
MEDIA AND THE LEGAL CULTURE IN THE BALKAN COUNTRIES - ON THE CROSSROAD BETWEEN THE RIGHT TO INFORMATION AND THE PRINCIPLE OF PRESUMPTION OF INNOCENCE

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Abstract. The role of the media in society is indisputable. Freedom of information is a mirror of democracy. And the rule of law require respect for human rights and freedoms, including the presumption of innocence. Hence the need to find legal solutions and practical mechanisms, which will guarantee the right to information about judiciary and will pay attention to the rights of the parties. This is pronounced in the Balkan countries, where there is a disproportion between laws and their application, calling into question human integrity and the rule of law.

Keywords: Legal culture, media, presumption of innocence, Balkan countries

1. INTRODUCTION

Where there is no publicity there is no justice. Publicity is the very soul of justice” (Bentham J. 1789)
Transparency is an essential value of any functioning democracy. The task of the media as a "fourth power" is to inform the citizens about the "third (judicial) power", which improves its responsibility. Therefore, justice must not merely be done, but should be seen to be done (Lord Hewart 1924). But their (mis-) use can be counterproductive to the quality of justice and put into question other human values, including the presumption of innocence. This is especially present in countries with semi-consolidated democracies, such as Republic of North Macedonia (RNM) and most Balkan countries, where media interaction with the justice system is used as an instrument to degrade someone or to pursue someone else's interests. Before the proceedings begin, media (and through them - the public) "trials and condemns" the suspects in parallel proceedings and prejudice their guilt, which can lead to the erosion of justice. It is therefore necessary to establish an optimal balance between the transparency of legal proceedings and the protection of human rights and freedoms and instead of as opponents, the media together with institutions and citizens, should be partners in the practice of justice, thus creating a participatory society and interactive legal culture.

2. THE ROLE OF THE MEDIA IN THE PROCESS OF DISPERSION OF JUSTICE

The principle of open justice] is a cardinal principle of the justice system. It underpins the rule of law and ... requires the courts to engage with the public (Lord Neuberger 2011)
Freedom of expression and the right to information are part of civil rights, which are enshrined in Article 19 of the UN Universal Declaration of Human Rights and Article 10 of the European Convention on Human Rights, as well as in national constitutions and laws. They help to get to the truth (Mill J.S. 1859, 49-50), contribute to greater institutional accountability and more efficient justice, and influence citizens' trust in the judiciary and raise a general culture of the rule of law.

But can freedom of information be justified if it violates other values? In conditions of media expansion with a lack of control mechanisms, it is difficult to harmonize public justice with human rights. Some centers of power, through the media, seek to instrumentalize the public and judiciary towards the desired ways of acting. Parallel media "processes" create a social climate for someone's fault, before a final decision is made. The growing corruption in the society contributes to that, which influences the creation of "retributive populism", according to which the judiciary should show a more restrictive attitude towards the defendants. It can affect the integrity of prosecutors and judges who, instead of doing justice, will make decisions according to public expectations. In this regard, deprivation of liberty, charges and convictions are at the center of public attention; unlike acquittals, which are rarely followed or used for articles criticizing the justice system and its (non-) efficiency.

This does not mean that the media are not allowed to report on court proceedings and comment on their course and outcome. On the contrary, freedom of information is their professional obligation, guaranteed by law and is not disputed at all. Disputed is only the manner in which it is practiced, which should correspond to greater responsibility for personal freedoms and rights. In fact, in all jurisdictions over the centuries, the relationship between the public and judiciary is based on the Latin rule *Ad huc sub judice li est*, ie "the case is still under consideration". This means that no one has the right to interfere in ongoing proceedings and information may not be published that could violate the right to a fair trial. According to the European Convention on Human Rights (1950,

Article 10, Paragraph 2), every state has a duty to achieve balance between free speech and protection of reputation and to prevent "trials" by the media and the public, which could lead to:

- pressure on the parties in the judicial proceedings, which prevents them from presenting their truth;
- previous convictions and bias of the institutions in the cases in question or
- serious violation of the presumption of innocence and the reputation of the suspects.

