

ANNUAL REPORT ON THE EFFICIENCY OF THE

LEGAL PROTECTION OF HUMAN RIGHTS

IN THE REPUBLIC OF MACEDONIA



USAID
FROM THE AMERICAN PEOPLE

DEFENDING HUMAN RIGHTS PROJECT



Macedonian Young Lawyers Association

Period: September 2014 – December 2015

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SUMMARY:

Respect for human rights in the Republic of Macedonia during 2014 and 2015, was set back by two distinct processes – (1) political crises arising from the intercepted communications scandal and (2) the influx of refugees and migrants. In February 2015 political crisis was triggered with the disclosure and broadcasting of intercepted private communications of more than 20,000 citizens allegedly implicating senior Government officials. The second one is the refugee crisis and the influx of refugees and migrants transiting through the territory of the Republic of Macedonia to more affluent EU states. The two processes as mentioned above had a significant impact on the protection of human rights in the country raising serious questions regarding the level of respect towards the fundamental human rights and freedoms established and protected by the Constitution of the Republic of Macedonia. The political crisis sparked questions regarding the respect and protection of liberty and the privacy of communications, as well as the use of “special investigative measures”. Moreover, the publicized intercepted conversations (so-called “bombs”) suggested violations of civil and political rights: to protest, vote, election rights, the right to a fair trial, etc. On the other hand, the “refugee crisis” generated issues regarding the country’s compliance with obligations relating to respect of the right to life, conditions at the detention centers for irregular migrants, as well as the right to fair trial.

- **Rights concerning life, physical and moral integrity**

In the five month period between November 2014 and May 2015, in several separate railway accidents on the territory of the Republic of Macedonia, a total number of 27 migrants lost their lives. The authorities of the Republic of Macedonia were fully aware of the growing number of persons who were illegally transiting through the territory and further aware that the migrants were using the railway lines to make their way through the country. The influx of refugees and migrants further resulted in the overcrowding of the Detention Center for Foreigners in Gazi Baba where **inhumane conditions** were reported. In the year 2015 a **case of hindered access to health protection** of a prisoner was also noted. Of particular concern is information of a **failure to report rapes** committed on beneficiaries of educational and penitentiary institutions.

- **Right to liberty and fair trial**

In some cases, court orders for detention and detention extensions were recurrently implemented with **identical decisions**, without due individual assessment being carried out, whether or not conditions for ordering detention were fulfilled. Macedonia had already been subject to condemnation by the European Court of Human Rights for such practices. In the reporting period the common practice of prolonged **detention of immigrants** at the Detention Center for Foreigners in Gazi Baba, without legal grounds and in absence of a court decision, was noted.

- **Right to equality**

During 2014 and 2015 the **Ministry of Interior continued its practice to prevent Macedonian citizens from leaving the country** based on suspicions that those citizens could abuse the visa free regime and seek asylum in the EU.

This practice is not prescribed in any law and disproportionately affects members of the Roma ethnic community. The infringement of the right to equal treatment has also been noted in cases where **employment contracts are not extended** after an employee informs the employer that she is pregnant. Persons subject to this or other types of discrimination are often not ready and willing to report the discriminatory act, while persons who have witnessed discrimination are afraid to testify in such proceedings for fear of repercussions.

- **Right to privacy, freedom of speech, freedom of movement and peaceful assembly**

The published information of alleged interceptions of 20,000 persons, which in some cases were confirmed as authentic by politicians, journalists and nongovernmental organizations activists, potentially suggest a severe infringement of the secrecy of communications and privacy. Furthermore, in 2015, pressures relating to the right to protest and peaceful assembly were noted.

- **Right to property, work and social protection**

Severe difficulties were noted in the realization of the right to social welfare protection. Through a retroactive application of regulations the right to social and permanent financial assistance was terminated affecting over 1,000 people. The unreasonably lengthy appeal process determining the rights of social welfare protection and vague decisions hindered access to social welfare protection for citizens. The enforcement continues to raise serious issues like: the amount and proportionality of the enforcement expenses, the enforcement of social aid income, etc.

- **Legal certainty**

In the year 2014, and especially in summer of 2015 increased legislative activity was noted, which resulted in the promulgation of more than 400 laws in a period of three months. Such vast number of amendments included laws of great importance for the protection of citizens' rights, as well as their livelihood (Law on Pension and Disability Insurance, Law on Health Insurance, the Criminal Code and the Law on Labor Relations). That frequency of the amendments of laws, calls into question the legal certainty of the citizens in the Republic of Macedonia.

INTRODUCTION

About the Report:

The Annual report on the efficiency of the legal protection of human rights in the Republic of Macedonia¹ is an activity of the USAID Defending Human Rights Project (hereinafter: the Project) implemented by the Macedonian Young Lawyers Association (MYLA). The purpose of this Report is to present the key human rights violations noted in the process of implementing the first year of the Project. Besides documenting human rights violations, the Report also analyzes the efficiency of available legal remedies, primarily protection received from the courts.

The purpose of the Report is to contribute to the portrayal of human rights situation in the Republic of Macedonia. The Report complements national as well as international reports, and it focuses in particular on legal protection of human rights, i.e. the methods and the extent to which the legal mechanisms are efficient in their aim to protect human rights.

The first part of the Report consists of description of human rights violations noted by the Project. The violations are divided into six sections: 1. Life, physical and moral integrity; 2. Liberty and fair trial; 3. Equality; 4. Privacy, freedom of speech and peaceful assembly; 5. Property, work and social welfare protection and 6. Legal certainty. The second part of the Report, through specific case studies, analyzes whether and to which extent the existing legal means are efficient and adequate in providing protection to citizens in specific cases.

About the USAID Defending Human Rights Project:

The aim of the three-year program USAID Defending Human Rights Project is to contribute towards the advancement of human rights protection and promotion and democratic values in the Republic of Macedonia, through legal education, strategic litigation and capacity building of legal professionals and civil society organizations. The Project is implemented by the Macedonian Young Lawyers Association.

The project activities are divided into the following components:

¹ Hereinafter: the Report

- **Capacity building of lawyers and young legal professionals on human rights**

Basic and advanced trainings of lawyers and young legal professionals on human rights are organized, and training program is offered to young legal professionals. The aim is to contribute towards improvement of their knowledge in the area of human rights promotion and protection. The Project aims to create a pool of skilled young legal professionals capable of challenging the legal system and practices in defending human rights and fundamental democratic values guaranteed by the Constitution.

- **Strategic litigation and legal advice in cases of human rights violation**

The Project provides free legal aid to victims of human rights violations as well as strategic litigation before domestic and international courts. Reports with analysis regarding human rights respect as a result of the strategic litigation undertaken are developed and presented to public.

- **Strengthening the role of civil society organizations in protecting human rights**

The Project works with civil society organizations to enhance their advocacy skills and capacities in the area of human rights protection. The project supports the coalition of civil society organizations and human rights lawyers to implement public education and awareness activities.

About the Methodology Applied:

In the process of preparation of the Report the team used combined analytical and synthetic approach towards the collection, documentation and analysis of data. The Report aims to accomplish the following study goals:

- Portray human freedoms and rights violations as documented during the Project implementation;
- Analyze whether the existing legal means, most importantly protection provided by domestic courts, are efficient enough in providing protection to the citizens in cases of violations of their freedoms and rights.

The data concerning the identified human rights violations are collected throughout the following sources of information:

- Documented complaints and information from citizens, obtained through the Project's free of charge telephone line - 0800 77 800,
- Documented legal advice provided by Project's attorneys,
- Insight into the case documentation where procedures have been initiated with the support of the Project,
- Observing relevant international and national reports regarding human rights protection in the Republic of Macedonia, the legislative activities, as well as observing the media releases concerning human rights protection, and
- Requests for free access to public information.

The human rights violations presented in this Report were documented using the *descriptive method* whereby a detailed statement of facts is provided, whilst personal information of the sources of information is protected accordingly. The term violation is used to describe every act, failure to act, conduct and policy that affects the fundamental freedoms and rights as defined in the Constitution of the Republic of Macedonia.

The efficiency of the legal means is analyzed through the use of case studies. This method encompasses an analysis of a concrete case and scrutinize the way available legal remedies work in practice. Cases subjected to analysis are selected in accordance with the following criteria: higher number of citizens affected by a problem, a problem that has already been noted and presence of facts and proofs the occurrence of a violation of a certain human right. This method focuses on the following case elements:

- The circumstances surrounding the case ,
- The material facts of each case,
- The relevant and effective legal provisions governing the issue,
- The legal means available in the specific situation, i.e. their legal formulation and the experience gained through the proceedings initiated,,
- Legal issues raised by the case and the conduct of the courts.

The Report comprises the period between September 01st, 2014 and August 31st, 2015, which represents the first year of the Project implementation.

About the legal protection of human rights in the Republic of Macedonia:

Fundamental freedoms and rights of the individual and the citizen recognized

under international law, are not only guaranteed and protected, but together with the rule of law form one of the fundamental values on which the Constitution is based. As a supreme legal act, the Constitution establishes a list of freedoms and rights protection of which is guaranteed in the Republic of Macedonia².

The international agreements ratified by the country form an integral part of the legal order. A possibility to include additional freedoms and rights, which are not already provided by the Constitution, exists. The protection of freedoms and rights, according to the Constitution, is realized through the **guarantees of basic freedoms and rights³**. **The fundamental guarantee provided by the Constitution is the possibility to seek and gain protection by the courts as well as the Constitutional Court of the Republic of Macedonia, in legal proceedings based on the principles of priority and urgency.**

Other guarantees provided by the Constitution as guarantees to human rights protection, include court protection of the legality of certain acts, as well as active introduction of human rights and basic freedoms to citizens. Despite these guarantees, human rights protection is also realized in accordance with the respect to the rule of law principle (constitutionality, legality, public promulgation of the laws, vacatio legis period, prohibition of retro-action of the regulations, as well as independent and self-governing attorneys). Restriction of the freedoms and rights, where permitted, is only permitted as determined by the Constitution, during a state of emergency or war, in a manner established by the Constitution.

In addition to the court protection, the Constitution establishes the Ombudsman of the Republic of Macedonia as a separate body that protects citizens' constitutional and legislative rights when they are violated by administrative body, organization or other institution carrying out public mandates is guaranteed.

² Chapter 2 of the Constitution of the Republic of Macedonia.

³ Articles 50-54 of the Constitution of the Republic of Macedonia.

Part 1:

DOCUMENTED HUMAN RIGHTS VIOLATIONS

Area 1: Rights concerning life, physical and moral integrity

The Constitution of the Republic of Macedonia defines the human right to life and person's physical and moral integrity as *absolute*⁴. Irrevocability is guaranteed through the prohibition of: the death penalty; any form of torture, or inhumane or humiliating conduct or punishment; and forced labor.

The use of new means of coercion by the police is allowed

The Assembly of the Republic of Macedonia in March 2015 amended⁵ Article 91 of the Law on Police Forces⁶ allowing for the use of **new means of coercion** with the aim of re-establishing public order and peace in cases of mass breaches. The new means of coercion include: **electric paralyzers, rubber bullets, special vehicles for maintaining public order and peace** and pyrotechnic-explosives (**shock grenades**). The law regulates the type of situations where means of coercion can be used. The use of these means of coercion is permitted in cases when a police officer has previously ordered the crowd that is violating the public order and peace, to disperse and that order has not been complied with. Such means shall be used only by an order of the police officer who conducts the action. There are no other legal provisions that regulate the use of the means of coercion.

The use of the aforementioned coercive powers could cause very serious⁷ and potentially lethal consequences⁸ to the health of persons subjected to them.

Because of the serious effects of such means their use should be limited by precisely defined criteria, in a procedure that guarantees proportionality and absolute necessity, and only in cases when the order and peace cannot be re-

⁴ Articles 10 and 11 of the Constitution of the Republic of Macedonia.

⁵ Law on Amendment and Addition of the Law on Police, Official Gazette of The Republic of Macedonia, n. 33/2015, Article 5.

⁶ Law on Police, Official Gazette of The Republic of Macedonia n. 114/2006.6.

