REPORT

ON COMPATIBILITY OF THE LEGAL ORDER OF REPUBLIC OF MACEDONIA WITH EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

(ARTICLES 1-7)

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OBLIGATIONS OF GENERAL FEATURES: ARTICLE 1 OF THE CONVENTION

I

In arranging the matter of human rights and freedoms and the system of their protection, the Constitution of Republic of Macedonia tends to adopt all guarantees of rights and freedoms enshrined in most significant international acts, among which specially in the Convention for the Protection of Human Rights and Fundamental Freedoms. The influence of international acts upon the Constitution of Republic of Macedonia is evident on a large scale, in defining of fundamental principles of the position of the individual in the society and its relations towards the state and other individuals. On specific scale, this influence is evident in determining the contents, way of their exercise and the way of protection of individual rights and freedoms. In this sense, the obligation of harmonizing its legal order with the fundamental requirements of the Convention, which arises from the act of ratification of the Convention for all member countries of the Council of Europe, Republic of Macedonia has undertaken it as a moral obligation even at the time of preparation and adoption of its new constitution in 1191. Now, immediately before the ratification of the Convention, this obligation is being continuously practiced trough the influence of the Constitution upon laws and other elements of the normative part of the legal order and upon conducting the legal practice. However, in the Republic of Macedonia, the process of incorporation in the domestic law of rights and freedoms guaranteed by the Convention, followed by the creation of an institutional mechanism for their protection, has started however even before the ratification of the Convention, as a manner of *"securing to everyone within its jurisdiction the rights and freedoms defined in Section I of the Convention"*.

The constitutional concept of human rights and freedoms poses a reflection of the fundamental relation within the framework of the social and political system in the Republic of Macedonia. Fundamental rights and freedoms have been treated by the Constitution in two different ways: first, in their wholeness - in the shape of programme and leading principles, requiring and assuming their elaborate interpretation in the process of their further constitutional standardization and their legislative

operationalization, as well as in the process in their practical implementation and protection; Second, in their individuality - in the shape of direct legal requirements, most frequently in the shape of prohibitions, authorizations or obligations, addressed to authorities caring out public power within the framework of those legally arranged social relationships which constitute or influence upon the contents or upon the way of exercising of individual human rights and freedoms.

The basic aim of guaranteeing of human rights and freedoms by the Constitution of Republic of Macedonia is to secure their legal inalieanation on a constitutional level. In the domestic legal order the contents of fundamental human rights and freedoms poses an exclusive constitutional matter. As a rule, they are being exercised directly on the basis of the Constitution, and the way of their enjoyment can be prescribed by laws only in the case when an expressed constitutional authorization exists and only in the framework of that authorization. In this way, of course, in the framework of the domestic legal order, only the Constitution can be a criterion for the exercise and protection of human rights and freedoms. Thus, human rights and freedoms become constitutionally set material boundary for the public power, through the principle of constitutionality in the process of creation, transformation and implementation of law,.

The Constitution treats human rights and freedoms on three different levels of generality. First, they are an integral part of the preamble to the Constitution, further, they have been defined as one of the fundamental values of the constitutional order of the Republic of Macedonia and, finally, the key position of the normative part of the Constitution has been dedicated to them.

The Preamble of the Constitution of the Republic of Macedonia emphasizes the guaranteeing of human rights and freedoms, providing social justice, the build-up and conducting of the principle of rule of law as the most important targets for the adoption of the Constitution. The setting of such targets represents a formal proof of the political determination of the Republic of Macedonia to grow into a democratic society in which the citizen as an individual is the bearer of rights and freedoms which have not been donated and dozed by the constitution and laws, but merely they are noted and confirmed in consistent with the democratic achievements in the world.

