protection of the reputation, especially of the officials. This is due to the fact that in the most cases until now the defendant is not obliged to publicly apologize for the defamation or the insult, which raises questions about the meaning and goal of implementing these mechanisms for protection.
3. The majority of the processes for libel and defamation are against journalists, indicating a tendency of exerting a pressure on the way journalists treat the public officials in cases of public interest, and who at times may question the honor and reputation of these officials.

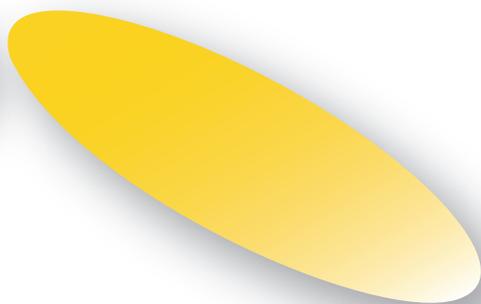
4. In terms of the awards for non-pecuniary damage, which are extremely high, a question arises around their appropriateness in terms of protection of the honor and reputation, meaning whether they are a compensation for damages or a penalty that is used as a disciplinary measure.

5. The presented cases clearly show the excessive formalism of the executive authorities in the application of the legal provisions that regulate the public interest. None of the analyzed cases provide elaboration on the meaning of the public interest in the specific situation.

6. The judges lack knowledge of the principles of the international law that govern the segment of public interest. This is evident in the presented judgments, which only touch on the assessment of what is the public interest in the specific case.

7. Regardless of the effort for direct application of the case-law of the European Court for Human Rights through the national legislation, there is still improvisation in its application. In order to overcome this issue, it is necessary for the Supreme Court to have a pro-active role in creating a judicial practice, which would be in compliance with the case-law of the European Court. It is important to use the already defined criteria, i.e. principles under which ECHR reaches decision on such cases.

8. It is necessary to strengthen and intensify the training for application of the ECHR standards, which later may be reflected in other legal issues related to the public interest.



10

Addenda

Apart from article 8, 9, 10, 11 and article 1 of Protocol 1 of the Convention which certainly play an important role, the Convention also defines the public interest in article 15 (Derogation in times of emergency) as well as in article 1 of Protocol 7 (Procedural safeguards relating to expulsion of aliens) and article 2 of Protocol 4 of ECHR.



10.1. Article 15 of the Convention

It is peculiar that the public interest within the framework of the Convention is mostly interpreted in terms of the restriction on restrictions of freedoms and rights it guarantees. Namely, if we consider the second group of freedoms and rights referred to in the paragraph above, public interest has the greatest effect precisely in article 15, paragraph 1 which derogates the obligation to respect the Convention “to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law”⁵⁶, for all but the absolute rights⁵⁷. The application of this article of the Convention is rare exception and it must be

closely monitored by the Council of Europe because, for example, it is applied in a state of war between the Contracting Parties of the Convention. The control of the situation is provided by/ in paragraph 3 of the same article that envisages specific obligation for the contracting party “shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed”.⁵⁸

In the case of *Greece v. The United Kingdom* (1958), accepting that it has jurisdiction to rule upon the application lodged by Greece against the United Kingdom over alleged violations of the rights and freedom of the Convention in Cyprus, the European commission for human rights⁵⁹ in its decision stated that “the derogations of the Convention is justified and the measures invoked were limited to those strictly required by the exigencies of the situation, envisaged in article 15 of the Convention. However, in determining the later, the Government should be able to exercise a certain measure of discretion”.⁶⁰ Article 15 has rare application in the Court’s jurisprudence, because it concerns a situation that is not common for the member states of Council of Europe.

⁵⁶ Article 15, paragraph 1 of the European Convention of Human Rights.

⁵⁷ Prohibition of torture (article 3), prohibition of slavery and forced labor (article 4) and no punishment without law (article 7).

⁵⁸ Article 15, paragraph 3 of the European Convention of Human Rights.