⁷ Non lethal weapons as legitimizing forces? 2004, author Bryan Rappert, pg. 88

⁸ Non lethal weapons as legitimizing forces? 2004, author Bryan Rappert, pg. 88

established using alternative less coercive means. However the new legislation is not sufficiently precise and does not provide sufficiently clear definition on the circumstances when and how those means could be applied, despite the fact that the use of such means could jeopardize the lives of citizens.

Access to appropriate healthcare rendered difficult for persons serving prison sentence

A close relative to a person serving a long-term prison sentence in one of the penitentiaries in the Republic of Macedonia approached MYLA. While serving his sentence, the detainee fell ill with a severe disease of the lymphatic system which required enhanced medical care and attention. The person was subjected to several diagnostic and surgical treatments, all of which proved to be unsuccessful. His family was not informed about those treatments. In 2012 and 2013 his parents made several requests of the Director for Execution of Sanctions to release the person temporarily so as to enable him to seek and obtain appropriate medical treatment, all of which were denied. During summer 2013, the health condition of the person deteriorated to the extent that he could no longer move by himself. As a result he was released in the month of July 2013. This was too late, two weeks after his release, despite medical examinations and the therapy he received, the person passed away at the age of 38. The person's age, the fact that he experienced problems with his health for a prolonged period of time, as well as the fact that his family was not informed about his health condition, diagnosis and the therapy undertaken, indicate that this was a case of a hindered access to adequate healthcare for a person serving prison sentence. This case of hindered access to healthcare was indeed noted by the Ombudsman of the Republic of Macedonia in his Annual Report for the year 2014⁹.

Inhumane conditions at the Detention Center for Foreigners in Gazi Baba

The Ombudsman of the Republic of Macedonia and the National Preventive Mechanism having conducted several visits of the Detention Center for Foreigners in Gazi Baba, confirmed allegations made by detainees indicative of inhumane conditions for migrants and refugees. The Ombudsman of the Republic of Macedonia¹⁰ emphasized that there are no adequate conditions of accommodation for irregular migrants at the center, especially for women and children. The Center is overcrowded, the conditions are below any minimal standard, there is no consistent medical care and there are an insufficient number of beds for the numbers held there. Detainees were unable to exercise their right to free movement and could not take daily walks because the construction is not appropriate for the purpose for which is being used. Of particular concern is the fact that there has been registered police brutality against the migrants in Gazi Baba¹¹. The center's inappropriate conditions were highlighted in the

⁹ Page 68 – 72 of the Report.

¹⁰ Annual Report on the degree of human rights securing, respecting, advancing and protection, 2014 Ombudsman of the Republic of Macedonia

¹¹ Human Rights Watch – , 2015

first half of 2015 with the increase of refugees from the Middle East crisis areas. Because of the large number of complaints and the immense pressure from the international and national human rights organizations, the Detention Center was closed in July 2015.

27 immigrants lost their lives on the railway lines in Macedonia¹²

In the period November 2014 – May 2015, in several separate accidents, a total number of 27 foreign citizens illegally transiting through the territory of the Republic of Macedonia lost their lives, and twelve were injured. These persons used the so-called Balkan Migration Route¹³ by entering the country clandestinely with the intention to transit through Macedonia on their way to Serbia and further on to one of the EU countries. Because they entered the country illegally they were unable to access and use public transportation or taxi during the transit and forced to walk and thus vulnerable to groups of people smugglers. In order to travel north these migrants used the railway line from the city of Gevgelija to Kumanovo, as guidance. The aforementioned accidents happened on these railway lines. The most severe accident happened on April 23, 2015 near the town of Veles, when 14 people were killed. The frequency of the accidents, the number of people killed, as well as the long period of time over which the accidents occurred, are indicative of the fact that the Government took insufficient steps to protect the right to life of people transiting through the country, albeit unlawfully.

Cases of sexual abuse at the educational and correctional institutions that were not reported

There were several cases of a failure to report the sexual abuse of minor inmates at educational and penitentiary institutions. At the Educational and Penitentiary Institution in the city of Tetovo, there was an attempt by employees to withhold information about the rape of a minor. In May 2015 a minor inmate was raped by four of his peers and when the victim immediately reported the crime, the only action the competent officers took was to record the rape in the Book of Daily Events. The competent officers decided that there was no need to carry out medical examination of the victim. Such a decision resulted in the loss of a possibility to provide evidence proving the rape by the Forensic Medicine Institute. In addition, there were no measures undertaken to protect the victim, he was left unattended for the following two weeks with the alleged perpetrators of the rape. After two weeks the victim succeeded in his efforts to inform the Ombudsman of the Republic of Macedonia in writing, after which the Ombudsman proceeded to undertake necessary actions. The Head of the Educational and Penitentiary institution is reported to have confessed that he had hidden the case of the rape of the minor¹⁴.

¹² Source: <http://dnevnik.mk/?litemID=359D381FE62BBB4FB348342E9198A6ED>

¹³ <http://frontex.europa.eu/trends-and-routes/western-balkan-route/>

¹⁴ Source: <http://fokus.mk/obvinet-vraboten-od-vospitno-popravniot-dom-tetovo-ne-prijavil-siluvan-e/>

Area 2: Right to liberty and fair trial

This area includes the *right to liberty* as well as *procedural guarantees* for a fair criminal procedure and trial. In accordance with the Constitution of the Republic of Macedonia the liberty of the person is irrevocable. No person's freedom can be restricted except by a court decision or in cases and procedures determined by law¹⁵. Persons detained shall be brought before court as soon as possible, within a maximum period of 24 hours from the moment of detention, and the legality of their detention shall there be decided upon without delay. Pre-charge detention may last, by court decision, for a maximum period of 180 days. After the indictment, the duration of detention is extended or determined by the competent court in a case and procedure stipulated by law. The procedural guarantees for a fair trial include¹⁶: the right to be informed of the reasons for his detention or arrest; the right to be informed about his rights; the right to Counsel; the presumption of innocence; the rule of law in determining criminal offences (*nullum crimen sine lege*); the right to compensation in the event of unlawful arrest, detention or conviction; and the prohibition of a person to be tried twice for the same crime (*ne bis in idem*).

The detention is ordered and extended through issuance of identical decisions and reasons for decisions, without necessarily taking into consideration the individual circumstances of every case independently

The Basic Court Skopje I – Skopje in the course of the year 2013 ordered detention of 30 days to a person where there existed reasonable doubt that he had committed the crime for which he had been accused. The order was made on the ground that all three detention prerequisites, prescribed by the Law on Criminal Procedure, were fulfilled ((1) risk of the accused absconding, (2) re-offending and (3) interfering with the investigation). However, the court did not direct itself to the individual circumstances and undertook no assessment as to whether the particular facts of the case fell within the aforementioned requisites. The person was held in detention even after the investigation was concluded and the charges were filed, the person was deprived of liberty for a total of 14 months with a total number of 13 consecutive decisions authorizing the extension of the detention for 30 day periods. Each of the decisions for extension of detention were identical the only difference being the date of promulgation. The reasons for the decisions were also identical, they contained the standard phrases and explanations without stating the specific circumstances of the case, and without legal arguments justifying the necessity of the prolonged detention. The detainee unsuccessfully appealed against all the decisions authorizing the extensions of the detention: The decisions, like the decisions of the first instance court, contained standard phrases and terms and entirely failed to address the arguments raised in the grounds of appeal. This conduct of the courts is contrary to the right to liberty of the person and has already been noted and criticized by the European Court of Human Rights in the case of Miladinovi and others against Macedonia.¹⁷ *Moreover the circumstances of the case and number and nature of*

¹⁵ Article 12 of the Constitution of the Republic of Macedonia.

¹⁶ Articles 13 and 14 of the Constitution of the Republic of Macedonia.

¹⁷ Applications nos. 46398/09, 50570/09 and 50576/09

repeated decisions without accountability make it difficult to imagine that such abuses are anything but systematic.

Person tried twice for the same crime

A person who was convicted of committing the criminal offence of abuse of public office and authorization, and was sentenced to serve one year imprisonment. The decision was final and effective however the convicted person was unavailable to the authorities to serve his prison sentence. After some time, separate charges were filed against several persons accused of being accomplices in the same offence together with the convicted person being charged for the second time for the same offence for which he had already been convicted. The court passed the judgment in *absentia convicting* the same person twice for the same offence, and the Court of Appeal upheld the second conviction. This amounts to a violation of the constitutionally guaranteed principle of prohibition of person to be tried twice for the same crime (*ne bis in idem*).

Deprivation of liberty of immigrants for the purpose of securing their presence as witnesses in criminal procedures

In the Republic of Macedonia during the years 2014 and 2015, it has become common practice to deprive immigrants of their freedom for the purpose of securing their presence as witnesses in criminal procedures against suspects of smuggling immigrants¹⁸. Foreigners who were transiting through Macedonia together with persons suspected to be smugglers of persons, were detained by police at the Centre for Foreigners “Gazi Baba” for a prolonged period of several months. They were detained for the purpose of providing their statements as witnesses in court. This kind of deprivation of liberty, in the absence of court decision and/or legal grounds justifying the detention is unconstitutional and contrary to Article 5 of the European Convention on Human Rights. Pursuant to the Convention, the deprivation of liberty is only possible under precisely determined circumstances, and providing testimony before a court of law is not a ground justifying detention. The migrants were held at Center for Foreigners together with their family members including children.

Disproportionately high sentences for professional drivers transporting immigrants, even though they were not part of organized immigrant smuggling groups

In the course of years 2014 and 2015, when the refugee crisis intensified, a significant number of professional taxi drivers who had transported immigrants in the course of their everyday professional activities, were accused and even convicted of Immigrant Smuggling (crime in accordance with Article 418-6 paragraph 2 of the Criminal Code). The penalty imposed by law for such a crime is imprisonment for a minimum one (1) and maximum five (5) years. Some of the professional drivers convicted are facing imprisonment for at least eight (8) years, where amongst the immigrants who were smuggled there were persons

¹⁸ Resume: Border areas in Europe – violation of refugees and immigrants rights in Macedonia, Serbia and HungaryPg. 5. Available at: <https://www.amnesty.org/en/documents/eur70/1650/2015/hu/>

younger than 18. This conduct, as seen from the aspect of the Criminal Code, in formal sense is legitimate, but there are several circumstances that render its fairness questionable. In these cases, the accused were not always part of an organized immigrants smuggling group. The persons that are accused (and convicted) were working in their capacity as taxi drivers and were asked by the migrants to transfer them from point A to point B within the territory of the Republic of Macedonia and were paid for the service. Professional taxi drivers have neither the right nor the authorization to ask customers for their identification, nor do they have the right to ask for information concerning their legal status or in what capacity they are present in the country. The sentence is disproportionate to the offence considering that the minimum sentence for a rape is three years, and for murder only five years. These convictions are also unfair because as of July 2013 with the amendments of the Asylum Law, it is rendered lawful for transiting migrants to move through the country freely for a period of three days and to use taxi services in the Republic of Macedonia.

Area 3: Right to equality

Equality is one of the basic human freedoms and rights guaranteed by the Constitution. According to the Constitution, citizens of the Republic of Macedonia are equal in their freedoms and rights, regardless of sex, race, color of skin, national and social origin, political and religious beliefs, property and social status.¹⁹

Roma minority are disproportionately affected by measures of border control when exiting the country²⁰

During the course of the years 2014 and 2015, the common practice continued of Immigration Officers of the Ministry of Interior of Macedonia preventing citizens of the Republic of Macedonia who are in possession of valid passports from leaving the country. The oral explanation provided to some of those affected was that they did not fulfill the entry requirements of EU member states, and there was a risk that they would abuse the visa-free regime and seek asylum in an EU state. The aforementioned persons did not receive any written document or decision explaining why they were prevented from leaving the country. Such practice violates two basic human freedoms and rights: the freedom of movement and the right to equality. The prevention from leaving the country disproportionately²¹ affected the ethnic Roma community. Almost every citizen who reported this problem was a member of the Roma community. Where the person seeking to exit the country is of Roma ethnic origin, there is higher probability that he/she shall be subject to an exhaustive border control, including

¹⁹ Article 9 of the Constitution of the Republic of Macedonia.

²⁰ This is refers to the problem with so-called fake asylum seekers that are prevented from leaving the country with the explanation that they will misuse the visa regime and will seek asylum in the EU member states. This problem, besides the fact that embodies the right to equality also has implications to the freedom of movement that will be further explained in the next chapters of the Report.