The special constitutional, legal, political and functional value of human rights and freedoms has been emphasized by the Constitution on its second level of their guaranteeing - through their inclusion in various

contents of article 8 paragraph 1 of the Constitution, dedicated to the fundamental values of the constitutional order of the Republic of Macedonia. This one is relatively speaking more general in comparison with otherprovisions. In that way, it is more lasting basis for the achievement of human rights and freedoms. Individual fundamental values of constitutional order directly concern to human rights and freedoms, whereas some of them concern general condition for their achievement. First, fundamental human rights and freedoms recognized by international law have been expressly defined as one of the fundamental values upon which constitutional order rests. This constitutional provision of most common nature poses a basis for further constitutional treatment of human rights and freedoms, as well as the basis and course for their legislative interpretation and operationalization. Further more, by determining the principle of the rule of law as a guarantee against any abuse, breach, deprivation or restriction of human rights and freedoms, the most common constitutional and legal prerequisite for their achievement and respect in the social practice has been created.

In the framework of determining the fundamental values of constitutional order, the defining principle according which "it is free anything that has not been prohibited by the Constitution and laws", has a special significance for human rights and freedoms (Article 8, paragraph 2 of the Constitution of the Republic of Macedonia). This principle offers leading course in the interpretation of the contents and limits of powers of public authorities relating to human rights and freedoms. According to this manner of interpretation, the freedom of an individual and its specific rights are superior to powers of public authorities, and their restrictions, if any, must be expressly set by the Constitution and be conducted only within the framework of the Constitution.

The third level of generality in arranging the matter of human rights and freedoms poses their direct guaranteeing according their specific contents and groups of contents. It has been set out in Section II of the Constitution, which, according its position in the constitutional text (before the section related to organization of State power) illustrates its attitude towards human rights and freedoms. Having in mind the contents of Section I of the Convention, as well as a number of Protocols related to the contents of individual freedoms and rights guaranteed by the Convention, the set of human rights and freedoms defined by the Constitution of the Republic of Macedonia entirely contains the list of human rights and freedom set out in the Convention, according to the following scheme:

- Right to life from Article 2 of the Convention and Protocol number 6 has been covered by Article 10 of the Constitution, which proclaims the irrevocability of human life and which prohibits sentencing to death under any circumstances;

- Prohibitions from Articles 3 and 4 of the Convention, relating to torture, slavery and hard labour, have been covered by Articles 11 and 32 of the Constitution, guaranteeing irrevocability of physical and moral integrity of an individual, prohibiting any form of torture, inhumane and humiliatory conduct and punishment, as well as any form of forced labour, i.e. guaranteeing the right to work and free choice of employment;

- The right to liberty and security of person from Article 5 of the Convention has been covered by Article 12 of the Constitution, guaranteeing the irrevocability of the liberty of a person and determining the cases and conditions under which the liberty of a person can be restricted when such a person has been accused of committing an criminal offence;

- The right to a fair hearing (Article 6 of the Convention) has been guaranteed by several provision in the Constitution relating to the presumption of innocence of the accused person (Article 13 of the Constitution) and to specific rights of a person deprived of his liberty due to suspicion of committing a criminal offence (Article 12);

- The principle of legality in punishing, i.e. the prohibition of retroactivity of the criminal law (Article 7 of the Convention) has been incorporated in Article 14 of the Constitution, determining the principle of legality in punishing the offenders of criminal offences, as well as in Article 52 paragraph 4 of the Constitution prohibiting the retroactivity of laws and other regulations;

- The rights to effective remedy from Article 13 of the Convention has been incorporated in Articles 15 and 50 of the Constitution, guaranteeing the right to appeal against all individual acts passed in the first instance by a court, administrative authorities and other bodies exercising public powers, i.e. guaranteeing the right to judicial protection of human rights and freedoms guaranteed by the Constitution, as well as protection of legality of all individual acts passed by public authorities;

- The right to respect one's private and family life, as well as the right to marry (Articles 8 and 12 of the Convention) has been guaranteed by Articles 17, 18, 25, 26 and 41 of the Constitution;

- Guarantees from Articles 9 and 10 of the Convention in an appropriate way have been incorporated in the contents of Article 16 of the Constitution, guaranteeing the freedom of belief, conscience, thought, free expression of thought, speech, public presentation and public information;

