ACCESS TO COURT DECISIONS

A legal Analysis of relevant international and national provisions

OSCE
Rule of Law Department
September 2008
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1. Introduction

The principal aim of the right to a public judgment is to ensure that the administration of justice is accessible and open to public scrutiny. Therefore the right to have a judgment made public can be asserted by anyone, including people who are not parties to the proceedings.¹

The current practice of the national authorities regarding accessibility of court decisions is rather restricted: in regards to publishing of court decisions the situation is that only decisions of the Constitutional Court are published (in the Official Gazette).² High court decisions (appeal courts and the Supreme Court) are circulated amongst judges internally within the courts, and academics and other “interested parties” can ask for permission from the Judicial Council or the President of the Court to view court decisions.³ This permission is granted with the discretion of the court. Anecdotal evidence as well the little empirical evidence⁴ that is available suggests that national courts are very reluctant to make decisions and judgments available to the general public.

The Rule of Law Department of the OSCE Monitor Mission to Skopje has prepared this Analysis with the purpose to provide an overview of the international standards regarding the publicity of judgments and decisions, the implications for the national level, and domestic legislation regarding access to court decisions.

Access to information, especially in the field of justice, establishes a significant benchmark indicating the level a society has developed to in the area of rule of law and human rights. The purpose of this paper is to stress the relevance of the existence of a transparent and functional mechanism that will make the process for free access to legal information easier.

¹ http://www.amnestyusa.org/Manual/241_The_right_to_a_public_judgment/page.do?id=1104727&n1=3

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2. NATIONAL PRACTICE

Most basic and appellate court decisions and judgments are not published. The parties receive a copy of the court's decision, but, as in the case of court records, a scholar researcher or other interested person needs permission from the court president for access to the decision. This permission, however, seems to be only given if the applicant can prove some specific legal interest in the respective case. If the case involves privacy concerns - juvenile, divorce, or family law issues - permission is usually denied.

Appellate court and Supreme Court decisions are circulated internally for use by the other judges. The Supreme Court published annual compilations of its decisions, although it has not done so since 2001 because of a lack of funds. Excerpts of significant Supreme Court decisions are now published in the Macedonian Judges Association's newsletter, "Judicial Informer", as are occasional appellate court decisions. Excerpts of Supreme Court, Constitutional Court, and appellate court decisions are also sometimes published in the Macedonian Business Lawyers Association newsletter. Decisions of the Constitutional Court are published in the Official Gazette, as well as in annual compilations.

Although verbatim transcripts of proceedings are not made, a written summary of the proceedings is included in the case file. The parties and their lawyers have access to these minutes, as well as other court records, although the public cannot easily obtain them.

Public access to court records is restricted, and generally only the parties and their lawyers have access to the case file. Others who desire to review the record must demonstrate their interest in the matter to the council hearing the case, or after the file is sent to the court archives, to the court president. In criminal cases, a non-party is often refused when requiring reviewing the case file, and if access is given then the non-party should give the court president a reasonable justification for doing so.

Each domestic court verdict begins with the sentence "In the name of the citizens of Republic of Macedonia" and yet not every citizen has access to what has been declared on his/her behalf.

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3 Article 65 of the Court Rulebook (Official Gazette No.6/2007) prescribes: "(1) By the request of the parties and third persons that have legal interest, receipts, certificates for different facts consisted in the writs or for which there is official register in the Court and copies of the public books can be issued, if the president of the court e.g. the judge who is working on the case evaluates that the request is justified.

(2) For the content of the court decisions, the records and the other acts in the writs, receipts are not issued, only rewrites and copies can be issued."

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Therefore the question arises if, under obligations of international law, Courts are in
general required to enable and facilitate anyone interested access to its judgements
and decisions.

In addition, the Law on Courts raises an interesting question as in its provisions
stipulates that if the judge publicly presents information and data for court cases for
which there is not yet an effective decision it will be considered that he/she was
conducting his function unprofessionally and in bad faith. Looked in a broader
understanding, does this mean that a Judgment of the first instance court that is not
effective yet cannot be shared with the public until the entire procedure upon the
legal remedies is completed?

3. INTERNATIONAL LAW

As a general rule, judgments and decisions must be made public.

Judgments in trials - criminal or otherwise - must be made public except in certain
narrowly defined circumstances. To make public, as will be shown below, includes
the reading of the judgment in open court as well as making the document as such
accessible. The obligation of states to “make public” the decisions of their courts is
found within the provisions on “the right to a fair trial”. This right stems from Article
10 of the Universal Declaration of Human Rights (1948) and has been elaborated on
and set down in binding form in the International Covenant on Civil and Political
Rights (ICCPR) and the European Convention on Human Rights and Fundamental
 Freedoms (ECHR).