²¹ Report by Nils Muiznieks, Commissioner for Human Rights of the Council of Europe for Macedonia T. 96 ii 101

questions about the final destination and the amount of funds available to them. The disproportion is accentuated when taking into account that only 2.7 % of the population in the Republic of Macedonia declared themselves as “Roma”, while almost in all reported cases of “returning from the border” the affected citizens are of Roma ethnic origin. In some cases, the Immigration Officers openly state that the reason why a person is not allowed to leave the country is the fact that he/she is of Roma ethnic origin and they shall seek asylum. For this reason they are prevented from leaving the country. This practice discloses the fact that there is constant systematic discrimination and race profiling of Roma ethnic origin citizens at border crossings.

Fixed-term employment contracts and pregnancy – discrimination on the basis of sex and pregnancy

Women employed on fixed-term employment contracts are often informed that their contract is not to be extended when they tell the employer they are pregnant. The employers’ actions are rendered possible by the Law on Labor Relations, which although prohibits dismissals during pregnancy (Article 101 of the Law on Labor Relations), does not prohibit the non-extension of fixed-term contracts because of expiration of the time for which the contract itself has been stipulated (Article 101 paragraph 3 of the Law on Labor relations). This prohibition may be justified, taking into account the nature of the contract for a definite time. Nevertheless, it is an abuse of that provision to interpret as *carte blanche* in dissolving the employment contract for the women who become pregnant. In the vast number of cases, it is clear that the employer had the intention to hire the female employee for long period of time (she had been tasked with long-term assignments, included in the working plans, etc.). Nevertheless, immediately after the employee informs the employer of her pregnancy, the employment contract is not extended for further periods, despite the continuing need of staff. The obvious reason for not extending the contract is precisely the fact that the employee is pregnant, which may amount to a violation of the Law on Labor Relations. Women facing this problem, in addition to the stress suffered during pregnancy as well as the loss of income, could also suffer other consequences. In a situation where they have not accumulated a continuous period of employment of at least six months before the pregnancy occurred, the employee loses her right to paid maternity leave because of pregnancy and motherhood, a fact that could jeopardize the means of livelihood for the family as a whole.

Citizens continue to report discrimination on grounds of political opinion

Discrimination based on political affiliation or the lack of it occurs in the Republic of Macedonia; nevertheless, citizens very rarely report such form of discrimination and undertake legal actions. Citizens are not willing to seek protection from the institutions as a result of fear, the difficulties they face in order to prove discrimination, and the perceived low prospects of success of legal remedies. Discrimination based on political affiliation or the lack of it usually occurs in cases of employment and commencing employment in state administration organs, local self-government and public enterprises. The unequal treatment is implemented through favoring the members or supporters

of a particular political party, which hinders the employment opportunities of members or supporters of other political party/ies, or persons that are not at all members or supporters of any political party.

Hate speech in a script used at the subject Psychology of the Person

Phrases that are offensive and discriminatory towards the LGBTI community can be found in a script used for the university subject Personality Psychology at the Psychology Studies at the Faculty of Philosophy in Skopje. The text used is insulting towards persons with different sexual orientation and not appropriate for a science based study, which is being used in the education and formation of future psychologists and psychotherapists. The script contains phrases like: “the homosexuality is unnatural, immature, unhealthy and non-optimal (whatever this phrase means) sexual intercourse”, “the homosexuality jeopardizes the survival of the humankind”, and describes it as a “deviation”; in addition, it aligns homosexuality with pedophilia and incest. The only conceivable purpose of this unjustifiable and groundless interpretation is to stigmatize and condemn a whole group of people on account of their sexual orientation. Also, the text contains obsolete interpretations and information, bearing in mind that the homosexuality has been removed from the diseases list in year 1973.

Inclusion into the educational system is rendered difficult for the children with mental and physical disability

The objective of including children with disabilities into the mainstream educational system is a world tendency that provides better integration not only into the school environment, but also into society. However, this process in the Republic of Macedonia is facing certain challenges. First of all, not every school has a special education needs professional, which puts the parents in a situation where they themselves have to hire a professional who will work with that particular child. Secondly, in some of the schools, the classes for children with special needs are separated from the regular classes, and have different conditions for performing the lectures, which puts those pupils at a disadvantage compared to the rest of their peers.

Different price of railway tickets for refugees

BIIn conditions of increased entry of refugees at the territory of the Republic of Macedonia, the Public Enterprise Makedonski Zheleznici (Macedonian railway services) changed the price of the ticket several times, for the use of refugees. At the moment of writing of this report, a ticket for the line Gevgelija-Kumanovo (border line Tabanovce) costs 7 euro, while for refugees the exact same ticket costs 25 Euro. The higher price of the ticket, according to unofficial media statements²², is said to be justified by the additional cost of the Public Enterprise Macedonian

²² <http://plusinfo.mk/vest/44265/troshocite-na-mz-transport-pricina-za-visokata-cena-na-biletot-za-begalcite>

railway for providing additional trains and lending rail-cars. However this act by the biggest public transporter is unconstitutional, illegal and opposes the norms and the principles that the Macedonian legislative are required to abide by under international law. This points to the obvious and direct uneven²³ treatment and exploitation of refugees and immigrants transiting through Macedonia. The discriminatory ticket prices breach the Constitutional provision at Article 29, paragraph 1: "Foreigners in the Republic of Macedonia enjoy freedoms and rights guaranteed by the Constitution, under conditions determined by law and international agreements." The railway services are a form of public transportation, and pursuant to Article 3, paragraph 1, sub-paragraph 1 of the Law on Transportation, public transportation is to be made available under equal conditions for all users. The 1951 Convention relating to the Status of Refugees and its 1967 Protocol are ratified through succession by the Assembly of the Republic of Macedonia in 1994. The Convention contains provisions at Article 29 whereby the contracting parties pledge to refrain from imposing tolls or taxes of any kind on refugees, including other tolls or taxes that are higher than the ones that are imposed on citizens in similar situations.

Area 4: Right to freedom of speech, communication confidentiality, peaceful protest and freedom of movement

The Constitution of the Republic of Macedonia guarantees the freedom of personal opinion and conviction, conscience, thought and public opinion. Furthermore, the Constitution guarantees the freedom of speech, public appearances, public information and free foundation of institutions for public information. The Constitution guarantees the freedom and confidentiality of letters and all other forms of communication. Citizens have the right to peaceful gathering and public protests without having to obtain a specific permit. The Constitution determines the right to free movement²⁴, as well.

Pressures attempted to discourage citizens to realize the right to protest

In December 2014, as the Student Plenum protested against the proposed amendments of the Law on Higher Education, a series of various gatherings and public protests were initiated by different organizers (High School Plenum, Journalist Plenum, and Citizens Associations such as "Ajde", "Solidarnost", etc.) opposing: external testing of high school students, political pressure over journalists, social and health contributions for freelancers, etc. persons involved in organizing some of these events and mere participants have reported attempts aimed to pressure abandonment and non-attendance of the protests. There had

²³ <http://www.vest.mk/?ItemID=C71C2AB52C7E754F8286A531E61CC989>

²⁴ Art. 16, 17, 21 and 27 of the Constitution of the Republic of Macedonia

been various forms of pressure, varying from subtle to direct threats. Students from multiple cities reported pressure from their Heads of School or professors in the form of threats should they attend the protest.

Breach of freedom of movement at the border crossing points

The common practice of preventing persons from leaving the country, carried out by the Immigration Officers, which applies mainly to representatives of the Roma community, continued in 2015 with the same intensity as in the previous year. Immigration Officers are not issuing a written notification that a person has been prevented from leaving the country, which deprives the relevant person from a right of appeal, which is a constitutional right. According to the Ministry of Interior, the reasons why these persons have been denied exit from the Republic of Macedonia lie with their non-compliance with the terms of entry into EU member states. This restriction has no legal grounds whatsoever, since Article 27 of the Constitution of the Republic of Macedonia states clearly the reasons for restricting the freedom of movement of citizens as follows: initiated criminal proceeding, endangering safety or public health. Restricting the freedom of movement to these three cases is exhaustive. Furthermore, Ministry of Interior's referral to the Schengen border code is inapplicable due to the fact that it is an EU regulation not applicable in the Republic of Macedonia which according to our Constitution, cannot be used as a source of law. Preventing people from leaving the country does not have any legal ground in the domestic legislation either. There are no procedures or regulations in any of the articles of the Law on border control whereby preventing a person from leaving the territory of the Republic of Macedonia is described or rendered lawful. In addition and as a consequence of these practices, many border control officers did not take into account whether the person was traveling to an EU member state or simply to a neighboring non-EU country, such as the Republic of Serbia. Situations were noted when citizens traveling to Serbia have been prevented from leaving the country, regardless of the fact that Macedonia and Serbia have a bilateral treaty enabling border crossing of their respective citizens only by showing a biometric personal ID card. Macedonia has executed such treaties with other neighboring countries, as well. The number of persons whose exit was restricted is high²⁵. The Ombudsman determined that a breach has occurred by stating in its 2014 Annual Report that the number of persons seeking assistance from this institution due to restricted exit from the border cross-points in Macedonia had been increasing.

Illegal interception of communication of more than 20,000 citizens

In February 2015, the biggest political party in opposition announced to the public that an alleged interception of communications and tapping of more than 20,000 citizens had been occurring over a long period of time. Following the announcement, the opposition published the alleged taped conversations of public officials and politicians of the ruling party which indicate alleged corruption, abuse of power, election irregularities, and pressure over the judicial system and much more. Simultaneously, the opposition started delivering audio

²⁵ In 2012 and 2013 only, a total of 15,590 citizens were restricted from exiting the country because they were not able to justify their intended border crossing according to the law. Source: Statement of the MOI Speaker, MS Marija Jakovlevska, given for BIRN <http://prizma.birn.eu.com//mk/стории/дискриминација-печат-за-враќање-на-македонските-роми>

recordings and transcripts to the public of conversations between allegedly tapped persons. Should the alleged tapping of telephone conversations and communication interception prove as correct, than one could assume a violation of the constitutional right of privacy, and the freedom and confidentiality of letters and all other communication forms. The Constitution incorporates one single exception to the privacy and communication confidentiality rule which consists of the necessity of such exceptions due to a criminal proceeding or when it is in the interest of the defense in a court proceeding. This exception to the rule may be granted only by means of a court decision having legal basis. Everything outside the framework of these terms is considered a breach of the Constitution and a criminal offence.

Area 5: Right of ownership, labor and social protection

The Constitution grants the right to ownership, the right to labor and the right to social protection, the realization thereof being subject to the governance of separate laws. The Constitution sets the grounds of the ownership relations, employment and social security²⁶.

Enforcement continues to cause a significant number of complaints by the citizens

The enforcement of executable court judgments carried out by individual enforcement officers and especially the way it is carried out raises a number of key questions relevant to the citizens. The requirement for the immediate enforcement of judgments is a necessary element in the system of rule of law and administration of justice. However, since it has a direct impact on the right of ownership, it has to be carried out in accordance with the law, transparently and fairly. The complaints and administrative appeals submitted by citizens in regards to the operations of the enforcement officers comprise a significant share of the total number of complaints and administrative appeals. The mere fact that enforcement has the most direct impact on the citizen's property and income is one reason why there are such negative sentiments to the procedure, regardless of the fact that it is a necessary means for executing court judgments. Nevertheless, a significant amount of the complaints and administrative appeals have raised serious questions regarding the manner in which the enforcement is carried out.

- **Disproportionately high enforcement costs** which are several times higher than the principal debt. There is a recurring situation where the annual debt for broadcasting fees amount to MKD 1,800, whereas their enforcement costs amount up to MKD 6,000 which exposes the citizens to additional costs significantly and disproportionately higher than the principal debt.

²⁶ Articles 30, 32, 34 and 35 of the Constitution of the Republic of Macedonia

- **Enforcement measures even after the debt has been paid in full. Anecdotal evidence** shows examples where due to the lack of communication between the creditor (mostly a bank) and the enforcement officer, the enforcement officer takes up unnecessary measures (such as inventory and appraisal of real estate) after a debt has been settled which in the end, are borne by the debtor.
- **Failure to deliver an enforceable deed.** Often citizens become aware that they are subject to an immediate debt enforcement (of debts sometimes over ten years old) only after they realize that their bank account has been blocked. Prior to that, they have not received any notification or information nor were they delivered an enforcement deed (judgment) on which grounds the enforcement may be executed.
- **Enforcement of income pertaining to the right to social protection** even though it is prohibited, there have been several reported cases.