By all standards of human rights and freedoms, everyone is presumed innocent until proved guilty according to law (*Nullum crimen nula poena sine culpa*).¹ Violation of this principle cannot be justified by anything, not even freedom of speech. That is why the media should inform balanced, to report from beginning to end for each case with equally representation of all parties in case and always check the received data, regardless of their source.

How to practice the principle of public justice without jeopardizing the presumption of innocence? This is possible if the interaction between judiciary and the media is based on three fundamental components:

- Accountability of judicial institutions for the rule of law and justice, where the public has a legitimate right to evaluate their work. But also greater responsibility of the media towards respect for the rights and integrity of all parties in the judiciary procedure;
- Independence of judicial institutions means that they are obliged to make decisions only on the basis of facts and evidence and in accordance with the law, without direct or indirect influence, from any person or for any reason (The Bangalore Principles of Judicial Conduct 2001). The media must be immune to instrumentalization in someone's interest. This must also be observed in mutual relations. A free press is not to be preferred to an independent judiciary, nor an opposite. Neither has primacy over the other (Frankfurter F, 1946, 354). The media should respect the independence and impartiality of the judiciary and be aware that public support is necessary for the judiciary and is of benefit to society (Brioni Declaration on the Principles of Judicial Independence, 2015).
- Citizens' trust in the decisions of judicial institutions is possible, if they are made in a transparent manner. And vice versa - citizens are distrustful of actions and decisions made behind closed doors. If the media promotes skepticism in the decisions made, the public trust in the institutions also decreases. And vice versa - their objective reporting affects the credibility of the justice system and the trust of citizens.

These three interdependent components are the foundation on which the forced but stable "marriage" (Surette R. 2007) between the justice system and the media should be based. As "partners", they can develop a lasting relationship based on mutual interests for both of them. This creates a stable culture of rule of law, in which everyone is equally responsible for their rights and responsibilities.

3. INTERNATIONAL STANDARDS FOR MEDIA COVERAGE OF JUDICIARY PROCEDURES

“Every right implies a responsibility; every opportunity - an obligation; every possession - a duty” (Rockefeller 2014)

The freedom of information is inherent without the protection of the rights of others, such as a fair trial and the presumption of innocence or to maintain the authority and impartiality of the judiciary (European Convention on Human Rights 1950, Article 6, 8 & 10 paragraph 2 & International Covenant on Civil and Political Rights 1966, Article 19, paragraph 3). In accordance with Article 10 of EConv.HR, the media have the right, but also the professional duty to report on actions of judicial bodies (including prosecutors and investigating judges) and police services that attract the attention of the public. Otherwise, journalists will conduct parallel "investigations", which have a negative effect on regular proceedings. (Council of Europe Recommendation REC (2003)13).

In this regard, the European Court of Human Rights (ECHR) recognizes the role of the public in the fair administration of justice, as a key component of the right to a fair trial (ECHR, Case of Campbell & Fell v. The United Kingdom 1984, Langborger v. Sweden 1989, Borgers v. Belgium 1991 etc). It protects the parties from arbitrariness and secret administration of justice by the institutions and serves to preserve the citizens' trust in the objectivity of the justice system. Institutions should make all information available, but only if it is not to the detriment of the secrecy of investigations or to delay or prevent the outcome of the proceedings; as well as for the protection of the privacy and reputation of the parties in the procedure, and for their reintegration into society. Particular care should be taken when the parties are juveniles or other vulnerable persons; as well as when the identification of the victims, the witnesses (especially the protected ones) and the families of the parties may have a detrimental effect, both on them and on the proceedings. Therefore, restrictions on freedom of expression in accordance with the law are "necessary in democratic societies", as ensuring a fair trial or presumption of innocence are "legitimate goals" that journalists must respect when reporting on ongoing proceedings. (Council of Europe Recommendation (2003)13, Principle 2 - Presumption of innocence, Du Roy & Malaurie vs France 2000, Paragraph 34, p. 7). This applies to statements that contain prejudice, whether intentional or not (ECHR, Worm v. Austria

