

## **MEDIA INDUSTRY IN THE LIGHT OF THE JUDICIARY INDEPENDENCE IN ALBANIA**

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**ABSTRACT:** *The historical changes in our country as those of world historical periods of time have influenced considerably in the media evolution. The masmedia service as a service offered by third parties, with no participation from state, has been conceded to the private sector upon a rigid rule of the respect for the principles in a democratic society. The service of masmedia has some given features such as: (i) It is offered in respect of the public interest (ii) It is offered from the private profitable sector (with the exception of the state/public institutions) (iii) It should function as a watchdog of the other 3 state pillars executive, legislative and judicial. (iv) it should have an informative, educational, entertainment, investigative, cultural, scientific according to the characteristics of the community in a country (v) It should be independent from any intervention. Media is established in the form of a commercial company, such form been given in accordance with the will of the founders, (members, shareholders, societies) as well as in accordance with the legal requirements. Most of the countries legislation require for a company that offers media service to be registered in the form of a shareholder company (joint stock).*

**KEYWORDS:** Media, Judiciary, Business, Albania, Freedom, Speech

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### **INTRODUCTION**

Freedom of expression including the right to a free press is a constitutional right in many countries. The lawmakers cannot approve laws which limit the right of journalists to distribute the information. However, governments use censorship, thus limiting the press in cases of national security or in issues where this right violates other rights prescribed in fundamental laws of a country.

The cases of limitation of the freedom of expression have been reviewed in a fundamental way from the court. The competence of the court (judicial power) to review cases of limitation of the freedom of expression are a guarantee added against any governmental influence or other, in exercising this right for the gathering and distribution of the information as well as the direct communication with public.

One of the very first cases being judged in the European Court of Human Rights establishing the practice of the relation in between of freedom of expression and right to a fair trial is the case *The Sunday Times vs. Great Britain*, dated 26 April 1979. The debates and irritated opinions expressed on a case under investigation have been largely part of academics discourse, as well as of international conferences in many countries after the 90-s. These conferences have in some cases concluded in some written rules like International Covenant on Civil and political Rights, and European Convention on Human Rights.

The two aspects that deal with the relation in between of the freedom of expression and the right to a fair trial include first the relation of media with the judiciary bodies and secondly media relation toward a person's right to non culpability. The first aspect is generally

discussed in the framework of the check and balance principle as envisaged thereto in the Article 7 of the Albanian Constitution. On the other hand, the second aspect has been elaborated largely in the jurisprudence of the European Court of Human Rights as well as other courts according to different jurisdictions. For the ECtHR the relation has been established in judgements rulings on basis of the Articles 6 and 10 of the Convention.

## LITERATURE/THEORETICAL UNDERPINNING

The case is related to a company so called “Distillers Company Its” which during the years of 1958 – 1961 produced upon a licence and sold in Great Britain a medicine with an ingredient called thalidomide. This ingredient was used for the very first time in Germany (RFGJ) from the company Chemical Gruental. This ingredient caused effects especially to pregnant women. In 1967 many articles on daily newspapers were published as in The Sunday times and Daily mail. Considering that the case was under investigation, the prosecutor made a note to the magazine with threats that he should put sanctions and penalties to it according to law, because it caused an ‘offensive to the court’ in delivering opinions that were public conclusions before the case was trialled.

The provisions of international treaty as ratified by Albanian parliament have given life to the expressing of media evolution in this paper. As adopted and opened for signature ratification and membership from the General Assembly upon its resolution 2200 A (XXI) dated 16 December 1966 entered into force: 23.3.1976

The International Covenant on Civil and political Rights and European Convention on Human Rights have been studied. Article 14 of the provides: *“1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (order public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.*

*2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law...”*

The paper has given rise to a comparison in between of Article 10 (Para 2) and Article 6 of the European Convention of Human Rights. Article 6 provides the right to a fair trial. Such comparison has been deepened for the articles 26, 173 of the Code of civil procedure and articles 103, 340 of the Code of criminal procedure.

The ICJ has also produced the opinions and findings used in the paper. The commission (ICJ) was active in 1990 – 2000 and it organized some international conferences with participants mainly judge of different countries of different jurisdictions.

ICJ has formulated some principles the so called Madrid principles on the relation in between of media and judiciary defining boundaries for exclusion of the right of media to impart information that one can find in the book of Naylor, Bronwyn. "fair judgement or free press: legal responses on media reports in the judgement of criminal proceedings" (1994) Cambridge Law Journal 492 page 497, there has been used the statement to underpin the .