Consequences due to trade union activity

The person was the President of a union organization within the institution in which he was employed. As a result of his engagement in union activities the person entered into a conflict situation with his superiors. The management initiated a disciplinary proceedings against this person which led to his suspension and demotion to a lower position. The person appealed against such decision. On the grounds of the appeal, the court adopted a decision which annuls the first-instance resolution to demote the person simultaneously obligating the institution to reinstate their old position. However, the institution did not comply with the appeal decision.

Persons who are no longer consumers of central heating still obliged to pay heating bills – breach of the right to ownership

In 2012, the Energy Regulatory Commission adopted the Guidelines for heat energy distribution²⁷ which introduced a duty for all users, who have previously been excluded from the heating system, to enter into an agreement. In the event they do not enter into such an agreement, a heating fee for the claimed power shall be levied. Such a duty is not mentioned in the Energy Law which is subject to amendments containing such disputed regulations. A group of citizens submitted an initiative to assess the constitutionality and lawfulness of these regulations and provisions, but the Constitutional Court refused to accept this initiative. As a result of the Guidelines, a large number of citizens are forced to pay a monthly fee varying between MKD 500 – 1000 (c. 9 - 16 Euro), regardless of the fact that they do not use the heating system. Additionally, such an interpretation allowing these persons to be subject to paying a fee, only because they are living in collective residential buildings with a heating system without actually receiving heating energy (in the form of hot water or steam) nor having an agreement for the use of heating energy, jeopardizes the right to a free use of property which is a breach of the right to ownership.

²⁷ Official Gazette of The Republic of Macedonia no. 97/12

Problems during the realization of the right to a permanent cash subsidy

A 58-year old woman with a severe mental disability is living together with her retired sister. Both are supported by the sister's pension amounting to MKD 8,000 (130 Euro). The compulsory medication costs drained the pension making it insufficient for their monthly living costs. The ladies applied for a permanent cash subsidy at the local Center for Social Affairs bearing in mind that all three criteria, necessary for this subsidy, have been met: 1) the lady is incapacitated for work, 2) she is materially not provided for (total income per person is less than MKD 5,000) and 3) she cannot secure existential funds on other grounds. The application was rejected even though these criteria were met. The grounds for the rejection provided by the Center for Social Affairs state that the woman had two brothers and a sister, who were obligated to alimnet their sick sister, even though they live in separate households. However, the Center did not take into consideration the material condition in which the brothers and the sister of the relevant lady live in and whether they are capable of supporting their sister, or not.

Disability pension revoked due to negligence by the Pension and Disability Insurance Fund of Macedonia

The person was a beneficiary of a family pension after the death of her father on the grounds of incapacity to work due to illness. In 2013, the person was informed that due to the fact that she was unable to present herself to the compulsory medical examination in 2008, the family pension is revoked and the beneficiary shall return approximately a half of a million MKD (8,130 Euro) of paid pensions to the fund. The problem in this case arises from the decision of the Pension and Disability Insurance Fund in which her disability pension was extended by 2006. She was neither informed of nor invited to a medical examination in 2008, even though the decision must contain and communicate such data, in accordance with the Law on Pension and Disability Insurance. In the meanwhile, the Fund did not deem it necessary to invite the person to a meeting or to inform her of her obligation to take a compulsory and control medical exam. As a result thereof, the lady is left without any source of income, without funds for her compulsory medications and at the same time, she is facing a civil proceeding for the debt according to the Fund, which may even lead to her losing the apartment where she lives.

Difficult access to health care of a person exempted from health participation payment

The relevant person worked as a seamstress when she obtained injuries of her spinal cord and was thus incapacitated in performing her work. In 1998, the competent Health Insurance Fund of Macedonia adopted a decision which stated that the person, as an insured person is acknowledged the right to use the salary subsidy in the amount of 100% of the basic subsidy and is exempted from their own participation payment when using health care services to which she is entitled to. In 2010, when using physical therapy services, the person paid a certain amount in cash on the grounds of participation, and after applying for

a refund, the funds were not refunded i.e. the refund application was rejected. The decision of the fund has been confirmed by a decision made by the Ministry of Health, stating that the appeal against the first-instance decision is rejected as unarguable, and the person is instructed to initiate another proceeding in front of the Health Fund. In 2013, the person underwent an MRI screening for which she did not pay the participation amount. Following this event, the decision as of 1998 and the non-payment of the MRI participation were presented before the Health Fund simultaneously submitting a request for refund of the physical therapy participations from 2010. The entire documentation and the calculations issued by the Institute for Physical medicine and rehabilitation for every single year were submitted, as well. Once again, the Fund adopts a decision which states that the person does not meet the legal requirements for exemption and refund of the collected participation and rejects the request. The person appeals this decision in front of the Ministry of Health in June this year, and hasn't received a resolution in regards to her appeal, to date. After informing the Fund about the stage of the proceeding, the person is manipulated by the employees and in a hostile tone was instructed to appeal the unprofessional treatment of the employees. She receives another first-instance decision on the very same day, despite the fact that there was no outcome of the appeal procedure at the time. The second decision rejects her request for refund. Since the person has very little legal knowledge, she did file an appeal for the unprofessional treatment of the employee, but this appeal was recorded as an appeal to the first-instance decision issued on the very same day. In this particular case, it is apparent that the first-instance authorities in an administrative procedure continue the practice of adopting single-sided, ill-reasoned decisions, which uninterruptedly perpetuate the lack of the necessary legal instructions of an uninformed party, thus making the access to the institutions more difficult for the party and setting obstacles in the realization of her rights. Furthermore, the unprofessional and incompetent behavior and treatment of the requests of the parties and their knowledge and literacy and the specific restriction in exercising the right to an appeal of a first-instance decision are more than evident..

Area 6: Rule of law and legal safety of the citizens

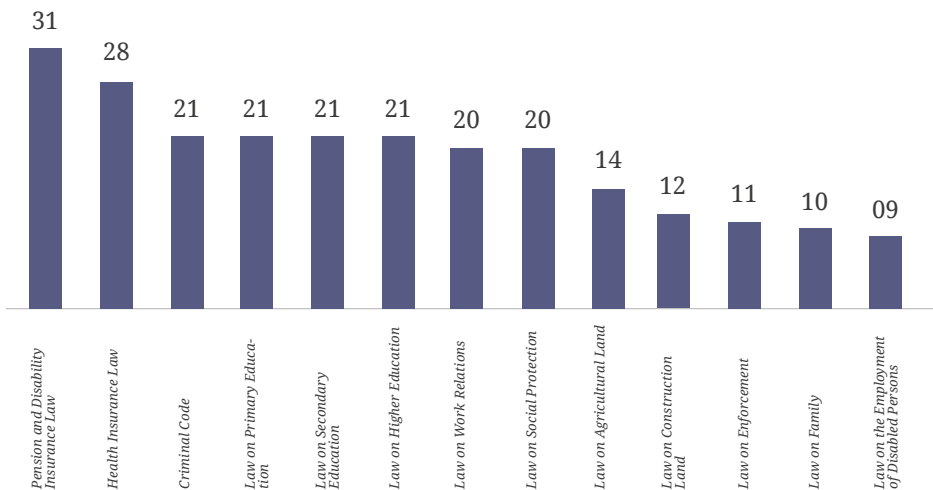
The Rule of law is a fundamental principle of the constitutional order of the Republic of Macedonia and is the main prerequisite for respecting and protecting the basic human rights of her citizens. Complete respect and implementation of this principle, is a prerequisite for legal protection of human rights. The basic meaning of this principle consists of obliging both the state and its citizens to abide by the law and that all citizens being equal in the eyes of the law. The rule of law is eminent when the following premises are fulfilled: the existence of an adopted system of general rules, general acceptance of the legal norms by the citizens, the feasibility of the conditions imposed by the law. The law must be applicable to the same extent for every citizens and effective mechanisms and instruments protecting the execution of the breached legal norms must be available. According to the *World Justice Project*, the rule of law is linked to the fulfillment of the four principles as follows:

- The state and its officials and representatives are liable before the law.
- The laws are unambiguous, published, constant, fair, and protect human rights including the citizens' safety and property.
- The process by which laws are adopted, carried out and executed is accessible, fair and efficient; and
- Access to justice is made available by expert, independent and ethical judges, lawyers and court officials whose number is sufficient, who have the necessary resources at their disposal and who reflect the communities they are serving.

During the period covered in this Report, the Project noted the following processes / events relating to the rule of law in the Republic of Macedonia, especially in regard to the legal certainty of the citizens:

- **Frequent amendments of laws**

In the last 10 years there has been intensive legislation activity in the Republic of Macedonia, which includes both the adoption of completely new laws and partial amendment of the existing laws. The legislative activity is justified by: the need for harmonization between the Macedonian and the EU legislation i.e. “acquis communautaire” (so called EU flag laws); the need for carrying out strategies



for the reforms in certain areas (ex. judicial system); and carrying out specific government programs. Insight into the 50 different laws regarding the legal system of the Republic of Macedonia or laws and their respective amendments²⁸ and the implications thereof affecting the citizens on a daily basis for the last 10 years, will provide us with an overview of their extent and quantity.

The frequent amendments of specific and important laws obstruct the proper functioning of the legal system. Within a short period of time, legal norms governing a certain legal issue are being changed, and following such changes is a struggle even for legal practitioners, let alone for regular citizens. Additional to the legal system, citizens face uncertainty given that their potential rights and obligations are subject to frequent and unpredictable change.

- **Increased legislation activity**

The practice of increased adoption of laws and other regulations continued in 2014 and 2015: in July, August and September, a total of 278 laws were²⁹ adopted. Regardless of the fact that this number is the result of the amendment of the Law on the General Administrative Procedure and the Law on Misdemeanors, the frequent alteration and adoption of new general regulations can still pose a danger for the legal certainty of the citizens.

Number of adopted laws per month:

IX 2014	X 2014	XI 2014	XII 2014	I 2015	II 2015	III 2015	IV 2015	V 2015	VI 2015	VII 2015	VIII 2015
40	21	16	42	28	15	54	29	14	40	39	199

- **The retroactive application of a regulation resulted in revoking the right to social protection of more than 1,500 persons³⁰**

In 2015, the Ministry of Labor and Social Policy adopted two guidelines³¹ which alter and amend the guidelines which determine the realization of the right to social aid and permanent cash subsidy in more detail. According to the new guidelines, **moneys received via quick money transfer in the amount above MKD 50,000 (813 Euro)** are regarded as property suitable for covering the living costs of its beneficiaries and as such, they should report it. The Guidelines for the alteration and amendment have been published in the Official Gazette of the Republic of Macedonia no. 11, dated January 26, 2015 and entered into force the day following their publication. During the first half of February 2015, the cross-municipal Centers for Social Protection, without giving prior notice of the amendments to the public, adopted first-instance decisions to revoke the right to social and permanent cash aid of many beneficiaries (according to the wording used in the decisions, the right “lapsed”). The grounds thereof were that during 2014, these persons received funds via “fast money transfer” and referring to

²⁸ Alteration and amendment of the basic law or adopting a new law governing the same subject matter

²⁹ Including the laws on altering and amending existing laws

³⁰ This issue is analyzed in more details in Part 2 of this Report

³¹ The Guideline on the manner of determining the income, property and ownership rights within a household, determining the bearer of the right and the documentation necessary for the realization and the use of the right to a social cash aid (“Official Gazette of the Republic of Macedonia no. 54/13 and 126/13) and the Guidelines for determining the income, property and ownership rights and the documentation necessary for the realization of the right to a permanent cash subsidy, the staff composition and the operational guidelines of the expert committee and the second-instance committee, the legitimization of the expert persons, the record keeping of issued findings and contents of the findings form, evaluation and opinion regarding the incapacitation to work (Official Gazette of the Republic of Macedonia no. 58/13)

the Guidelines adopted in January 2015, regardless of the fact that the cited guidelines were not into force when such finds were received.