¹ <http://www.un.org/en/universaldeclaration-human-rights/article11>. See also Article 6-1 in EConv.HR

1997, Application 22714/93, 25 EHRR 454, Paragraph 50).² To this end, both the judiciary and the police should refrain from statements that run the risk of prejudice and provide only information to the media that is verified or based on reasonable assumptions. This is especially true for the prosecution, as it is only one of the parties in the proceedings. When commenting on a court decision, the prosecutor must not undermine public confidence in the judicial system (ECHR, Decision as to the Admissibility of Application No. 39822/98 by *Altın v. Turkey* 2000). This is a principle of inadmissibility, according to which the public's trust in the independent administration of justice must not be undermined by negative comments from a member of the judiciary (prosecutor or other judge). Profiling information in a way that directs the public to form its own conclusion can lead to disrespect and mistrust in institutions. If the public becomes accustomed to pseudo-trials in the media, it could have adverse consequences for the courts' acceptance of a legitimate forum for resolving legal disputes and for determining the guilt of any individual, in which the public should have greater respect and trust (ECHR, *The Sunday Times v. United Kingdom* 1979, Series A. No. 30, 14 EHRR 229, Paragraph 63). "The authority and impartiality of the judiciary" are fundamental to the smooth administration of justice (ECHR, *Worm v. Austria* 1997, Paragraph 40-41). At the same time, there is a limited opportunity to be informed about the procedures, if it is "in defense of the public interest"; that is, the person is not liable if his or her statements are opinions whose truth is not provable (ECHR, *De Haes and Gijssels v. Belgium* 1997, Paragraph 25).

Although balancing free information with the right to a fair trial varies due to the influence of legal culture in a particular community, most countries have adopted these standards. In this regard, in the United Kingdom, liability for publication with "indecent abuse" of a judge or court, which speaks of their bias, due to external influences or pressure on them and which creates a significant risk that the course of justice in the proceedings will be severely prevented or exposed to prejudice (UK Contempt of Court Act 1981, Article 2 (2)).³ An exception to this is a publication, made as a discussion or with good intentions for matters of public interest, if the risk of prejudice in the legal proceedings is only a side effect of the discussion (*Ibid*, Part 5). In Denmark, the media may not report unilaterally on proceedings, use pretentious expressions or talk about parties if they are not relevant to the case (Danish Administration of Justice Act 2013, section 1071). Both Australia and New Zealand point to "a real risk and potential possibility that the article was deliberately written to create prejudice that the debate is fair" (*Duffy, ex p. Nash* 1960, 2 All ER 891, 896).

In contrast, US courts have little opportunities of punishing media that comment on proceedings, unless there is a "clear and current danger" of enforcing it; and publishers can be punished only if "material evil is extremely serious and the degree of nonsense is extremely high" (*Bridges v. California*, 314 US 252 (1941), p.263; *Wood v. Georgia* 370 US 375 (1962)) etc. *Ibid*). It allows the media to report on trials, with little or no restrictions.

This is an indication that in most countries, the right to a fair trial is accepted as an essential postulate for the protection of the individual's freedom of procedure and culture of the rule of law. In addition, many countries have established mechanisms for self-regulation of the media and judicial institutions, such as Codes of ethics, independent Councils for control of media and professional guidance.

4. LEGALITY OR QUALITY - BETWEEN FREEDOM OF INFORMATION AND PRESUMPTION OF INNOCENCE IN REPUBLIC OF NORTH MACEDONIA AND OTHERS BALKAN COUNTRIES

“Written according to European standards ... applied according to Balkan standards” (Lani et al., 2008)

The legal framework regulating freedom of information, transparency of judiciary and protection of human rights and freedoms in the administration of justice in the Balkan countries is in line with international law. At the same time, the media have their own self-regulation, based on professional and ethical principles. But there is an obvious dichotomy between such regulation and its implementation, which is due mainly to the civic and legal culture in these societies, in which the particular interests of individuals and groups dominate over public needs.