- The right to assembly and association (Article 11 of the Convention) has been covered with guarantees of freedom of political association and activity (Article 20 of the Constitution), of the right to public protest (Article 20 of the Constitution), as well as the guarantee of the right to join trade unions and the right to strike (Articles 37 and 38 of the Constitution);

- Prohibition of discrimination (Article 14 of the Convention) has been built in the principle of equality of individual before the law (Article 9 of the Constitution);

- The rights of aliens (Article 16 of the Convention, Article 4 of Protocol number 4 and Article 1 of Protocol number 7) have been guaranteed by Article 29 of the Constitution;

- Protection of private property (Article 1 of the Protocol number 1) has been guaranteed by article 30 of the Constitution;

- The right to education (Article 2 of Protocol Number 1) has been entrenched in Articles 44,45 and 46 of the Constitution;

- The right to free elections (Article 3 of Protocol number 1) has been guaranteed by Article 22 of the Constitution;

- The right to movement (Article 2 of Protocol number 4) and condition under which it can be restricted have been sorted out in Article 27 of the Constitution;

- The question of cases, conditions and ways of restriction of human rights and freedoms in time of war and state of emergency (Article 15 of the Convention) has been covered by article 54 of the Constitution of the Republic of Macedonia.

This short survey of the way of arranging the matter of human rights and freedoms in the Constitution of the Republic of Macedonia and the coverage of individual provisions of the Section I of the Convention shows the following:

First, the Constitution demonstrates a very positive attitude towards human rights and freedoms, not because it recognized their high level values as constitutional institutions, but also because it underlines their preexistence in comparison with authorization of public authorities, as well as their function of a framework in restricting the public power;

Second, the style and way of expressing of constitutional norms relating to human rights and freedoms is being characterized by preciseness, determination and inambiguousness, though the Constitution has not always been successful in its effort to do it. Language used is being characterized by the avoidance of ideologization in determining of the contents of human rights and freedoms and the way of their implementation;

Third, human rights and freedoms from Section I of the Convention have been entirely incorporated in the set of human rights and freedoms guaranteed by the Constitution. A system of their effective protection has been also provided in case of their non-respect or breach. Thus, a constitutional basis has been created for the compatibility of domestic legal order with the requirements and standards envisaged by the Convention.

The question of the relationship between the Constitution and the laws in constituting human rights and freedoms, i.e. the question of subject and scope of their legislative arrangement, has a special importance for incorporating provisions of the Convention in the domestic legal order. Human rights and freedoms are, above all, a constitutional category and, under normal circumstances, they can not be limited or stripped, whereas in a state of emergency their limitation and stripping may be possible only in cases and under conditions set by the Constitution. As a rule, if their specific contents allows it, human rights and freedoms determined by the Constitution are being achieved directly on its basis. However, if their nature does not let their direct application, the way, conditions and procedure for the achievement of separate rights and freedoms can be prescribed by law, only if such prescription is an indispensable condition for their implementation.

The Constitution of the Republic of Macedonia is not precise enough in the establishment of such a principle. The exclusiveness of the

constitutional arrangement of rights and freedoms arises to a greater extent from its common approach towards this matter, than it has been directly defined by an expressed constitutional provision. For example, the Constitution contains about 25 provisions by which it has been expressly envisaged the adoption of a law for the purpose of arranging of matters relating to the achievement of separate rights and freedoms. But, however, it does not contain any expressed provision prohibiting passing such a law in those cases where the expressed constitutional authorization for passing such a law does not exist. That's why, the passing of such a law in each specific case in practice has been vested with the competent authority (the Constitutional Court of the Republic of Macedonia) to judge whether or not, from the aspect of elusiveness of rights and freedoms as a constitutional matter, the passing of a law dealing with conditions and ways of their achievement has been indispensable and whether or not its contents surpasses the framework of the presumed constitutional authorization.

The Constitution exploits the term "fundamental rights and freedoms". However that very use does not tend to express a concept according to which the Constitution defines only a single part of the set of rights and freedoms it recognizes as essential ones, and that the rest of them are left over to the laws. At the root of this terminology rests the concept according to which, the Constitution of the Republic of Macedonia couples with the continuity of the constitutional development in the world and it takes over those rights and freedoms that have proved themselves as an indispensable legal foundation for the achievement of democratic essence of society and for the active and protected plight of an individual as a basic cell of that society. In fact, it is a matter of taking over of the formula most widely used in most significant historic and nowadays valid acts and documents and through which it has traditionally indicated that set of guarantees constituting the legal foundation for the position of an individual in a democratic society.