⁵⁹ From 1954 to the entry into force of Protocol 11 of the Convention in 1998, individuals did not have direct access to the European Court of Human Rights, but instead they had to apply to the Commission, which launched well-founded to the Court of Human Rights.

⁶⁰ Steven Greer: “The Margin of Appreciation: Interpretation and Discretion Under the European Convention on Human Rights”, pg. 9

10.1.1 Article 1 of Protocol 7 of the Convention

Article 1 of Protocol 7 provides the basis for expulsion of an alien person by court order without allowing him to submit reasons against his expulsion, to have his case reviewed and to be represented in the expulsion procedure, if the expulsion is necessary in the interest of public order or national security.⁶¹ This restriction, as the one previously mentioned, is within the public interest of the state and the same is applied by the state through implementing such measures at its discretion.

In the case of *Bolat v. Russia*, the applicant, an ethnic Kabardinian, who was born and lived in Turkey, lived in the Kabardino-Balkarian Republic of Russian Federation on the basis of a long-term residence permit in the period from 1998 to 2003. Due to the fact that during an extraordinary identification check-up, the applicant was caught spending the night at his friend on different address from the one in his residence permit, he was arrested and fined. He started proceedings against the fine.

In the meantime, during a second attempt for extension of his residence permit from 2003 until 2007, the existing permit was annulled and he was deported on a flight to Istanbul, Turkey. Despite the deportation, the Nalchik Town Court, where the applicant resided during his stay in the Kabardino-Balkarian Republic, accepted his appeal and ordered the authorities to extend the applicant's residence permit for five years, starting from August 2003. The applicant was informed by the competent authorities for residence of foreigners that they will implement the decision of the court and will extend his residence permit. He then decided to go back to Kabardino-Balkarian Republic, but on the airport he was detained without being allowed to meet with his attorney and was again deported to Turkey.

After this, the applicant filed an appeal before the European Court of Human Rights for violation of right to freedom of movement guaranteed in article 2 of Protocol 2 and for violation of article 1 of Protocol 7 of the Convention. On 05.01.2007,

the Court has made a Decision that held that there was violation of both articles of the Convention. Regarding the forced deportation, the Court stipulated “*that the State have a discretionary power to decide to expel an alien present in its territory but its power must be exercised in such a way as not to infringe the rights under the Convention of the person concerned*”.⁶² According to the Court, in this case, the state did not point to any legal provisions that provides for a person's expulsion in the absence of a court decision. Accordingly, there has been no “*decision reached in accordance with the law which is the sine qua non condition for compliance with article 1 of Protocol 7 of the Convention. On the contrary, the applicant was expelled at the time when his complaint about the annulment of his residence permit was being reviewed and the interim measures indicated by the court for the period necessary for the review was effective*”.⁶³

10.1.2 Article 2 of Protocol 4 of the Convention

The public interest in the Convention is stipulated in two articles, i.e. in article 1 of Protocol 1 (Protection of Property) and article 2 of Protocol 4 (Freedom of Movement).

Concerning the freedom of movement, the public interest is mentioned in paragraph 4⁶⁴ in terms of justification of the restrictions on rights recognized in the article 2 of Protocol 4 itself. The rights recognized in the first paragraph may also be subject to restrictions in some areas if they are envisaged in the law and are justified by the public interest in a democratic society. This is a very interesting formulation because the definition of the public interest in a democratic society is left to be determined on case-by-case basis by the state and the Court.