Para 9. Cit: the experience of many of the citizens related to the justice system does not go beyond the participation as parties to the proceeding, witnesses or members of a jury. The role of media is fundamental for the distribution of the information to the public, related to the role and activity of the courts... the integration of justice in the society requires that the judicial system be transparent and to learn how to increase its participation. It is not the idea that the courts be media shows, but that they could contribute to the transparency of the trial itself. As known until now, the full transparency is impossible, especially if we consider the need to support the effective investigations and the interests of the participants, but the knowledge on how it functions does in no doubt hold an educative value and it should help to increase the public trust in judiciary. – the establishment of media offices in courts, with due responsibility for the communication and information; - the distribution of printed materials, creating internet spaces under the administration of courts; - organization from the courts of a calendar with educate forums and/or regular meetings opened especially for citizens, organizations of public interest, decision making bodies, students.

There has been the Principle I (2) (d) as well as Goal of the Recommendation (which has been substituted from REC CM/Rec (2010) 12 of the committee of ministers of member states "on the independence, efficiency and responsibilities of judges" as adopted from the committee of ministers on 17 November 2010), of the Council of Europe no. (94) 12 of October 13-rd, 1994: "in the decision-making process the judges should be independent and free to act upon no limits, unacceptable influence, incitement, pressure, threats or intervention, is those direct or indirect, from any side or on whatever ground. The law should provide for the sanctions and penalties on persons that so try to influence upon judges".

## METHODOLOGY

The paper has been based on the books and researched paper, as well as the legislation in force in Albania. The information and the data included in the official questionnaire used for the Albanian integration to EU, has been a useful tool as well.

In the National Center for Registration of Businesses there has been analysed the data and the reports published by media business, to indicate the number of the court trials where media business is part of in the Albanian courts.

Lastly, the author has been using surveys from the magistrate candidates for the academic years of 2011 – 2014 on their perception for media industry comparing the independence and influence practice.

## Results/Findings

The Albanian legislation provides expressly the prohibition of media (closed trials) to be present and distribute information on a specific trial cases. On the other side, in the framework of the judge's independence, the International Commission of Justice (ICJ) has

formulated some principles the so called Madrid principles on the relation in between of media and judiciary defining boundaries for exclusion of the right of media to impart information.

In the framework of the soft legislation on freedom of expression and judicial power, there should be noted the opinions drafted and approved from the Consultative Council of European Judges (CCEJ) as well as Consultative Council of European Prosecutors (CCEP) addressed to the Committee of ministers of the Council of Europe.

Although the effect of the opinion is not mandatory for the national legislation of the EC members, they do institute a very good judicial frame and a needed one required to be implemented from the countries so that the check and balance principle be implemented properly.

In the opinion of the (CCJE) no. 7 (2005), on “justice and society”, it is recommended that judiciary be responsible for the distribution of information for public through media. This doesn’t not add a duty for the judiciary but that the judicial bodies should constitute the mechanisms in distributing information that raise a public interest. Such recommendation is based on the effect that can produce the ban of information to the media from judiciary. The lack of information can produce a reduction of the public trust into the judiciary or in some cases a wrong opinion of public on the judiciary. The recommendations include that the reasoning of judgements should be as clearly and understandable for the public. They establish some rules of ethics for the judges and their attitudes in tribunal as well as some places (depending on the social and cultural tradition and mentality of a country).

The relation in between of judiciary and media is like a fragile string which is pulled from one side to another only to gain power. For example the interest of one owner of media to cancel a tax penalty against his business is answered by the need of media to give correct information over the performance of a court. The outstanding merit of the judiciary is to find the balance between these two sides of the string on which the public goes through.

The media has a right and is encouraged to take part in the hearing session but often the journalists have a distortion of the news from the judicial and legal point of view. Regarding this the journalism schools are recommended to create courses for institutions and legal procedures.

The recommendation (2003) 13 of the Council of Ministers addressed to the member states, “on distribution of information through the media related to criminal cases” provides that in criminal cases which constitute a public interest, the judicial bodies should inform the media for their actions, for as long as this doesn’t violate the investigations or doesn’t delay or obstacle the result of the process. On the criminal investigations they last for a long period of time, this information should be given constantly.

Other opinions have determined a set of rules pursuant to the court obligation to distribute information in a structured way, avoiding abuse for an individual within the relation court-media providing accurate information to the public.

With regard to the judiciary functioning, in order to protect the public interest and the right to receive information, the judiciary should be limited to enjoying some particular rights. For a judge the need for discrimination (in terms of limitation to enjoyment of some rights) is countable towards the respect for human rights. A judge or a prosecutor has some attributed

rights, but he also is a subject to some limits that are made norms in legal and ethical rules. Especially these limits become more evident on his\her relationship with the media.