One of the basic civil freedoms and rights in the RNM is the freedom of speech and information, free access to information and its transmission and the right of reply and correction in the media (Constitution of the RNM 1991, Article 16). Similar provisions are provided in the constitutions of other Balkan countries. However, all of them prescribe restrictions on these rights, when their practice violates other rights, including the presumption of

² In *Worm v. Austria*, a journalist was convicted of an article in which he pleaded guilty to tax evasion. The ECHR ruled in favor of the institutions with explanation that there was no violation of the right to freedom of expression, but of the principle of the presumption of innocence.

³ In the case of *R. v. Almon*, Judge Wilmot J. stated (1765, 97 ER, p.100): [Criticism of judges] arouses in the minds of the people dissatisfaction with all court decisions and forces them to disobey them ... it is an obstruction of justice, more dangerous from every other obstacle (*Duffy, ex p. Nash* 1960).

innocence. In Bulgaria, the right to information may not be exercised to the detriment of the rights or reputation of other persons and in that case the state authorities may deny it (Constitution of Bulgaria 1991, Article 41, title 1). In Greece, the right to information may be restricted due to the fight against crime and the protection of the rights and interests of third parties (The Constitution of Greece 2001, Article 5A). This is also provided in Serbia, if it is necessary to protect the rights and reputation of others and to preserve the impartiality and authority of the court (Constitution of Serbia 2006, Article 46).

The principle of publicity is provided in the procedural laws. But with a simultaneous obligation for the state bodies, the mass media and other subjects in the procedure (defense attorneys, injured parties), to respect the principle of presumed innocence (Law on Criminal Procedure of RNM 2010, Article 2 paragraph 2). To that end, under Article 69 paragraph 5, photographs or recordings of persons detained or deprived of their liberty may be published only by concealing their faces. If the unjustified conviction or the unfounded or unlawful deprivation of liberty of a person is shown in a public media and thus the reputation of that person was damaged, the court, at his request, will announce the decision on the unjustification of the previous conviction, ie the unfoundedness or illegality of deprivation of liberty (Ibid. Article 554, paragraph 1).

In terms of the media, freedom of information is guaranteed in all Balkan countries, with respect for human privacy and dignity. In the RNM, any person mentioned in the media that criminal charges have been filed against him/her or that an investigation or criminal procedure has been initiated, has the right within three months from the decision to reject the criminal charge, to reach a final decision with which the investigative or criminal procedure has been terminated or a final verdict of acquittal has been rendered, to require the editor-in-chief to publish information or a response to it (Law on Media 2013, Article 3 paragraph (1) and Article 25 paragraph (1)). Although freedom of expression is promoted; as a fundamental principle of the work of broadcasters, among other things, should be respect for the presumption of innocence, encouraging the public's sense of fairness and objective and impartial coverage of events (Law on Audio and Audiovisual Media Services 2013, Article 2 paragraph 2 and Article 61). Journalists in RNM must also respect these standards in anti-corruption proceedings, where the publication of information must be based on facts, equal treatment of all parties and respect for presumed innocence (Law on Prevention of Corruption 2002, Article 57). The Bulgarian National Council for Radio and Television may control the information protection media for decisions of courts or other state bodies (Radio & Television Law 1998, Article 33 item 8). In Montenegro, all information from institutions, including the judiciary, is available to the public; even those obtained in an unlawful manner, if they are in the interest of preventing crime, protecting the reputation or rights of others, and preserving the authority and impartiality of the judiciary (Law of media, Article 21). In Serbia, it is forbidden for anyone in the media to be called a perpetrator of a crime or to plead guilty before a final court decision; because of the presumption of innocence, protection of human dignity, as well as the independence, reputation and impartiality of the court or other competent body (Law on Public Information and Media 2014, Articles 73 and 74).