Namely, in the case of *Timishev v. Russia* where the applicant was ethnic Chechen and lived in Nalchik, Kabardino-Balkarian Republic, he applied for a permanent residence in 1997. His application was rejected pursuant to the laws of Kabardino-Balkarian Republic prohibiting former residents of the Chechen Republic from obtaining permanent residence. The applicant lodged a

61 Article 1, paragraph 2 of Protocol 7 of the European Convention of Human Rights.

62 *Bolat v. Russia* no.14139/03, January 5 2007, para. 81

63 *Ibid*, para. 82

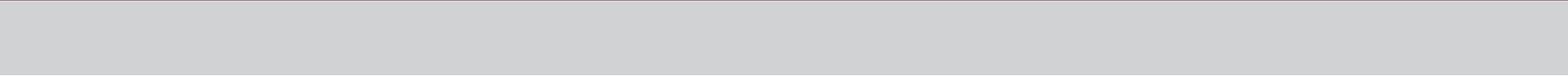
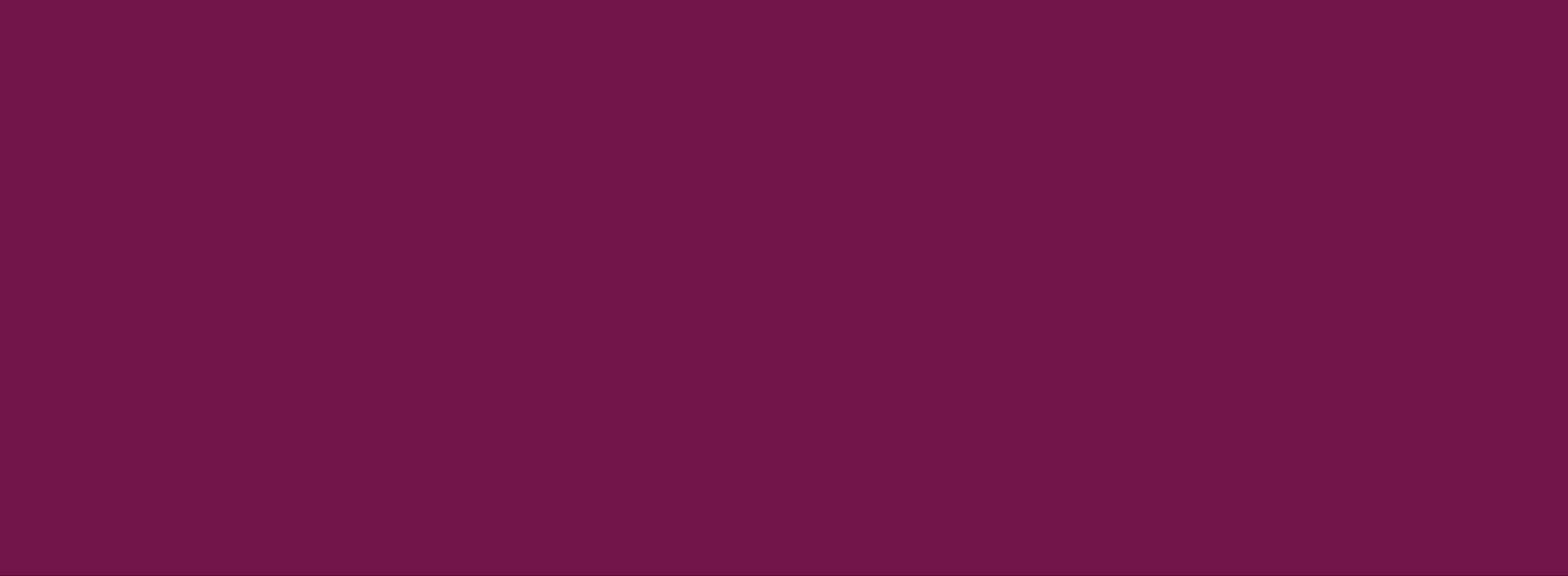
64 Article 2, paragraph 4 of Protocol 4 of the Convention: „The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.”

complaint against this decision before the Nalchik City Court which affirmed the rejection of the competent authorities for foreigners, and afterwards lodged a complaint before the Supreme Court of the Kabardino-Balkarian Republic which upheld the decision of the Nalchik City Court in 1997.