## Discussion

Considering the multiple role of media, the European Court of Human Rights has consolidated its jurisprudence towards the freedom of speech and extending the need for expressing opinions in media against every other state pillar with no exception for judiciary.

On the other side, as explained above, a judge is subject to limitation of his rights proportion to the substance of its duty functions. Thus, the rules above explained, might limit some fundamental rights which usually aren't subject to limitation for the other citizens, such as the freedom of speech or the freedom to gather information. Since the rights of a subject, no matter if it's a citizen or a judge, interact with his/her obligations carried within the functioning of duties, he/she shall be subject to some limitations in respect to other rights such as right to privacy or right to freely express ones opinions.

Also, the duties and responsibilities of an official (judge or prosecutor) can come in compliance with the general criminal law regarding the un culpability of the individual until the end of the process, and the profession secret (ex. Attorney, priest), but even from the ruling norms or ethical requirements (the case of a judge dress).

In the following Para, we shall try to analyze some rules and obligations that are in common for both judiciary and media. Media carries with it the duty to inform the public as well as to watch over the other powers. Judiciary carries with it the duty to rule in a fair way and give fair justice. It is judiciary who in an aspect of accountability, is obliged to provide information to the public, to be transparent and to safeguard the rule of law. The overlap of these multiple levels of duties and obligations can provide a picture on the relationship between the media and a judge.

### The pressure and unacceptable influences in judiciary

The communication of a judge with media has to be viewed firstly from the ethical and legal requirements provided for judges and prosecutors. The massive communication should consider also the need that a judge might/ must know (investigate, or judge) all facts placed in front of him free from any "exterior and unnecessary influence". The principle on enforcing an independent and professional judiciary is highly expressed in the second paragraph of the General Principles of the United Nations over the judiciary Independence in 1985: "The judge must select the cases background in front of it, with impartiality, based on the facts in addition to the law, without any limitation, unacceptable influence, stimulation, pressure, threats or intervention, direct or indirect, from any aspect or whatever reason."

There has been the Principle I (2) (d) as well as Goal of the Recommendation of the Council of Europe no. (94) 12 of October 13-rd, 1994: "in the decision-making process the judges should be independent and free to act upon no limits, unacceptable influence, incitement, pressure, threats or intervention, is those direct or indirect, from any side or on whatever ground. The law should provide for the sanctions and penalties on persons that so try to influence upon judges."

The article 3 of the new Recommendation of 2010 includes the same concept in its provisions: "the objective of independence of the judiciary, as laid in the Article 6 of the



ECHR, is to guarantee that every person's right and liberty shall be judged through fair trial, on basis of legal provisions and with non influence".

### Independence of judiciary and freedom of expression

In deepening our analysis, we shall address another aspect of the conflict (formal non compliance) in between of the need to protect the judicial activity from "outside influences and unnecessary and the safeguard of the right to information".

In the framework of the international acts standards, article 10 of the ECHR provides the freedom of expression. While its Para 1 ensures that: "1.Everyone has the right to freedom of expression... to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...", its Para 2 provides that: "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, - within other reasons – for maintaining the authority and impartiality of the judiciary".

The other aspect to be addressed is related to the guarantee and the impartiality of the judge including the cases on which the masmedia activity has an impact or a relevant impact. The first rule foreseen by Article 19 of Recommendation Nr. 12 of 2012 is very clear. "The proceedings and legal cases that are related with the Administration of justice have public interest. The right to be informed related to the legal cases must, anyway, be exercised keeping in mid the imposed limits by the judices independence."

Rolling in our review, it would be valuable to mention that the European Court of Human Rights (ECHR) has treated the mediatised campaigns case in relation to legal cases. Such campaigns are admitted to instil to a media interest on court proceedings on one side, and to an undoughtful interest of public to be informed on the other side.

The court has continuously stated that the term "authority and impartiality of the judge", is a value that should be in compliance with the right of public to get information, and as such, it should be interpreted under the light of the Convention. "For this purpose, importance should be given to the central position that holds the content of Article 6 which reflects the fundamental principle of the right state." "The term "judicial" (judicial power) understates the machine of justice or the legal arm of the government like the judges in their official capacity."