In indicating the bearer of specific rights and freedoms, the Constitution, most frequently together, exploits the terms "individual" and "citizen". At first sight, they seem to be two different categories of rights and freedoms, i.e. two different categories of their bearers. However, the terminology used has no essential significance for the contents of the individual rights and freedoms. As a rule, under the term "individual" the Constitution tends to mean each living human being upon whom the jurisdiction of the Republic of Macedonia has been exerted, no matter whether he or she is its national and not depending on his or her natural or

social capacities. Determination of the "individual" as a bearer of the largest part of rights and freedoms enshrined in the Constitution poses an indication of the concept the universal character of rights and freedoms and of the widest humanistic approach to their guaranteeing, achievement and protection.

Under the term "citizen" the Constitution most frequently means nationals of Republic of Macedonia. However, its simultaneous use along with the term "individual" does not by itself mean exclusion of those persons who are not nationals of Republic of Macedonia, but upon whom its jurisdiction has been exerted on different bases, from possessing those rights and freedoms. In other words, the use of this term is not discriminatory one, neither in shape, nor in contents, nor in scope of guaranteeing, achievement or protection or individual rights. Whenever the capacity "national of Republic of Macedonia" is relevant one (it can be only in a limited number in which it is necessary realistically to define the subjects of exactly determined rights and freedoms which according to their contents are strictly linked to the citizenship), it has been expressly emphasized in the Constitution. For instance, such are those relationships which are related to the right to vote, carrying out public functions, carrying out of duties related to the defence of the country e.t.c. On the other hand, the constitutional distinction between nationals of Republic of Macedonia and non-nationals in their assertion as subjects of individual sorts of rights and freedoms or in the scope of guaranteeing of those rights and freedoms, i.e. the distinction between "everyone" as a subject to rights and freedoms guaranteed by the Convention and the nationals of Republic of Macedonia as subjects to precisely determined sorts of rights and freedoms, has its coverage in this very Convention. Namely, in its Article 16, member countries are allowed to set certain restrictions of aliens' political rights and freedoms. Otherwise, a part from the exemptions above mentioned, all other rights and freedoms guaranteed by the Convention and which are incorporated in the Constitution of the Republic of Macedonia, are enjoyed by all people jurisdiction of Republic of Macedonia has been exerted upon, regardless of the character of their legal linkage to that country. On the other hand the capacity of being non-national of the Republic of Macedonia poses a relevant constitutional basis for the determination of some special rights to aliens, which can be extended beyond general standards meant for citizens (Article 29 of the Constitution), or for the exemption of aliens from certain constitutional duties characteristic for citizens (such as national military service, on the basis of article 28 of the Constitution).

The largest portion of rights and freedoms guaranteed by the Convention, respectively taken over and incorporated in the Constitution of the Republic of Macedonia, according to their contents, belong to the category of classical personal rights. In the Constitution, as well in the Convention, their function is to secure the integrity of the personality of an individual in regard to the State and its authorities, as well as to other organizations and institutions bearing public powers. Their aim is to secure physical and mental integrity of a person, as a sphere of his privacy which is absolutely forbidden to be incurred into by the State. In this sense, personal rights from the Constitution of the Republic of Macedonia represent the basis for all other human rights, especially those ones of political nature.

The largest portion of rights taken over from the Convention by the Constitution are being treated as "negative rights". Their constitutional guarantees, in the shape of defined subjective rights to everyone in the society, as their counterbalance, on the part of the state create an obligation for restraint from undertaking action of legal or factual nature in those protected and prohibited spheres. They also cause an obligation for prescribing, passing and carrying out sanction for such an action undertaken by state bodies, other organizations with public powers or by individuals, which has been directed at the physical and mental integrity of a person previously mentioned. The state respects such sort of rights and freedoms by not creating any legal, institutional or factual barriers preventing, aggravating or discouraging people to enjoy them. It also respects them by discouraging (mainly by punishing) those subjects who otherwise are prone to creating such barriers.