On June 1999, the applicant and his driver travelled by car from Republic of Ingushetia to Kabardino-Balkarian Republic, where they were pulled over at the Uruk checkpoint border, and refused entry from the Republic of Ingushetia to the Kabardino-Balkarian Republic, because the police officers had oral instruction from the Ministry of Interior not to admit persons of Chechen origin. After this, the applicant complained but was dismissed by the local city court and also by the Supreme Court with explanation that the applicant failed to show that he had been denied entry because of his Chechen origin. In addition, the applicant complained to the Russian Ombudsman and the Prosecutor General of the Russian Federation, who launched an inquiry to the Ministry of Interior of Kabardino-Balkarian Republic. The Minister of Interior replied that due to the characteristics of the border unit where the applicant was denied entry, the nature of the unit of police officers is affected in some manner because it is on border with regions with high level of crime and are often under gunfire. He has suggested that this conduct would be discussed at the operational level.

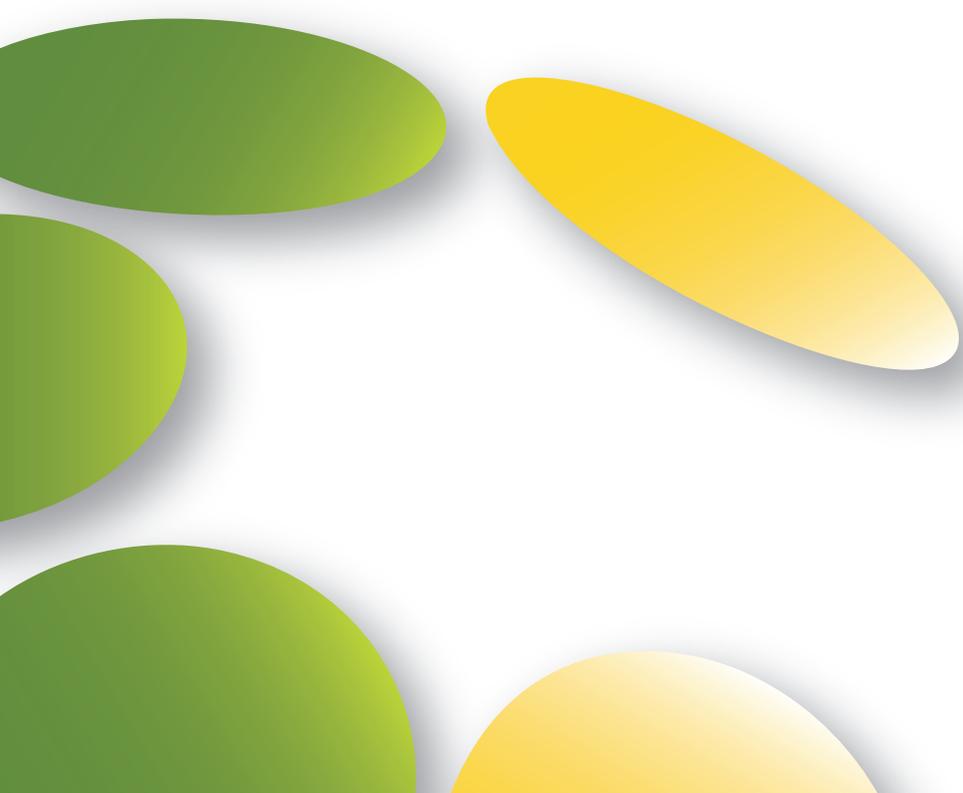
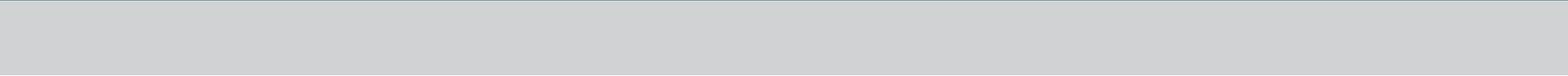
After this, the Russian Ombudsman concluded that the restriction on the constitutional rights of the citizens to freedom of movement on the border of Kabardino-Balkarian Republic is raised in terms of the threat of entry of subversive groups of armed bandits on its territory, and it is effective only on short-term which make this restriction legitimate.