6 Article 75, paragraph 1, line 6 of the Law on Courts (Official Gazette No.58/2006): “Unprofessional
conduct and conduct in bad faith of the judicial function shall imply unsatisfactory professionalism of
the judge having an effect on the quality and efficiency of the work, including……Public presentation of
information and data for court cases for which there is not yet an effective decision enacted.”

7 Article 14(1) of the ICCPR, Article 6(1) of the European Convention, Article 23(2) of the Yugoslavia
Statute, Article 23(2) of the Rwanda Statute; see Article 8(5) of the American Convention; see also
Articles 74(5) and 76(4) of the ICC Statute.

8 http://www.unhchr.ch/udhr/lang/eng.htm

9 http://www.ohchr.org/english/law/ccpr.htm. The host country made no reservations to this treaty,
therefore the provision of this treaty are binding in the host country in their entirety.

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3.1. International Conventions

- International Covenant on Civil and Political Rights (ICCPR)

Article 14 of ICCPR elaborates the rather general foundation of article 10 of the Universal declaration of Human Rights regarding fair trial standards and gives a very clear direction regarding the accessibility of court judgments:

“(1) [...] any judgment 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.”

- European Convention on Human Rights

In addition Article 6 (1) of the ECHR, an instrument that 23 years earlier than the ICCPR entered into force, provides that:

“[…] Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

- International Conventions within the domestic context

First, the host country is legally bound to respect and ensure the provisions of article 14(1) ICCPR and article 6(1) of the European Convention on Human Rights (ECHR) as a state party to these treaties. In compliance with Article 31 of the Vienna Convention on the Law of Treaties (1969) treaties must “be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

Second, by virtue of Article 118 of the Constitution “international agreements ratified in accordance with the Constitution are part of the internal legal order and cannot be changed by law”.

Both of these landmark conventions stipulate the general obligations of making judgments and decisions available to the general public. Any exception to the rule, especially in the field of Human Rights, has to be interpreted very narrowly.

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12 Compare with footnote 7, but also the jurisprudence of the ECHR regarding article 10 or 11 of the ECHR.

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Therefore, public access to a hearing can be limited or excluded under both the ICCPR and the ECHR under very special circumstances, namely to protect the morals, public order, national security in a democratic society, when the interest of the private lives of the parties require and at the discretion of the court where publicity would prejudice the interests of justice.

However, regarding the “making public” of court decisions, there are no exceptions to this rule in the ECHR, and only very limited circumstances under the ICCPR where non-publication is permitted such as: if it is in the interests of juvenile persons, for proceedings concerning matrimonial disputes or in cases of guardianship of children.

Even when an exception to the making public of court decisions exists, any interference with a right or non-compliance with an obligation in order to be legitimate must be prescribed by law, pursue a legitimate aim, be necessary in a democratic society and be proportionate to the aim pursued.

International courts recognize the importance of transparency and public accessibility in order to fulfill their mandates accordingly. The European Court of Human Rights, the International Court of Justice, the International Criminal Tribunals for the Former Yugoslavia and Rwanda as well as the International Criminal Court make all their judgments and a vast majority of their decisions available on the internet to anyone interested.

### 3.2. International jurisprudence

More specific guidance to the obligations of courts to make judgments public can be found within the jurisdiction of international courts, especially by the European Court of Human Rights (ECHR).

- Pronounced publicly

The ECHR gives special importance to the “publicity” of proceedings, seeing it in a wider context as the cornerstone of a fair judiciary and functioning democracy. In the case of *Pretto & Others v Italy* the ECHR stated that:

> “21. The public character of proceedings before the judicial bodies referred to in Article 6 § 1 (art. 6-1) protects litigants against the administration of justice in secret with no

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13 This is apparent from the wording if Article 6(1), i.e. “Judgements shall be pronounced publicly” this is mandatory provision through the use of “shall” as opposed to “may”, whereas regarding access to the hearing the provision continues “but the press and public may be excluded from all or part of the trial”.

14 See footnote 8.

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public scrutiny; it is also one of the means whereby confidence in the courts, superior and inferior, can be maintained. By rendering the administration of justice visible, publicity contributes to the achievement of the aim of Article 6 § 1 (art. 6-1), namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention.\textsuperscript{15}

Regarding judgments and publicity, the ECtHR stated that: "...it considers that in each case the form of publicity to be given to the "judgment" under the domestic law of the respondent State must be assessed in the light of the special features of the proceedings in question and by reference to the object and purpose of Article 6(1)"\textsuperscript{16}

Thereby, the ECtHR recognises the diversity of the legal systems of its Member States, but underlines the imperative of the principle of publicity:

22. Whilst the member States of the Council of Europe all subscribe to this principle of publicity, their legislative systems and judicial practice reveal some diversity as to its scope and manner of implementation, as regards both the holding of hearings and the "pronouncement" of judgments. The formal aspect of the matter is, however, of secondary importance as compared with the purpose underlying the publicity required by Article 6 § 1 (art. 6-1). The prominent place held in a democratic society by the right to a fair trial impels the Court, for the purposes of the review which it has to undertake in this area, to examine the realities of the procedure in question."\textsuperscript{17}

\begin{itemize}
\item Making the judgment available to everyone
\end{itemize}

The court held that, having regard to the appeal court’s limited jurisdiction (i.e. to decide whether there has been an error of law) depositing the judgment in the court registry, which made the full text of the judgment available to everyone, was sufficient to satisfy the requirement of being "pronounced publicly".\textsuperscript{18}

In Sutter v Switzerland\textsuperscript{19}, the ECtHR held that public delivery of a decision of a

\textsuperscript{15} See also the Godber judgment of 21 February 1975, Series A no. 18, p. 18, § 36, and also the Lawless judgment of 14 November 1960, Series A no. 1, p. 13.

\textsuperscript{16} Pretio and others v Italy, 8 December 1983, art paragraph 26 at http://cmiskp.echr.coe.int/docs/197/view.asp?Item=1&portal=hhkm&action=html&highlight=PRETTO\%20\%C\%20ITALY&sessionId=1356568&skin=hudoc-en

\textsuperscript{17} See also notably, mutatis mutandis, the Adolf judgment of 26 March 1982, Series A no. 49, p. 15, § 30

\textsuperscript{18} Szucs v Austria 24 November 1997 at paragraph 43

\textsuperscript{19} Sutter v Switzerland, 22 February 1984 at http://cmiskp.echr.coe.int/docs/197/view.asp?Item=1&portal=hhkm&action=html&highlight=SUTTER\%20\%C\%20SWITZERLAND&sessionId=1356568&skin=hudoc-en

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military appeals court was not necessary, as public access to that decision was ensured by other means, especially the possibility of seeking a copy of the full judgment from the court registry and its subsequent publication in an official collection of case-law.\textsuperscript{20}

The ECtHR’s approach to assessing whether the obligation to pronounce judgments publicly has been violated is to look at the whole court proceedings in a particular case. In the case law analyzed in this paper, if the first instance decision was not made public there was a violation of Article 6(1) ECHR.

The minimum requirement to make a judgment public is to deposit the judgment in the court registry in order to make it available to everyone.

In further defining the rule that the judgment must be available to everyone, the ECtHR further elaborated on the argument sometimes brought forward by national jurisdictions that accessibility can be restricted to specific groups of person:

- Access only to those with legitimate interest?

In Werner v Austria\textsuperscript{21} and Szucs v Austria\textsuperscript{22} the ECtHR listed several elements that would lead to a condemnation by the ECtHR:

1. neither judgment was given in public session by the court of first instance or the court of appeal
2. access to the judgments and case files was limited to those with a “legitimate interest” in the case, which was decided by the court at their discretion,
3. access to the full text of judgments from the court registry for those with a legitimate interest only existed in respect of judgments from the Supreme, Administrative and Constitutional courts, \textit{not the courts of first instance or appeal}.

\textsuperscript{20} Mole and Harby at page 22 and Sutter v Switzerland at paragraph 34

\textsuperscript{21} http://cmiskp.echr.coe.int/tkp197/view.asp?Item=1&portal-hkm&action=html&highlight=WERNER%20%C%20AUSTRIA&sessionid=1356568&skin=hudoc-en

\textsuperscript{22} Szucs v Austria, 24 November 1997 at http://cmiskp.echr.coe.int/tkp197/view.asp?Item=1&portal-hkm&action=html&highlight=SZ%20C%20AUSTRIA&sessionid=1356568&skin=hudoc-en

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The ECtHR found that there had been a violation of the obligation to make public the decisions in these cases under Article 6(1) because the judgments had not been pronounced orally in court and had not been "sufficiently ensured by other means" and because "full text of the judgments [of the courts of appeal and first instance] are not made available to everyone" but a limited class of people.

In reverse, it must be concluded that a public announcement of the judgment in court with a subsequent denial to make the text of the judgment available would be contrary to the requirements of publicity stipulated by the ECtHR.

- making full written determinations only available to certain classes of the public, i.e. academics or interested parties is not permissible under the ECHR as this does not guarantee access to the judgments to everyone

- At first instance the judgment must be pronounced orally and in order not to limit the access to the judgment to a limited class of persons it should also be made available to all members of the public on request

- the appeal court does not have to orally pronounce the decision as the object of public scrutiny of the courts decisions is met by the first instance substantive decision being made accessible to all members of the public, however, the appeal decision should be made accessible to the public through the court registry

All of the cases on the "making public of court decisions" under the ECHR concern cases where the court has not pronounced the verdict orally in court at the appeal levels of the litigation. The courts have decided that where the first instance decision (the substantive determination) as been pronounced publicly at the stage of first instance, this is sufficient to secure the right to a fair trial under Article 6. In these cases the first instance decision was also accessible to the public through deposition in the court registry. In cases where the first instance and the appeal decision where not pronounced publicly nor was the first instance determination available for public access in the court registry the court has found a violation of the obligation on states parties to make the decisions of their courts public.