- **The Law on Free Legal Aid does not make justice more easily accessible for the citizen**

The access to justice for citizens does not comprise a basic human right, but it is a right arising out of the constitutional right to equality and as such it is a significant tool in the realization and protection of human rights. Certain category of citizens whose financial condition prevents them from hiring a lawyer, face difficulty accessing quality legal aid due to national legislation and practice. In principle free legal aid is available and includes a range of services starting from general legal advice to free representation before the courts or in administrative proceedings before governmental institutions and agencies. However during 2015, we noticed that in practice access to legal aid for eligible persons is obscure, overly formalized and relies heavily on complex bureaucratic procedures. Furthermore the process of actually obtaining legal aid is so lengthy as to make it impossible to resolve legal issues within the strict legally prescribed deadlines. Furthermore, due to an incomplete and inaccurate appraisal of cases, the authorities often reject the request to free legal aid which makes the access to institutions authorized to solve the legal issue arbitrary and vague.

The following case illustrates this practice: the party, a woman living in a family household with her husband and three minor children, is an applicant for free legal aid. One of the children was borne during the first marriage of the party, but the biological father of the child is the current husband. The applicant requested free legal aid for the court proceeding about the dispute and determination of paternity. This legal matter pertains to the area of children and minors protection. The applicant is a beneficiary of the third-child-family-subsidy and this is the sole income for this five-member family. The Ministry of Justice, acting upon the request and in spite of the urgency principle according to which the proceedings should be concluded within 20 days after the request has been submitted, adopted a resolution after 90 days, stating that the right is not conferred since the applicant does not pertain to any category eligible for free legal aid. A claim was filed at the Administrative Court against this resolution within the deadline. The court held the resolution to be unlawful and overturned it, and the case was returned to the lower instance.

- **Lengthy proceedings before the Administrative Court of the Republic of Macedonia**

The Administrative Court is a key mechanism to determine the lawfulness of specific acts adopted by the state administration authorities. Once an administrative dispute is initiated, the Administrative court controls and corrects the decisions of the state administration by assessing how accurately and to which

level of detail they established the facts in a case, as well as how the procedural rules and subject matter laws were applied.

However the typically lengthy duration of administrative proceedings, sometimes up to several years raise doubts as to whether citizens are able to find a timely resolution of their legal issues and requests and whether in a real sense it provides effective protection of their rights. Where the administrative proceedings are not a viable option the citizens forced to, once again, invest time and energy in the first-instance proceedings before the state administration bodies, which does not guarantee that the respective review body will reach a decision different from the previous one. All too often, citizens find themselves lost and bereft of protection of their rights in the administrative labyrinth because of the lack of effective remedy.

PART 2: CASE STUDIES

CASE 1 – PREVENTING PERSONS FROM LEAVING THE COUNTRY

Prevention from leaving the country with (oral) explanation that the person will abuse the visa-free regime and will seek asylum in the EU member states

Context:

As of December 2009 the Macedonian citizens obtained the right³² to travel visa-free to the states of the so called ‘Schengen’³³ zone. The visa-free regime enables citizens that possess a valid biometric passport to stay, albeit without the right to work or study, in any Schengen-zone state for a maximum of 90 days. The visa liberalization followed after a positive assessment of reforms carried out in the Republic of Macedonia concerning border control, the introducing of biometric passports, as well as readmission agreements (returning and accepting citizens back to the country). In the year 2010, Belgium, Sweden and especially Germany noted massive increases, when compared to previous years, in the number of asylum seekers originating from the Republic of Macedonia, Serbia and Montenegro. These three countries also provided the largest proportion of unfounded asylum claims³⁴, a significant proportion of which were made by individuals of Roma ethnic origin³⁵. Intensified bilateral communications and meetings followed between the representatives of the Ministries of Interior of Belgium and Germany on one side, and the Ministry of Interior of the Republic of Macedonia, on the other, and the Republic of Macedonia was subject to diplomatic pressure to solve that problem and stem the number of unmeritorious asylum claims. Thereafter, the Ministry of Interior initiated a policy of scrutinizing and controlling exits at border crossings especially when organized group of citizens were exiting the country. The policy seemed to target organized groups of citizens and disproportionately affected members of the Roma ethnic group. A significant number of citizens of the Republic of Macedonia were prevented by the Ministry

³² From a legal point of view, the visa liberalization was implemented by the enforcement of the Regulation n. 1244/2009 of the Council of the European Union, amending Regulation (EC) No 539/2001 which granted visa requirement exemption to the citizens of the Republic of Macedonia while traveling into Schengen-zone countries.

³³ The visa liberalization refers to traveling into countries of the Schengen zone. Most of the Schengen-zone countries are EU state members, but however the two zones are not completely the same (for example, the United Kingdom is member of EU, but not of the Schengen zone; while Norway and Switzerland are not members of EU but are members of the Schengen-zone)

³⁴ Commission staff working paper on the post-visa liberalisation monitoring for the Western Balkan countries in accordance with the Commission Statement of 8 November 2010

³⁵ <http://www.spiegel.de/international/germany/from-serbia-to-germany-and-back-wave-of-roma-rejected-as-asylum-seekers-a-764630.html>

of Interior from leaving the country and given an oral explanation that they do not meet the criteria to enter the EU because of a suspicion that they will abuse the right to asylum.

Facts:

Case 1

A woman in her thirties, of Roma ethnic origin, together with her daughter, minor of age, in the month of September 2014 intended to travel for a short period of time to visit her aunt who lives in Germany and is a German citizen. Preparing for the trip, besides the biometric passports for herself and for her daughter, she also provided the following: return airplane tickets; a notary authorized letter written by her aunt, stating that she undertakes to cover all the expenses arising from the trip; translations of all of the documents, carried out by a certified court translator; evidence of travel insurance; a confirmation letter that her daughter is enrolled at primary school in Macedonia; and evidence of holding a certain amount of money. Upon arrival with her daughter at Airport Alexander the Great in Skopje, she was informed by passport control that she cannot leave the state and continue her journey. By way of justification the Immigration Officer orally explained, without any written notification, that her real purpose of travel was to seek for asylum in Germany. One week later, she tried again to travel to her aunt in Germany, this time by bus. At the border crossing Tabanovce, from the whole bus only she was picked out and ordered to the offices of the border police where she was informed that this was her second attempt to exit the state, and they showed her a video recording of her previous encounter with Immigration Officers at the Skopje Airport. She was also insulted by the Officer that she was “wearing the same clothes”, before letting her know that she can’t leave the state. This time an Immigration Officer placed a seal with two parallel lines on her passport.

Case 2

A man in his fifties, of Roma ethnic origin, in October 2014 had the intention to travel together with his family, to the town of Vranje, Republic of Serbia, in order to visit the family of his deceased brother. For that purpose he bought return bus tickets and with his family and their valid biometric passports they left for Serbia. At the border crossing Tabanovce, the man was called to get off the bus and explain the purpose of his trip. Which he did: he was on holiday leave from his employment in a public enterprise and he submitted written confirmation from his employer and explained that his intention was to visit his brother’s family. Asked about the amount of money he has with him, he answered that he had around 100 euro and that in his opinion that’s sufficient for a three-day visit to Vranje. The border official informed him that he did not have enough money

for the trip and without any written notification or seal to his passport he was prevented from leaving the state.

Case 3

A man aged 35, of Roma ethnic origin, together with his family intended to travel to Germany by car in order to visit his sister during the New Year holidays. Having arrived at the border crossing Tabanovce, Macedonian border officers asked him to hand over a so-called “guarantee letter”, which he didn’t possess. As a result he was orally informed he cannot leave the territory of the Republic of Macedonia. Two weeks later, the same person together with his father, who worked for three decades as a professional truck driver, headed to the town of Lerin, Republic of Greece. At the border crossing, he was informed that he can’t leave the country and this time they put a seal with two parallel lines in the corner in his passport.

Law:

The aforementioned cases touch four distinct legal issues that will be further analyzed in this study: the freedom of movement, the right to equality, rule of law, and efficacy of legal remedy.

The freedom of movement

Freedom of movement is one of the basic human freedoms and rights recognized in the Universal Human Rights Declaration³⁶, the International Pact of Civil and Political Rights³⁷, as well as the European Human Rights Convention³⁸. Besides these international agreements that are binding for the Republic of Macedonia, the freedom of movement is also protected by the Constitution of the Republic of Macedonia.

Article 27

Every citizen of the Republic of Macedonia has the right to free movement within the territory of the Republic and to freely choose his/her place of residence. Every citizen has the right to leave the territory of the Republic and to return to the Republic. The exercise of these rights may be restricted by law only in cases where it is necessary for the protection of the security of the Republic, in the course of criminal investigation or for the protection of public health.

³⁶ Article 13 of the Universal Human Rights Declaration.

³⁷ Article 12 paragraph 3 of the International Covenant on Civil and Political Rights

³⁸ Article 2 paragraph 2 of the Protocol n 4 of the European Human Rights Convention.

According to this, the right to leave the territory of the Republic of Macedonia is a key element of the freedom of movement. This right can be restricted only by law, only in cases it is necessary for: (1) protection of the security of the Republic, (2) in the course of criminal investigation or (3) for the protection of public health. The national border passing is regulated by Law on Border Control, which determines where state borders can be crossed, the types of border control can be imposed, powers to determine the identity of the persons crossing borders etc.

The law authorizes the police officers to make additional checkups in case by case basis, to inspect in the appropriate records and electronic databases to ascertain whether persons represent threat to the national security, public politics, international relations or public health³⁹.

Right to equality

The controversial practice of preventing exit disproportionately affects citizens of Roma ethnic origin. This can be concluded by comparing the huge percentage of persons of Roma ethnic origin being prevented from exiting with the modest percentage of citizens of Roma ethnic origin that make up the total number of citizen in the Republic of Macedonia. This questions the right to equality, which is also one of the fundamental human rights and freedoms enshrined in the Constitution and international agreements ratified in accordance with the Constitution (the International Covenant on Civil and Political Rights and the European Convention on Human Rights.)

Article 9

Citizens of the Republic of Macedonia are equal in their freedoms and rights, regardless of gender, race, color of skin, national and social origin, political and religious conviction, property and social status. Citizens are equal before the Constitution and the law.

Rule of Law

The practice of the Ministry of Interior also violates the rule of law principles that is also a fundamental value of the constitutional order of the Republic of Macedonia. First of all, there is no appropriate or applicable provision in the Macedonian law regarding the practice. In the Constitution, the laws or the ratified international agreements in accordance with the Constitution, there is no provision that authorizes border officers to control whether the citizens exiting the country are fulfilling the prerequisites for entering the EU. And because the law does not confer such powers neither does it set out a mechanism by which the exercise of such powers can be properly regulated or held accountable for improper use. There are no procedures and guidelines defining how and when citizens can be prevented from leaving, there is no written material or forms of

³⁹ Article 15 paragraph 4 of the Law on border control.

notification and legal writ which inform citizens of the decision they are about to face or have received, all of which renders impossible the right to appeal or otherwise challenge decisions to refuse exit.

Article 54

The freedoms and rights of the individual and citizen can be restricted only in cases determined by the Constitution. The freedoms and rights of the individual and citizen can be restricted during states of war or emergency, in accordance with the provisions of the Constitution. The restriction of freedoms and rights cannot discriminate on grounds of gender, race, color of skin, language, religion, national or social origin, property or social status. The restriction of freedoms and rights cannot be applied to the right to life, the prohibition of torture, inhuman and humiliating treatment and punishment, the legal determination of punishable offences and sentences, or to the freedom of personal conviction, conscience, thought, public expression of thought and religious confession.

Legal means:

Request for protection of freedom and rights lodged before the Constitutional Court of Macedonia

Relevant persons affected by such practice are entitled to lodging a **request for the protection of freedom and rights before the Constitutional Court of Macedonia**, but the request may seek protection only on the grounds of assumed discrimination due to ethnicity or religion, but not on the grounds of breach of the freedom of movement. After the request has been filed, the Constitutional Court determines whether there is a breach or not, and may annul the decision or prohibit the activity and practice which led to the breach. Bearing in mind the significance of the Constitutional Court in the legal system of Macedonia, two requests were filed seeking protection of freedom and rights from the Constitutional Court of Macedonia. Both requests were **rejected**⁴⁰ with the same grounds that **“not enough facts and evidence submitted which prove discrimination”**. Strikingly in both cases the Constitutional Court did not analyze the subject matter or the facts of the case or address the fact that evidence does not exist because of the unconstitutional practice of not providing written notification and reasons for the decision. In justifying the decision the Court solely cite the response provided by Ministry of Interior. With this legal stance, the Constitutional Court contradicts its own decision in the case U.no. 189/2012 which ruled on the terms and conditions necessary for exiting the country.