According to Article 2 paragraph (2) of the Law on Free Access to Public Information of the RNM, information holders (including state authorities) are obliged to inform the public, and all legal entities and individuals have free access to information (Article 3 paragraph 1). However, according to Article 6 paragraph (1) line 4), information holders may refuse a request for access to information obtained or compiled for investigation, criminal, misdemeanor, administrative or civil proceedings, the provision of which would have detrimental consequences for its course. According to paragraph (2) and (3), the information determined in paragraph (1) of this Article, become available when the reasons for their unavailability cease or if with their publication the consequences on the protected interest are less than the public interest determined by law.

Free access to information is also provided in the laws concerning the activity of institutions involved in the administration of justice. In the RNM, information on the work of the court and the course of proceedings is provided to the media by the president of the court, the responsible person or the public relations office; whereby they take care not to damage the reputation, honor and dignity of the person and the independence and autonomy of the court. In addition, the parties and other participants in the ongoing proceedings are prohibited from providing information and assessment of the course, conduct and outcome of the proceedings, if the court has prohibited such information (Law on Courts 2006, Article 97, paragraph 1, 2, 5 and Article 35 of the amendments 2010). Violation of this prohibition by judges is one of the reasons for their dismissal due to unprofessional and negligent performance of the judicial function (Ibid. Article 75). In Croatia, too, the influence of the media on the outcome of court proceedings and decisions is prohibited, in a manner contrary to a democratic society (Law on Courts 2013, Article 6 paragraph 1). In Kosovo, judges are not allowed to comment on the contents, evidence and decisions of any case in the media (Law No. 06 / L-054 on Courts 2018, Article 40 paragraph 4).

Public prosecutors are also bound by almost identical legal provisions. The Public Prosecutor's Office of the RNM or persons authorized by it are obliged to inform the public about cases in which it acts, especially if they arouse

public interest or are important for the exercise of its function of protection from criminal or other illegal actions. However, if the Public Prosecutor of the RNM considers that data or comments in the media violate the constitutional rights to the presumption of innocence, the principle of independence or the work of the prosecution, he has the right and duty to address the public and point out violations of these principles (Law for the Public Prosecutor's Office 2007, Article 8, paragraphs 1 and 2 and Article 6, paragraphs 1 and 2). In Albania, prosecutors are also not allowed to publish information that harms the investigation, violates the dignity and privacy of individuals (Law No. 8737/01 on the organization and functioning of the Prosecution Office, Article 6 title 2).

Apart from the constitution and the law, the responsibility of the media for informing about judicial proceedings is also subject to professional self-regulation, based on ethical standards. The manner of informing must be free from sensationalism and the presumption of innocence must be respected, all parties involved must be reported equally and a verdict must not be suggested (Journalists' Code of RNM 2001, Article 8). Journalists in Greece are also obliged not to prejudge court decisions and to respect the presumption of innocence (Code of ethics for professional journalist of Greece, Articles 1 & 2). Due to the recent past in Bosnia and Herzegovina, journalists must be especially careful when reporting on witnesses in war crimes trials, as well as on their relatives and friends, unless full, fair and accurate reporting of the trial is necessary and effective. of misinterpretation of the truth or the course of the trial. (Code for Printing and Online Media BiH 1999, Articles 10 and 10a). In Serbia, the media are obliged to protect the identity of the suspect, even when pleading guilty. This means not only protection of the name, but also of other data: photo, address, marital or social status, belonging to a group, neighbors, relatives and friends. As victims and suspects are unaware of the power of the media, the journalist is obliged not to abuse their ignorance (Journalists' Code of Serbia 2015).