23 Szcus v Austria at paragraph 48
24 Szcus v Austria paragraph 45

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3.3. Soft law and other sources

The Human Rights Committee of the United Nations established that in case a judgment is not made public a breach of the ICCPR is established.

Other important Human Rights bodies issued decisions and opinions that, if not legally binding, at least carry authority and guidance for the interpretation of relevant provisions.

One of those is the Human Rights Committee that publishes its interpretation of the content of human rights provisions, known as general comments on thematic issues or its methods of work.

In one of its general comments on the right to a fair and public trial the Committee observed:

The publicity of hearings is an important safeguard in the interest of the individual and of society at large. At the same time article 14, paragraph 1, acknowledges that courts have the power to exclude all or part of the public for reasons spelt out in that paragraph. It should be noted that, apart from such exceptional circumstances, the Committee considers that a hearing must be open to the public in general, including members of the press, and must not, for instance, be limited only to a particular category of persons. It should be noted that, even in cases in which the public is excluded from the trial, the judgement must, with certain strictly defined exceptions, be made public.

As a body that also can assess individual complaints, the Human Rights Committee stated that because the judgment rendered against a defendant was not made public, a breach of the ICCPR could be established.

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25 This term is used to refer to jurisprudence which is not legally binding on states parties but which is persuasive authority given that it is an interpretation of the law by international experts who are themselves a source of law in International law.

26 The Human Rights Committee is a UN body of independent experts that monitors implementation of the International Covenant on Civil and Political Rights by its State parties.


4. DOMESTIC LAW

The International Covenant on Civil and Political Rights (ICCPR), like all other international Conventions that are ratified, is incorporated into the national law.

In its State Report to the Human Rights Committee in 1998, the Government stated the following regarding public access and the court process:

"Public access and excluding the public"

275. Public trial is at the same time a constitutional and a litigation principle. According to article 102 of the Constitution, the court hearings and the reading of the verdict are public. The public may be excluded in cases determined by law. The principle of public access applies to discussion before the courts in general, and it also has equal application in the criminal and civil proceedings.

276. Public proceedings are a right of the parties to the proceeding as well as of third persons who are not directly interested in the outcome of the proceedings. [...] 

279. The verdict must be published. According to article 344 CPC, the President of the Council, in the presence of the parties, their legal representatives, authorized persons and defense counsel, shall publicly read the verdict and give a short summary of the reasons for the verdict. If any of the parties is not present, the announcement shall be made to those present. The announcement of the verdict shall always be read in public session. The Council shall decide whether and to what extent it shall exclude the public when stating the reasons for the verdict. This concerns only cases when the public was excluded from the main hearing. It is not possible to exclude the public when making public the reasons for the verdict if the public was not excluded from the main areas.

However, the Government does not specifically address the issue access of court decisions to a general public. There are no clear provisions stating that decisions and judgments cannot be available to the general public (which anyhow, would be contrary to international law as shown above); the law merely specifies to whom a copy of the judgment must be delivered. In the absence of clear guidance from the national legislation, international standards and norms must be applied, allowing for general access to court decisions and judgments.

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5. CONCLUSIONS

From the direct applicability of these international conventions and the fact that the national legislation shall be interpreted in the light of international norms and standards, following findings can be drawn:

- The right to public judgment is violated if judgments are made accessible only to a certain group of people or when only people having a specific interest are allowed to inspect a judgment.29

- The requirement that judgments be made public (in all but the exceptional circumstances defined above) applies even if the public has been excluded from all or parts of the trial.

- “Made public” is generally satisfied by reading the decision aloud in an open public session together with the depositing of the judgment in a court registry where it is accessible to everyone or in procedural appeal cases with deposition in the registry alone.

- The minimum requirement to make a judgment public is to deposit the judgment in the court registry in order to make it available to everyone.

- The host country’s current practice of not publishing judgments of the courts of first instance and appeal and only making them accessible to individuals who are academics or interested parties is in violation of Article 6(1) of the ECHR and other international instruments.30

- The Council of Europe Recommendation of the Committee of Ministers to member states on the delivery of court and other legal services to the citizen through the use of new technologies R (2001) 31 (28th February 2001) is indicative of the general practice of members of the Council of Europe to make court decisions public and the desirability of making accessibility to court decisions as easy as possible to the general public.

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30 See Secus v Austria at paragraph 48


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