On the other side, the judge's independence and its functionality is supported and exercised based on what is called the Judges's Authority. The judges' authority influences directly on the public trust in judiciary and implements the verdicts through fair and impartial judgements. ECHR has determined that the phrase "the judges authority" in a certain way includes the notion that courts have been accepted by the large public as such, ensuring legal rights and obligations, for resolving disputes among persons, and for that reason, the large public should grant respect and trust in the capacity of courts to perform their duty." The protection given by Article 10 of the European Convention of The Human Rights, on the right of information can as a consequence be in conflict with the guarantee of and impartiality of judgements as provided thereto in Article 6, as long as the attention of media on legal cases might cause an unnecessary influence. Should the media attack judiciary, this can cause damage to the judge's authority. The Court confirms that: "If the cases on judgment are

oriented in order to make the public form its opinion on that case before hand, they could lose respect and trust on judiciary. But then again, this doesn't expel the public look intently to judiciary and their forums in delivering judgements to legal conflicts."

#### Delivery of opinions: media and justice efficiency

The European Court of Human Rights has often stated in its judgements the important role that the media plays in a democratic state as well as the level of democracy standards in a country. Democracy is often the result of the level and capacity of a state to be governed by the rule of law. However, the press must not exceed some limits especially for the protection of the reputation of the others, its duty and responsibility is to impart information and ideas on political cases and other cases which constitutes a general public interest.

#### **Implication to Research and Practice**

This paper implies that the law on media should be revised in Albania. Also the concentration issue raised in Albania should be improved in order that the ownership structure of media does not influence with the public interest implemented by the judiciary.

The editing line should be strengthened in the media broadcasters. Nevertheless the other media including the magazines should regulate themselves based on the principle of parity with other businesses.

The literature and research shows that the media should be self regulated. While in practice in Albania there is no self regulation followed by any media.

The opinions and recommendations show that the judges should avoid giving opinions for cases that are being trialled in their courts. The practice shows that in many cases the judges go in television, live broadcasting and give their own opinion on cases.

#### **CONCLUSION**

These cases undoubtedly include the ones that are related to the administration of justice, a fundamental institution in every democratic society. How should the public be informed with regard to the role that the judges perform within their activity? Should the public be informed only on the base of the surveys, collected facts and organised analysis? Can media deliver opinions and/or analysis according to the way the judge should exercise its power and are these analyses risky for leading the public the wrong way on the justice's function? All these questions are supported on what ECHR determined in the second paragraph of Article 10: "necessary in a democratic society".

The information that the judges and prosecutors implement their duties responsibly is made disposal to the decision makers in the framework of the accountability. The judiciary has, thus a very distinguished role in the society. It acts as justice guarantee, performing a fundamental value within the rule of law, having a great need for the public trust, so that it can have the necessary authority to influence in the public opinion and account any action toward a public bonafide.

In the end, we must say that the road of finding a cooperative mechanism between the media and judge on the public's use is a hard and sometimes risky road but that keeps within the

two-side obligation to finish with professionalism the giving and spreading the information. The prosecutor because of its position and its function that it carries, enjoys some rights and privileges but even some restrains towards them who are only citizens. Like one, the prosecutor has only the obligation to be reserved on giving opinions (ex related to a judgement, the functioning of justice or the given verdicts). On the other side, the prosecutor can only use the force of law to interfere an assault by the media. Regardless on the role it bears, it can often be necessary that the judge himself ask for the contribution of his colleagues (judges) to express his position against any destructive attacks, unsupportive in order to defend his own actions in a given case. For example, in case that a judge has been under media attacks for a given judgement, it should be highly effective that in the framework of the public trust the judiciary could explain the reasons and background of this judgement. This would lead to lack of possible distortions should the media express the reasons instead of the judiciary.

### Future Research

Future researches in this topic should be developed. The writing talks about the freedom of expression and the right to a free press, which are constitutional rights in many countries. Lawmakers can not approve laws that limit the freedom of journalists to spread information. However, as a limitation, governments might use censorship, so they can restrict the press in the case of issues that have to do with national security or for any case that is literally provided in the constitution or basic national laws.

Cases of restriction of freedom of expression are fundamentally reviewed by courts. The right for the Juridical Power to review the restrictions of the freedom of expression gives a special protection from each and every governmental intervention, or any kind of intervention, in practicing and applying of this freedom for gathering and distributing information as well as direct communication with public.

Two aspects on which the report of freedom of speech, freedom of an impartial legal process and the freedom for a due process finds usage are **firstly** the rapport of media with justice bodies and **secondly** the rapport of media towards non- guiltiness of a person.

The judicial practice of the European Court but even that of other courts according to the different legal systems have elaborated some principles related to the report of respecting both of those rights.

In the opinion of the Consultative Council of the European Judges for justice and society, it is advisable for the judiciary to keep responsibility of its own in giving the information directly to the public and media.

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