Deciding on the appeal of the applicant, the Strasbourg Court made a judgment that found a violation of article 2 of Protocol 4 of the Convention, and thus in the rationale of its judgment on whether the restriction is justified it stated that *“notes that the structure of article 2 of Protocol 4 is similar to that of articles 8-11 of the Convention. In order to be compatible with the guarantees of article 2 of Protocol 4, the impugned restriction should be “in accordance with the law”, pursue one or more of the legitimate aims contemplated in paragraph 3 and be “necessary in a democratic society” or, where the restriction applies to particular areas only, to be “justified by the public interest in a democratic society” as established in paragraph 4.*⁶⁵ Because the court determined that it was not acted in accordance with the laws and the freedom of movement of the applicant was restricted, it decided that it is not necessary to be assessed whether it was necessary in a democratic society. Therefore, the Court held that there is a violation of article 2 of Protocol 4 of the Convention.



Sources:

- Kalajdziev, Gordan. "Human Rights Framework for the European Criminal-procedure Law." Collection of Texts of Faculty of Law "Iustinianus Primus". Skopje. 2011: 115-28.
- Kalajdziev, Gordan. "Justice Procedure." Doctoral Dissertation. Faculty of Law "Iustinianus Primus", Skopje. 2004.
- Kalajdziev, Gordan. "Fighting Organized Crime and Legal State." Open Society Foundations. Skopje.
- Nowak, Manfred. "International Covenant on Civil and Political Rights: CCPR Commentary. Kehl/Strasbourg: N.P. Engel, 1993. At. 14, No. 24.
- J.A. De Hert, Paul. "Utrecht Law Review." Balancing Security and Liberty within the European Human Rights Framework. A Critical Reading of the Court's Case Law in the Light of Surveillance and Criminal Law Enforcement Strategies after 9/11. Utrecht Law Review, 19 July 2005. <<https://www.utrechtlawreview.org/articles/abstract/10.18352/ulr.4/>>.
- Dimovski, Sashe, Jovan Ilievski, and Zoran Dimitrievski. "Transparency in Criminal Proceedings." Manual for Journalists. 2014.
- Gocevski, Dragan, and Frosina Ilievka. "Deconstruction of the Concept of Public Interest in the Republic of Macedonia - (mis) Use on Behalf of the Citizens, Outgoing Report." Institute of Communication Studies, School of Journalism and Public Relations. 2015.
- "Monitoring of Defamation Actions Litigations." USAID Program for Strengthening Independent Media in Macedonia, Project for Responsible Media and Media Legal Reform. Center for Media Development. March. 2015.
- "Monitoring of Defamation Actions Litigations." USAID Program for Strengthening Independent Media in Macedonia, Project for Responsible Media and Media Legal Reform. Center for Media Development. July. 2014.
- "Monitoring of Defamation Actions Litigations." USAID Program for Strengthening Independent Media in Macedonia, Project for Responsible Media and Media Legal Reform. Center for Media Development. October. 2014.
- "Monitoring of Defamation Actions Litigations." USAID Program for Strengthening Independent Media in Macedonia, Project for Responsible Media and Media Legal Reform. Center for Media Development. December 2014.
- "Monitoring of Defamation Actions Litigations." USAID Program for Strengthening Independent Media in Macedonia, Project for Responsible Media and Media Legal Reform. Center for Media Development. April. 2014.
- "Monitoring of Defamation Actions Litigations." USAID Program for Strengthening Independent Media in Macedonia, Project for Responsible Media and Media Legal Reform. Center for Media Development. July. 2014.
- "Whistleblower Protection Act." Official Gazette, 196th ed. 2015.
- "Law on Civil Liability for Defamation." Official Gazette, 143th ed. 2012.
- "Public Interest, Political Philosophy and the Study of Public Administration." Public Interest, Political Philosophy and the Study of Public Administration. <<http://www.publicinterest.info/?q=public-interest-political-philosophy-and-study-public-administration>>.
- "Right to Equality before Courts and Tribunals and to a Fair Trial." University of Minnesota Human Rights Library. Human Rights Committee, July 2007. <<https://www1.umn.edu/humanrts/gencomm/hrcom32.html>>.
- Decision 8o.P4-61/13a from 24.04.2014, by the Court of First Instance Skopje 2, Skopje
- Decision GZ-1940/14 by the Court of Appeal, Skopje
- Decision P1-1388 / 12 from 22.04.2013, by the Court of First Instance Ohrid
- Law on Administrative Disputes (Internal Affairs Secretariat in Rebulpluc of Macedonia)