Extensive legislation is an indicator that the legal basis in the region is good. But the level of responsibility and adherence to ethical principles in informing about the administration of justice is debatable. The survey of the Regional Index of Openness of Institutions in the period from October to December 2016, showed that the courts meet 48% of the transparency indicators, and the prosecutor's offices only 40%. Half of the courts do not publish court decisions, and 2/3 of the prosecutor's offices do not follow how the media report on their work. In the RNM, the prosecutor's offices meet only 26% of the transparency indicators, and the courts, with 33%, are slightly "more transparent" (Macedonian Center for International Cooperation 2014). In Serbia in 2017, a total of 3,680 complaints were addressed to the Commissioner for Public Information and Personal Data Protection, and since 2016, 3,224 complaints have been forwarded, for which the procedure has not been completed; so that in 2017 there were a total of 6,922 complaints about ongoing proceedings (Commissioner for Information of Public Importance and Personal Data Protection 2018). For these reasons, the media use alternative sources, whose credibility is questionable, due to which, according to 38.4% of respondents, the media do not respect the presumption of innocence, often violate professional and ethical rules contained in their codes or present information that can to jeopardize the investigation itself (Macedonian Center for International Cooperation 2014). In 2017, 250 complaints were submitted to the Media Council in Bosnia and Herzegovina (Media Council in BiH 2017); while in Serbia, in just 14 days, 83 texts were published, which violated the presumption of innocence (Kleut J. & Mišljenović U. 2016).

In addition, in the current Balkan daily life we are witnessing media-exposed arrests, most of which did not end or ended with acquittals. The Helsinki Committee for Human Rights and other organizations noted them in their reports on human rights violations (Helsinki Committee for Human Rights 2014). An even bigger problem is that in most countries in the region, no one is responsible for such occurrences.

5. HOW TO ACHIEVE BALANCE BETWEEN FREEDOM OF INFORMATION, ENFORCEMENT OF JUSTICE AND PRESUMPTION OF INNOCENCE – CONCLUSIONS & RECOMMENDATIONS

According to Lord Bingham, the principle of open justice lies at the heart of the rule of law (McLachlin, B. 2014), because by animating public attention to antisocial activities by individuals or groups and initiating action against them, but also by continuously monitoring them; transparency encourages accountability of institutions and improves the justice and the culture of the rule of law. In that direction, the role of the media is indisputable, which are a bridge between the citizens and the judicial institutions. But at the same time, the principle of open justice can provoke a prejudice to justice and affect the (non-) public trust in the entire judiciary system. Although there is no universal way to equally protect the rights of individuals in proceedings and freedom of critical expression, the following recommendations could still be made:

- institutions to be encouraged to increase transparency and proactive approach to the media;
- to make the decisions of the institutions more understandable for the citizens, because transparent rule of law means that the people understand it, which strengthens the trust in the institutions;

- the information published by the media about the actions and the suspects to be important for the society, and not to be used for daily - political purposes and clashes with opponents;
- free access to information with shorter deadlines and better staffing and other conditions;
- institutions to provide guidance to the media and citizens, with explanations of their role in each part of the proceedings and how, when and what information they can obtain at different stages, depending on the specifics of the case and without compromising the secrecy of the investigation;
- institutions and the media to adopt codes of ethics, which should be harmonized with the law, but also with the ethical norms of the environment, as well as with international standards;
- strengthening the regulatory and self-regulatory bodies, which will control the observance of the codes of ethics and the laws;
- improve information protection mechanisms and develop security mechanisms for - who and how will have access to official data at all stages of the procedure;
- implementation of instruments for rapid detection and denial of information, which are false and can cause distrust in the institutions and violation of the rights of the parties;
- to train the institutions for their greater transparency, but also to train journalists who report on court proceedings (Council of Europe Recommendation REC (2003) 13). In that direction, it is necessary for representatives of the institutions to be involved in trainings for journalism students, in order to explain their organization and work; while for the general public, the institutions should organize "open days";
- the media should avoid qualifications such as "perpetrator" or "criminal" and prefer terms such as "suspect" person facing charges "in connection" with the event, ie avoid words that ignore the presumption of innocence;
- not to publish corruption articles without citing the source of the information, which casts doubt on their accuracy and the intentions of the media or the source of the information;
- to develop investigative journalism, which will check the information and make analyzes of the background of the event and the procedures themselves;

These recommendations should cross the gap between the justice system and the media and enable coexistence between these two pillars of modern society, based on a social culture that respects the rule of law, human rights and the integrity of the individual.

ACKNOWLEDGEMENTS: To my loved daughter Maria

ABBREVIATIONS

EConv.HR – European Convention on Human Rights

ECHR – European Court of Human Rights

RNM – Republic of North Macedonia

UN – United Nations

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