⁴⁰ U.no. 99/2013 and U.no 108 /2013

Excerpt from the decision U.no. 189/2012 of the Constitutional Court of Macedonia

*However, the constitutional provision in article 27 paragraph 3 allows the restriction of the right to exit the country only under circumstances such as, the protection of the countries reputation and the protection of the entry policy of other countries, (ex. **the entry and residence regulations of EU member states pertaining to the Schengen zone**). According to the Court, these grounds cannot be ascribed to any of the grounds under article 27 paragraph 3 of the Constitution and according to the Court's opinion; a state may restrict the right i.e. the freedom to exit the state of its own citizen holding a valid passport document only when there are serious and extraordinary circumstances as stated under article 27 of the Constitution.*

However only a year later, the Constitutional court adopted the following decision:

Excerpt from the decision U.no. 108/2013 of the Constitutional Court of Macedonia

*According to article 5 paragraph 1 of the Schengen border code "in addition to the remaining entry terms and conditions for persons, the following condition was introduced: to give grounds for the reason and circumstances of their intended stay, to have enough funds at their disposal for both alimending themselves during their stay and for returning to their country of origin...in this respect, **the Republic of Macedonia invests efforts to implement a border control system compatible with the Schengen standards and its legal order which incorporates the highest democratic benefits of the European countries.***

There are several reasons why the request for the protection of freedom and rights lodged with the Constitutional Court of Macedonia has been ineffective as a legal means for providing effective relief for the two applicants from the actions of Ministry of Interior. The exclusion of the right to freedom of movement from the range of rights eligible for seeking protection from the Constitutional Court means the possibility of meaningfully engaging with the subject matter of border control is prima facie excluded and source of the discrimination remains obscure without redress. Furthermore, a formalistic approach is applied to the evidence requirements even though it is an area where discrimination undoubtedly exists and is widely acknowledged to do so despite the fact that in an individual case racial profiling can be very hard to prove. The Court chose not to hold a public hearing to determine the facts even though it is obliged to undertake such an activity according to its Operation Guidelines. Moreover, there is inconsistent and even contradictory court practice and rulings in regards to this issue.

- **Proposal for the protection of rights to the Administrative court of Macedonia**

Bearing in mind that the breach of the freedom of movement and the right to equality are rights guaranteed by the Constitution and that actions of official breach such rights, it is theoretically possible to **submit a proposal for the protection of such rights to the Administrative Court of Macedonia**. This legal mechanism is governed by the Law on Administrative Disputes (art. 55 – 65). Should the Court find that the proposal has grounds, it could reach a resolution prohibiting any such future conduct and the pursuit of such discriminatory policies, as well as determine any necessary measures for reinstating prior circumstances. The Administrative Court has the power to set sanctions in the event the court's resolution is not complied with. In order to determine, whether this legal mechanism is applicable and effective in “persons returned from the border” cases, proposals were submitted to the Administrative Court of Macedonia requesting the protection against such unlawful activity. The Administrative Court of Macedonia rejected both proposals as incomplete giving grounds that the decision which is said to have breached the right was not submitted; even though the proposal's description clearly states that the activity in question is carried out without the issuance of any legal deed or written notification.

- **Civil action**

Aggrieved individuals may seek protection of their rights from the ordinary Civil Courts by filing a civil action against the Ministry of Interior. The civil procedure allows the pleading of multiple heads of claim and remedies; determining discrimination and determining the violation of personal rights; request for indemnification for caused tangible and intangible damage; determining the righteous indemnity. The advantage of this procedure is the possibility of shifting the burden of proof from the plaintiff to the defendant in regards to the determination of discrimination. Via MYLA, 22 civil actions were filed and two of which were acknowledged and two other rejected. One of the positive decisions has been confirmed by the Appellate Court, whereas the others are still in the second-instance procedure.

Excerpt from the judgment in the case XII P4-1277/14, dated 24.12.2014 at the Court of first instance Skopje 2

In the intent to leave our territory, one should abide by the terms for entry and respect the right to freedom of movement within the territory of the EU member states, as in article 17 of the Treaty, the Schengen border Code and the EU Directive dated April 29, 2014 (Official Gazette of the EU l 158, 30.04.2004)

Excerpt from the judgment in the case III-12/15 dated 07.07.2015, at the Court of first instance Veles

*...all actions carried by officials of the defendant are according to the Constitution, the laws and bylaws bearing in mind that the **Republic***

of Macedonia is a signatory of the Schengen Agreement under which our country undertakes to carry out tighter border controls during exit...

The main problem that puts the efficiency of this legal procedure in doubt is the irregular application of the law by certain courts. By citing the Schengen Border Code which has no legal force in the Republic of Macedonia, the person affected by this practice is prevented from receiving the appropriate legal protection of this right. Furthermore, pursuing an action before the ordinary courts may be relatively costly. One needs the assistance of a lawyer, court fees and expert opinions to be paid and there is always the risk of losing the dispute which would incur paying the court costs of the other party. These obstacles may prevent citizens from initiating proceeding.

Legal issues arising hereunder

- **Is the Republic of Macedonia a signatory of the Schengen Agreement?**

No, Republic of Macedonia is neither a signatory of the Schengen Agreement nor did the country join⁴¹ it. The Schengen Agreement establishes the Schengen zone which mustn't be mistaken for the EU since even though most EU member states are part of the Schengen zone, still these two are two separate international initiatives and not all EU states have joined Schengen. Macedonia's membership in the EU would not automatically mean accession to the Schengen zone.

- **Apart from holding a valid biometric passport, should Macedonian citizens meet additional criteria while exiting the country including a guarantee letter or having a certain amount of cash with them?**

Macedonian citizens are subject to minimal border checks comprising mainly of identity check via a valid passport. Through appropriate technical devices, the passport is cross-checked whether it has been stolen, abused, lost or declared invalid. On an unsystematic basis, the official may check the relevant electronic data bases as to whether a certain person poses a threat to the national security, the public policy, the international relations or the public health.

- **What is the legal nature of the so called Schengen border code in the Republic of Macedonia i.e. is it applicable?**

The Schengen border code is a **regulation**⁴² of the European Parliament and the Council of the European Union which establishes a code of community rules

⁴¹ http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/index_en.htm

⁴² REGULATION (EC) No 562/2006 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code)

governing the movement of persons across borders and should not be mistaken for the Schengen Agreement. The regulation is a legally binding rule that has an immediate and direct legal effect on the entire EU territory. As such, the regulation is legally binding for all EU member states. Republic of Macedonia is not an EU member state and thus, until the EU accession of the country, EU regulations are not a source of law in the Republic of Macedonia and the decisions and actions of the state authorities are not bound by such regulations. According to the Constitution, main sources of law in the Republic of Macedonia are the Constitution and the laws, as well as international treaties, ratified according to the Constitution.

- **From a constitutional point of view, does the maintenance of international relations between the Republic of Macedonia and EU member states and the EU as a community have precedence over the respect of human rights and freedom of the Macedonian citizens?**

International relations as the sum of rights and relations between countries do not comprise a source of law. Their transposition into compulsory law is possible through embodiment into international treaties and ratification in accordance with the Constitution of the Republic of Macedonia. Nevertheless, even in the case of ratified international treaties, they cannot become grounds from restricting the freedom and rights which, being the primary founding value, can only be restricted in cases as determined in the Constitution of the Republic of Macedonia.

Conclusion:

The proceedings before national courts, initiated for the protection of the rights of persons affected by Ministry of Interior's disputed actions have raised two very significant questions. Firstly, do the courts in the Republic of Macedonia perform their main function of protecting human rights effectively? And secondly, what legal implications arise from the visa-free access and the EU accession process of the Republic of Macedonia? Based on recent experience, several reasons for placing doubt in the effectiveness of the courts in providing the necessary legal protection of the citizens' rights can be identified.

a. Constitutional Court

The effectiveness of the requests for the protection of freedom and rights before the Constitutional Court of Macedonia as a legal means for providing protections of persons, affected by Ministry of Interior's actions is restricted due to the following:

Exclusion of the right to free movement as a right eligible for requesting protection from the Constitutional Court, which restricts the possibility to dive deeply into the subject matter i.e. identify the source of the problem which results in discrimination.

Formalism during the evidence proceeding in areas such as discrimination and racial profiling which are indisputably hard to prove. This has been acknowledged by our legislation in the Law on Discrimination, Prevention and Protection where special process guarantees are determined in the proceedings where discrimination is to be determined such as transferring the burden of proof and prohibition of victimization. By firmly insisting that the person seeking protection provide evidence of discrimination, the court appears to insist on formalism which makes it difficult if not impossible to establish the fact of discrimination.

The court does not hold public hearings which may ease the determination of the facts, even though the court is obligated to hold such hearing according to its Operation Guidelines. This is a general problem of the court⁴³, but even more, when dealing with a subject matter of such public importance and sensitivity, a public hearing should be a compulsory measure. Only through such a public hearing where besides the parties to the proceeding, other experts may participate, will the court be able to assess the facts and reach an appropriate decision on a sound basis.

There is an inconsistent and contradictory court practice in regards to this issue.

b. Courts of First Instance

The main problem that questions the efficiency of this legal means is the inappropriate application of the law by certain courts. Citing a regulation that has no legitimate legal effect in the Republic of Macedonia prevents a person affected by this practice from receiving the necessary legal protection of their right. Beside this, proceedings before the ordinary courts are relatively costly. The party requires an assistance of a lawyer, the payment of court fees and expert opinion fees, and there is always the risk of losing the dispute which would incur the payment of the other party's costs. This may dissuade citizens from initiating proceedings.

c. Administrative court

Two of the decisions made by the Administrative Court (USPI no. 9/2013 and 10/2013) are regarding persons who were prevented from leaving the territory of the Republic of Macedonia without delivering a single written legal deed or notice and by merely giving them an oral explanation that they shall abuse the visa free system by applying for asylum in the EU member states. The persons requested the protection from the Administrative Court by filing a proposal for the protection of freedom and rights, but in both cases, the court did not act in accordance with article 56 of the Law on Administrative Disputes, but requested the persons to submit a written decision proving the breach, even though the proposals clearly explain that the breach had been perpetrated by action (prevention of exit) and not by a legal deed. The citizens were unable to submit such a written deed, since it didn't exist, and because of that the court reached a decision rejecting the proposals in both cases.

⁴³ In the last 5 years, the court has held only one public hearing but it has acted upon more than 15 requests.

CASE 2 – RETROACTIVE APPLICATION OF A REGULATION

Termination of the right to social aid⁴⁴ and permanent⁴⁵ cash assistance through retroactive application of a regulation

Context:

In January 2015 the Minister of Labor and Social Policy of the Republic of Macedonia amended the regulations⁴⁶ that regulate the exercise of rights and access to social aid and permanent cash assistance. Such regulations regulate in particular the **types of assets** such as the **types of property and property rights** taken into consideration when assessing the financial status of the applicants and their eligibility to such rights. Persons using the right to social aid or permanent cash assistance are obliged to inform the competent Social Affairs Center⁴⁷ of any new income or property rights that have been determined in the regulations.

By amending the regulations, the Ministry of Labor and Social Policy introduced a new property right that shall be taken into consideration when assessing the financial status of beneficiaries of social aid and permanent cash assistance. In the new regulations, **the financial funds received through the fast money transfer service⁴⁸ in amount exceeding 50,000 denars shall be considered assets by which the users will be able to support themselves** and as such, they must be declared. If a person received such amount of money, he/she shall lose the right to social aid i.e. permanent cash assistance. The Regulations were published in the Official Gazette of the Republic of Macedonia No. 11 of January 26, 2015, **and entered into force on the day following the day of publication.**

⁴⁴ Social financial assistance is a right to social protection which may be exercised by a person capable of work and a household, financially unsupported and unable to provide the subsistence money based on other regulations.