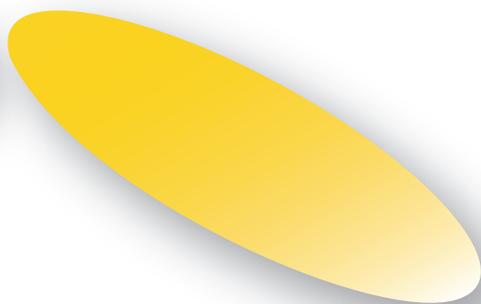
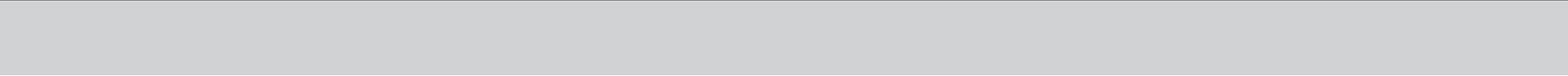
About the publisher

The Institute of Communication Studies (ICS) was established by the School of Journalism and Public Relations in 2013. ICS is a leading scientific research organization in the field of journalism studies, media, public relations, political communication and corporate communication. ICS in Republic Macedonia has a dual focus: through academic and applied research to advance science and to be supportive of practitioners; through post-graduate studies to build a network of young researchers who will strengthen the pillars of these disciplines.

The Institute is accredited to provide graduate (master) studies in two areas: Management of Strategic Communications and Management of Media and Multimedia. Using the procedure of binding the teaching process and learning through research, the ICS fosters the development of young people in research and promotes the process of creation and dissemination of knowledge.

The ICS has the following main objectives:

- Developing academic and applied research that will increase the knowledge in the fields of communication, media and public relations;
- Creating a thorough research base that will be used in the education process in the fields of communication, media and public relations;
- Promoting innovative ideas in research related to the industry needs;
- Encouraging the development of young professionals in research by engaging students and young researchers in this field;
- Publishing research results on current affairs and issues in order to contribute to the public debate and to the process of creating policies in the fields of interest to ICS.



About the project

The Institute of Communication Studies (ICS) implements the project “**Voicing the Public Interest: Empowering Media and Citizens for Safeguarding the Public Policy in Macedonia**”. Within the Project, ICS will (1) prepare analysis and policy papers and will organize discussions around them, (2) develop newsroom editorial guidelines for safeguarding the public interest, including the public interest test and, (3) impel citizens and experts to actively participate in the public sphere through the Res Publica blog.

Through analysis, policy papers, and discussions, ICS will provide a clear overview of the key aspects of public interest, i.e. how can citizens influence the policy-making process; how journalists cover public interest topics; the delicate balance between the public interest and other human rights (e.g. privacy, free speech); the role of the judiciary and the Government in safeguarding the public interest.

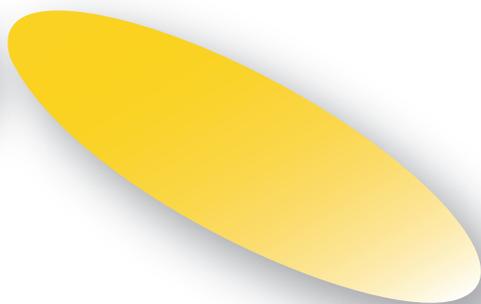
In collaboration with newsrooms, ICS will develop a Guideline for Public Interest Journalism (incorporating the public interest test) in order to

protect the public from negligent journalism and unlawful media practices, and restore the trust of citizens in media. The Guideline will set out the standards for producing or presenting the newsroom products, and will provide advice for media professionals on how to deal with editorial issues, and on how to produce content on the highest ethical level when covering public affairs. The public interest test will improve the skills of journalists to decide how best to proceed when they are reporting about the welfare and safety of the public. ICS will work with five national and regional media in order to develop the Guideline.

In order to reach a broader audience, ICS will utilize the newly developed web platform Res Publica (www.respublica.edu.mk) that will impel citizens, journalists, and experts to write articles and debate issues of public interest. This way, ICS will create a professional network that will continually analyze and introduce the public with current issues of public interest in the Republic of Macedonia.

The Project is supported by the British Embassy Skopje.





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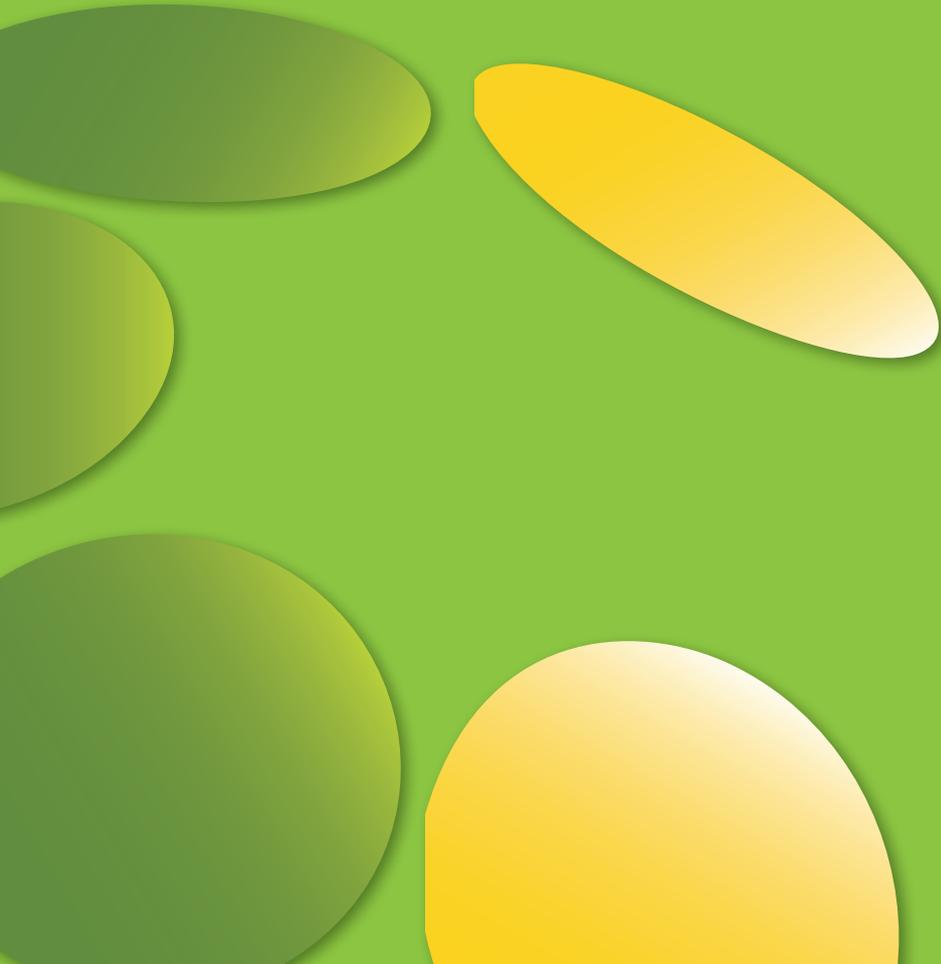
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VOICING THE PUBLIC INTEREST

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