⁴⁵ Permanent financial assistance is a right to social protection which may be exercised by a person incapable of work and having no financial support, who is unable to provide funds for his/her own subsistence on the basis of other regulations.

⁴⁶ The Regulations on the Manner of Establishing the Status of the Income, the Property and the Property Rights of the Household, establishing the holder of the right and the documentation necessary for obtaining and exercising the right to social aid ("Official Gazette of the Republic of Macedonia" No. 54/13 and 126/13) and the Regulations on the Manner of Establishing the Status of the Income, the Property and the Property Rights, and the necessary documentation for becoming entitled to permanent cash assistance, the composition and the manner of work of the expert commission and the second instance commission, identification of the experts, the manner of keeping records of issued findings and the form and content of the form for providing the finding, assessment and opinion on the inability to work ("Official Gazette of the Republic of Macedonia" No.58/13).

⁴⁷ Article 190 paragraph 2 of the Social Protection Act.

⁴⁸ Western Union, Money Gram etc.

In the first half of February 2015, immediately after such regulations became effective, the inter-municipal centers for social protection, without first informing the citizens of the amendments, obtained information from the National Bank of the RM about recipients of such money transfers during 2014 and passed decisions by which many of the beneficiaries of social aid and permanent cash assistance were deprived of their right to such assistance (“their right has been terminated” as formulated in the decisions).

Such decisions contained the reason that during 2014 the person received funds through the “fast money transfer” service. In such decisions the social affairs centers refer to the regulations adopted in January 2015 regardless of the fact that they had not yet been effective at the moment they received the money. The total unofficial number⁴⁹ of users who have lost in this way their right to social aid i.e. permanent cash assistance is nearly 1,300 citizens.

Not more than a month after the amendments, in February 2015, the Ministry of Labor and Social Policy once again amended the regulations referred to above and increased the amount of money received through the fast money transfer from MKD 50,000 to 70,000. Such amendment did not take into consideration the fact that in the meantime many of the citizens were deprived of their right because they received amounts greater than MKD 50,000.

Facts:

Case 1

The person N.N. during the year 2013 was using social cash aid because of his and his family’s difficult material situation. In August 2013, his son passed away as a result of a severe disease. With the purpose of helping the family with their funeral expenses, his relatives that live in Germany sent them around 1,500 euro via Money Transfer. Knowing that as beneficiary of social welfare is obliged to inform the Inter-municipal Social Work Centre for the money received, he was informed by the officials that the fast-money transfer income doesn’t have to be reported because the Rulebook does not provide for that. During years 2013 and 2014, the person continued to use the right to social cash aid until mid-February 2015, when he received a decision by the Inter-municipal Social Work Center Office in Skopje that his right to social cash aid is terminated and he is now obliged to return certain amount of money that was received without right. The person submitted an appeal against the decision to the Inter-municipal Social Work Center, in which he refers to the retroactive use of the regulations and explains that the received money was used to cover the expenses for his son’s funeral, as well as the fact that the received amount does not correspond with the amount stated in the Decision for annulment of the right. The Inter-municipal Social Work Center rejected the appeal without answering and without giving any explanation referring to the appeal grounds.

⁴⁹ The data have been collected by submitting individual applications for free access to information of public character however due to the inconsistent answers it can only be approximately determined that the number of people amounts to 1,300.

Case 2

The person N.N. during year 2014 was using his right to a social aid. Because of the floods at the beginning of 2014, the roof of the house where he lived with his family started to leak so he was forced to ask for help from his brother that lives and works in Germany. His brother sent him around 60,000 Macedonian denars that was intended to be used to repair the roof, which he did and for which the person possessed original invoices and fiscal bills. In February 2015, the person received a decision for the termination of his social cash aid. He submitted an appeal of that decision having attached the bills that prove the use of the money received, but the Ministry of Labor and Social Policy rejected the appeal without explanation or engaging with the grounds of appeal.

Law:

The previously described practice of the Inter-municipal Centers for Social Affairs of Republic of Macedonia raises several questions regarding the validity period and the application of the regulations as well as the authorization of the Inter-municipal Center for Social Affairs to inspect such data provided by the beneficiaries of the social protection rights.

- **Validity period and application of the regulations in RM**

The Constitution of RM, as one of the guarantees for the protection of the freedoms and rights, establishes in a clear and unambiguous way the prohibition of retroactive application of laws and regulations they may not have legal effect prior to their adoption. The only exception to this principle is permitted when subsequent regulations are more favorable to citizens.

Article 52 paragraph 4 of the Constitution of RM

Laws and other regulations may not have retroactive effect, unless as an exception, they are more favorable for the citizens.

- **Authorizing the Inter-municipal Center for Social Affairs to perform inspections to the personal data of the people using social aid or permanent cash assistance**

Those that have submitted an application for using or are already using the social protection rights shall, at the request of the Inter-municipal Center for Social Affairs, submit information and documentation that constitute evidence for the exercise of rights. In addition, they shall inform the Inter-municipal Center

for Social Affairs of every change in the facts and circumstances which are of relevance and importance to the recognition of such right. If they fail to do so within a period of 15 days they will be deprived of their right. The Inter-municipal Center for Social Affairs shall be entitled, on the basis of a consent given by the individual, to obtain evidence from other state authorities regarding the exercise of social protection rights.

Article 186 of the Law on Social Protection

At the center's request the legal and natural parties shall submit information and documentation comprising evidence for the exercise of the beneficiaries' rights provided under this law.

Article 190 paragraphs 2 and 3 of the Law on Social Protection

The applicant, i.e. the applicant's legal representative or guardian shall inform the competent center of every change of facts or circumstances which construed a basis for recognizing the right to social protection, at the latest within 15 days from the day on which such changes occurred.

If the applicant, i.e. the applicant's legal representative or guardian fails to act in compliance with paragraphs 1 and 2 of this article, he/she shall be deprived of such right.

Article 191 of the Law on Social Protection

The center shall ex officio occasionally, in any case at least once a year, reexamine the existence of the facts and conditions for becoming entitled to and exercising the right to social protection and if it establishes that they have changed, it shall adopt a new decision.

Article 8 of the Regulations

The Social Affairs Center shall submit its request for obtaining information on facts the records of which is kept by another state authority, i.e. another entity keeping a register of records, upon the previous consent granted by the party for using his/her personal information in the procedure for exercising the right to social aid, on a form-Request for obtaining information ex officio, provided in Annex No.2 making an integral part of these Regulations.

Legal remedies:

Any individual who had been deprived of his/her right to social aid i.e. permanent cash assistance as a result of receiving funds through the fast money transfer service before the regulations came into force shall be entitled to file an appeal to the Ministry of Labor and Social Policy. If the appeal is not accepted such individual will be entitled to instigate an administrative dispute.

- **Appeal to the Ministry of Labor and Social Policy**

An appeal may be filed against the decision revoking (terminating) the right to social aid i.e. permanent cash assistance to the Ministry of Labor and Social Policy within a period of 15 days upon receiving such decision. The right to appeal against the decisions adopted in first instance is a right guaranteed under the Constitution. By filing the appeal, the authority of second instance shall be allowed to establish whether there have been any flaws and whether the decision is grounded or not. If the decision has flaws or is contrary to the law, the authority of second instance may revoke the decision and refer the case for reconsideration, or decide the matter on its own.

In this project, a total number of 50 appeals were submitted against decisions terminating the right to social aid i.e. permanent cash assistance as a result of funds received through the fast money transfer before January 27, 2015. All appeals contained two main allegations:

1. *This is a case of obvious retroactive application of an unfavorable regulation not permitted under our Constitution, and*
2. *The information has been obtained without the required consent of the individuals using social aid i.e. permanent cash assistance.*

The appeals were filed in a timely manner and they met all procedural prerequisites for taking actions under them.

The Ministry of Labor and Social Policy rejected all appeals filed by individuals who have received more than MKD 70,000, while accepted the appeals of those who have received between MKD 50,000 and 70,000. The decisions rejecting the appeals acknowledged that the funds had been received in the period before the provisions of the Regulations entered into force, however, the Ministry of Labor and Social Policy found no violation of the law by giving the argument “*Since the appeal contains no evidence of facts which would lead to a different decision, the Minister in the reply to the allegations of the appeal in terms of article 245 paragraph 2 of the General Administrative Procedure Act refers to the reasons stated in the first instance decision*”. This argument is identical in all decisions on the appeals. What is evident is that the Ministry of Labor and Social Policy considers indisputable the fact that the funds had been received in the period before the amendments made to the regulations become effective and that the legal ground for terminating the right comprises the provisions of the regulations adopted on January 27, 2015. The Ministry of Labor and Social Policy **did not state its opinion on the both appeal allegations** stated herein above in any of the decisions rejecting the appeals.

The decisions accepted the appeals in the cases in which the funds received range

between MKD 50,000 and 70,000. In this case the Ministry of Labor and Social Policy refers to the existence of so called more favorable regulation.

Excerpt of the Decision No. 10-2404-2015 of 12.06.2015 adopted by the Ministry of Labor and Social Policy

Since the stated regulation is more favorable for the beneficiary, in case of reconsideration and decision making the first instance authority must have it into consideration when adopting a proper decision.

Legal questions arising from these cases:

The procedures initiated before the Ministry of Labor and Social Policy raised certain legal questions as to the proper and correct approach for establishing whether the actions taken by the Inter-municipal Center for Social Affairs and the Ministry of Labor and Social Policy are in compliance with the law and if not, whether the right to appeal may effectively protect the individuals who have been deprived of their right.

- **Can the Regulations adopted on January 27, 2015 have legal effect to actual events that had happened before such date?**

The Constitution of RM as one of the guarantees for the fundamental freedoms and rights also stipulates the prohibition of retroactive effect of the laws and other regulations. This guarantee prevents laws and regulations from having legal effect in time period before their adoption. The prohibition for retroactive effect of the laws finds its justification in the need to provide legal security and certainty for citizens who are required to comply with the current regulations and not with some future, unstipulated obligation. The prohibition for retroactive application of the regulations is excluded only in cases where the new regulations are more favorable for the citizens. The disputable regulations belong to the so called “other regulations” and as such they are subject to such prohibition as well. They cannot be legally effective i.e. cannot produce the prohibition of social aid beneficiaries receiving funds through fast money transfer above a certain amount before they entered into force. This regulation is in any case not favorable for the citizens therefore it is certain that this is a case of a retroactive application of an unfavorable regulation prohibited by the Constitution. This must have been taken into consideration when examining the legality.

- **Is the Inter-municipal Center for Social Affairs entitled to obtain information without having the party’s consent?**

The Inter-municipal Center for Social Affairs shall be entitled to obtain information on facts the official evidence of which is kept by another state authority (in this case National Bank of R.M. for fast money transfer) based on a consent previously

granted by the beneficiary of social aid i.e. permanent cash assistance (Article 8 paragraph 1 of the Regulations). However, in the first instance decisions the Inter-municipal Center for Social Affairs makes no reference to any consent granted by the individuals neither does it cite the reply of the state authority in this case the National Bank of R.M. containing the requested data.

- **Should the second instance authority rule on the allegations raised in the appeal?**

Pursuant to the General Administrative Procedure Act (applicable in this case) the argumentation of the second instance decision must contain assessment of all allegations in the appeal. If the first instance authority in its argumentation already made a correct assessment of the allegations raised in the appeal, the second instance authority may make reference to the reasons of the first instance decision. In the concrete cases the first instance authority never took into consideration the allegations raised in the appeal. Although the Ministry of Labor and Social Policy were obliged to assess the allegations of the appeal, it failed to do so.

Conclusion:

The actions taken by the Inter-municipal Center for Social Affairs which deprived more than 1,000 people of their social aid i.e. permanent cash assistance on the basis that they had received funds through the fast money transfer service before January 26, 2015, is clearly illegal. This behavior violates the prohibition for retroactive application of regulations expressly provided for in our Constitution. The second instance authority which is responsible for supervising the legality of the work of the Inter-municipal Center for Social Affairs must identify and prevent such illegal behavior. What is particularly striking in this case is the fact that we are not dealing with one isolated case but we are dealing with a practice exercised on the entire territory of R.M., in which more than 1,000 people lost their right to social aid i.e. permanent cash assistance.

The right to appeal, as the only legal remedy available to the people deprived of their right to social aid i.e. permanent cash assistance, has been shown to be ineffective in protecting these citizens from the obvious illegal behavior. First of all, the deadlines for submitting the decisions on settling the appeals had been exceeded - 4 to 5 months had passed until the decisions were provided to appellants exercising such rights. In its decisions the Ministry of Labor and Social Policy never stated its opinion on the grounds raised in the appeals nor provided any response to such grounds, but instead, rejected all appeals using identical formulaic phrases and expressions.

CASE 3 - VICTIMIZATION

Suffering negative consequences as a result of reporting cases of discrimination, initiating procedure or participating as a witness in a procedure to determine discrimination

Context:

It is particularly difficult to prove that discrimination has occurred. Discrimination is rarely public and open, rather usually it occurs in a very subtle way, and hence its determination depends on the word of the alleged victim against that of the alleged perpetrator. As a result of that, many victims of discrimination are disinclined to seek for legal protection. Besides the problems they face proving their claim, these persons also face different kind of pressure and consequences, having in mind that the discriminated person is ALWAYS in a subordinate position relative to the person or the institution that exercises control and authority to commit the discrimination (for example he is employed there, he seeks for health protection, he studies there, etc.).

In order to obviate this problem, anti-discriminatory legislation has introduced the concept of “victimization”. The victimization represents disadvantageous behavior towards and negative consequences for the person because he/she has been involved in exposing discrimination, either by initiating a procedure or participating as a witness in a procedure to determine discrimination. The Law on Prevention and Protection against Discrimination defines the victimization as a form of discrimination and prohibits it. The victimization exists not only towards the person that is a victim, but also towards the person that is participating as a witness in a procedure to determine discrimination whether or not they are a victim, as well as a person who is facing disadvantageous relation because of the fact that he rejected or obviated an act of discrimination.⁵⁰

The EU Directives 2000/43⁵¹ and 2000/78⁵² explicitly defines victimization and obliges the member states to include in their national legal systems all the necessary measures of protection for workers from unlawful termination of the

⁵⁰ Mirjana Najchevska and Bekim Kadriu, Terminology Glossary for Discrimination. OSCE and MCIC: Skopje, 2008, pg.17

⁵¹ EU Directive 2000/43/EC, 29/06/2000, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0043:en:HTML>

⁵² EU Directive 2000/78/EC, 27 November 2000, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32000L0078>

employment and other forms of negative treatment by the employers, as well as protection of individuals from negative treatment arising from the reaction of a conduct that has the purpose of contributing to the respecting of the principle of equal treatment.

Facts:

Case 1

The person H.H. was working for more than two years in a wood processing company on an employment agreement of an indefinite period. In the month of September 2014, the person was called by the Court of First Instance Skopje II-Skopje to appear in court as a witness regarding two ongoing court proceedings initiated by his colleagues against his employer for discriminatory demeanor. The hearing at which he was supposed to appear was scheduled for the middle of October 2014. At the beginning of October, the person was informed by his employer that he shouldn't come to work and that he is on a leave, despite the fact that the person did not submit a request to use annual leave. The next day, when the person tried to enter the company, the doorkeeper prevented him from doing so.

Since the person was prevented from working and accessing his working place, and because he was sent on leave contrary to his will, he immediately reported the event to the Labor Inspection.

After few days the person tried again to enter company's working premises, but again the doorkeeper prevented him to do that. After that, one of company's authorized employees offered him to agree to the termination of his employment in return for a 4-salaries compensation, **but under condition that he shall not testify against the company in the procedure against discrimination.** The person did not accept to terminate his employment and stated that he wants to continue working. Pursuant to his legal obligation to testify in the procedure against the employer, the person appeared in court and gave his statement. The following day, the employer prepared and handed him a decision to terminate his employment without any period of notice. In the decision, the employer made reference to article 82 of the Law on Labor Relations, and explained that the complainant had committed severe violations of the labor order and discipline and to his work obligations, because he was absent from work without justification three days in a row, i.e. five days in the current year. Those days he was absent are the very ones when the person was prevented from entering his workplace.

Case 2

In the year 2007, the person H.H. was transferred from one legal entity to other, both owned by the same employer. The legal entity was part of the company where that person had worked for the previous years. At his new position, he was not given any work tasks, and he was excluded from participating in any type of activities and events, although he was coming to work at the determined working hours. After three months, the employer handed him a decision to terminate his employment because of unjustified absence from work. The Court of First Instance Skopje II passed a judgement, later confirmed also by the Appellate Court, with which the decision for termination was annulled as illegal, and the employer was obliged to bring the person back to work. Although the person was returned to work, he did not receive his salary nor contributions, hence the person informed the State Labor Inspectorate for the same. After the inspection, the Inspectorate passed a decision for elimination of the defects. The managing official did not act pursuant to Inspectorate's decision and did not submit data referring calculation of the salaries and contributions for that person. Because of that, the executive official was charged for the offence and had been sentenced by the Court of First Instance Skopje I – Skopje. The person also addressed the Commission for Protection of Discrimination, but the Commission did not find discrimination pursuant to article 3 of the Law on Prevention and Protection against Discrimination. The Commission issued recommendation to the person to realize his right through filing a court claim. Regarding this case the Ombudsman took measures pursuant to the statement of the person and he submitted a request to the State Labor Inspectorate at the Ministry of Labor and Social Policy for undertaking measures to determine the facts. After the activities by the Inspectorate, the Ombudsman was informed that they undertook measures and it was determined that there was indeed violation of employee's right, and that the employer is obliged to pay him the salaries.

Law:

Law on Prevention and Protection against discrimination considers victimization as form of discrimination, and defines it in its article 100. Victimization as a form of discrimination is forbidden.

Article 10 of the Law on Prevention and Protection against discrimination

Discrimination includes the unfavorable behavior towards any person, bearing negative consequences as a result of undertaking certain activities for the protection against discrimination (has reported discrimination, initiated a procedure for discrimination and acted as witness during the procedure).

The Law on Labor Relations considers the filed suit or the participation in a procedure against the employee, as unfounded reason for termination of the employment contract.

Article 77 of the Law on labor relations

The following instances shall not be considered justifiable grounds for termination of employment:

2) Filing complaints or participating in proceedings against employers concerning violations of law or other regulations, before arbiter, court or administrative organs;

Legal remedies

The fulfillment of the legal obligation to appear in court as a witness in a procedure for determining discrimination and initiating procedure for protection from discrimination, in the first case resulted in the witness losing his employment and continuing discriminatory conduct besides that from which protection was sought, while in the second case, arose the issue as to which legal remedies shall complainants use in order to protect their own rights.

- Lawsuit for determination of victimization

In the first case the person initiated court procedure against the employer requesting the Court to determine whether victimization has occurred pursuant to article 10 of the Law on Prevention and Protection against Discrimination and sought annulment of the decision for dismissal of the employment agreement without any notice, as unlawful. The Court of First Instance in Skopje passed a verdict which partially accepts the claim and annuls the decision for dismissal of the employment agreement as unlawful, but **rejected the request for determining discrimination (victimization) as unfounded**. After the verdict of the court of first instance the person submitted an appeal to the Appellate Court-Skopje.

It can be concluded from the explanation of the decision that there was certain

hesitation of the court regarding the request for determination of existence of victimization, which can be seen from the following:

The court finds non-disputable that the decision for dismissal is unlawful and that the employer had intention to use the fact that the suitor was obstructed to enter his working place to dismiss him.

The court believes in the statement of the suitor where explicitly and unequivocally claims that he was asked not to testify at the proceeding at which he was called;

The court unambiguously accepted the chronology of the events. On September 5, 2014 the suitor was called to appear in court as a witness on October 14, 2014. On October 1, 2014 the person was removed from work and he was obliged to use his annual leave. In the meantime, he was advised not to testify at the proceedings. On October 14, 2014, the person appears in court as a witness, and just two days afterward on October 16, 2014 he was handed the decision for dismissal.

In the second case the person filed a lawsuit to the Court of First Instance Skopje II-Skopje requesting the Court to determine discriminatory conduct on the basis that his employer violated the right to equal treatment with his disadvantageous conduct. The court of first instance passed a ruling that the accused, on the basis of victimization was making discrimination towards the suitor because he undertook actions for protection against discrimination regarding the realization of the employment rights by not paying his salary and contributions. After the appeal submitted by the employer, the Appellate Court made a decision for accepting the appeal and the case is returned once again to the court of first instance. The court of first instance again passed the verdict that on the basis of victimization, discrimination had occurred. **Taking into consideration the explanations of the verdicts of the Court of First Instance Skopje II-Skopje, it can be concluded that:**

It is clearly defined that victimization has been committed as a form of discrimination, i.e. that the person that undertook certain activities in order to seek protection from discrimination while fulfilling his employment rights, is indeed victimized. The court ordered the accused to enable the victim to fulfill his employment rights, to restrain from actions that could infringe the right to equal treatment of the person, and to indemnify material damages caused by the disadvantageous conduct.

The filing of a civil lawsuit enables the court to determine whether the procedure for dismissal in the first case is lawful, the person to be returned at his work place, as well as to ask to determine discrimination. Moreover, the lawsuit enables decision for indemnification, fulfilling the employment rights and determines discriminatory conduct in the second case.

The key element in this kind of procedures is the possibility to be shown the mutual connection of the dismissal decision and the violation of the employment rights with victimization, i.e. disadvantageous conduct against person that

participated in a procedure for determination discrimination, or a person that undertook activities for protection against discrimination.

Conclusion:

The persons that are encouraged to report discrimination or are witnesses in proceedings for discrimination suffer negative consequences, especially if they are employed at an employer that performs the discrimination. The disproportionate financial opportunities and leverage, the possibility to influence evidence and witnesses, as well as the possible circumstances that the discriminated persons are members of vulnerable, minority or discriminated communities, indisputably influences them not to report the discrimination nor to participate in proceedings for the determination of discrimination. However, unfortunately the outcomes of the initiated procedures so far do not give sufficient information to determine whether a lawsuit in a regular legal proceeding is an efficient legal remedy for protection against victimization/discrimination.

REFERENCE LIST:

National regulations:

Constitution of the Republic of Macedonia

Rules of Procedure of the Constitutional Court of the Republic of Macedonia

Law on Administrative Disputes

Law on Police

Law on Execution of Sanctions

Law on Foreigners

Law on Criminal Procedure

Criminal Code of the Republic of Macedonia

Law on Border Control

Rules of Procedure on the shape and the contents of the seal for entering and exiting the territory of the Republic of Macedonia and the manner and the procedure of affixing the seal

Law on Prevention and Protection against Discrimination

Law on Labor Relations

Law on Ownership and Other Real Rights

Law on Enforcement

Law on Social Protection

Law on Pension and Disability Insurance

International Agreements that have legal force in the Republic of Macedonia

European Convention for the Protection of Human Rights and Fundamental Freedoms

Treaty between the Government of the Republic of Macedonia and the Government of the Republic of Serbia regarding the conditions for traveling of

the citizens of both countries (“Official Gazette of the Republic of Macedonia” n.172/11)

Stabilization and Association Agreement between the European Communities and their Member States, of the one part, and Macedonia of the other part (“Official Gazette of the Republic of Macedonia n. 28/2001) and the amending and addendum protocols (Especially Articles 76 and 77)

Visa Facilitation Agreement between Republic of Macedonia and the European Union (“Official Gazette of the Republic of Macedonia” n. 141/2007)

Agreement between Republic of Macedonia and the European Union for takeover of persons staying without permission (“Official Gazette of the Republic of Macedonia” n. 141/2007)

Relevant Reports on human rights protection:

Annual Report on the degree on providing, respecting, advancing and protection of human freedoms and rights 2014, Ombudsman of the Republic of Macedonia

Annual Report on the degree on providing, respecting, advancing and protection of human freedoms and rights 2013, Ombudsman of the Republic of Macedonia

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Amnesty international report - Violation against refugees and migrants rights in Macedonia, Serbia and Hungary
Non-lethal weapons as legitimizing forces?” 2004, author Brian Rappert

Report by Nils Muižnieks, Commissioner for Human Rights of the Council of Europe for Macedonia

Commission staff working paper on the post-visa liberalization monitoring for the Western Balkan countries in accordance with the Commission Statement of 8 November 2010

КОНТАКТ ИНФОРМАЦИИ НА ПРОЕКТОТ

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