However, the "negative" nature of these rights does not relieve the state from its obligation to secure institutional, organizational and other conditions necessary for their achievement and protection. This, above all, includes the establishment of a highly developed legal system, establishment a judicial system, creation of political condition for independent an unbiased judiciary and the like. In fact, it is a matter of a very "positive" obligation of the state. According to its contents and way of performance, it differs from obligations created by guaranteeing of so called "positive rights and freedoms" (social, economic, cultural and the new generation of ecological rights and freedoms), which imposes upon the state an obligation for direct material allotments, with the aim of achieving minimum standards of economic, social, cultural and other benefits for the individuals.

The obligation for creating conditions for true and effective, and not only formal, enjoyment of "negative" rights and freedoms has been imposed by the Constitution of the Republic of Macedonia in two different ways. First, it arises from the contents of separate rights and freedoms taken over from the Convention and second, it also arises from other constitutional provisions arranging other constitutional institutions, as well as the make up of the state authorities. The prescription by the Constitution of sorts of state authorities, their competence, authorization, procedure for conducting their functions, principles of their conduct towards citizens, procedure for their decision-making in particular cases and the like, poses a basis for the provision of necessary institutional and organizational conditions for a true performance and effective protection of rights and freedoms guaranteed by the Convention and taken over by the Constitution, i.e. for their true availability for the individual as their bearer.

II

The question of the relationship between international and domestic law, in the legal system of the Republic of Macedonia poses a constitutional matter, which is regulated in Section III of the Constitution called "Organization of the state power" - the provisions referring to the judiciary. Article 98 of the Constitution, listing formal sources of domestic law, has envisaged that "*courts judge on the basis of Constitution and laws and international treaties ratified in accordance with the Constitution*". Apparently, the purpose of the constitution-makers was not to present a complete list of all existing formal sources of law on the basis of which national courts exercise their function, but to list only key formal legal sources which are hierarchically superior in relation to the rest of them: the Constitution, laws and international treaties.

The constitution-designers have been explicitly clear that besides the Constitution and laws (which is comparatively speaking absolutely indisputable), international treaties as well pose a source of domestic legal order. But, in order to become a source (an integral part) of the domestic legal order, the international treaty must meet two additional conditions: first, the respective international treaty substantionally must be in accordance with the Constitution of the Republic of Macedonia, as the highest legal and political document in the country; and second, the treaty in question must be ratified by the Parliament of the Republic of

Macedonia. On the contrary, a treaty that has not met precisely defined conditions, is a defective one, a fact which unable its direct application by courts in the legally prescribed procedure.

As far as the second condition is concerned, the Constitution of the Republic of Macedonia has a legal blankspace. Namely, it has not been pointed out what authority is competent to assess the compatibility of an international treaty with the Constitution of the Republic of Macedonia. As the Constitutional Court is the central body for the control of constitutionality and legality, the conclusion that this body should be competent for the assessment of constitutionality of international treaties seems to be quite logical. However, the relevant provision determining the competence of the Constitutional Court of the Republic of Macedonia has not mentioned such a function of the Court among the others. This blankspace requires to be suitably filled in. But, even without it, in the course of so far practice, the Constitutional Court has assessed constitutionality of international treaties. Ultimately, such a practice is not incosistent with the spirit of the above mentioned provision, as far as the Constitutional Court decides on the constitutionality of already ratified international treaties. Namely, having in regard that ratification is being conducted by law, an act falling within the domestic legal order, it can be reckoned that the Constitutional Court, in fact, assesses the constitutionality of the law on ratification of an international treaty. However, this argument, shall not imply to situation where it should be assessed whether or not the signed, but not yet ratified international treaty, is in compliance with the Constitution of Republic of Macedonia.

Previously quoted constitutional provision is simply adopted by fundamental principles of the Law on Courts ("Official Gazette of RM" N. 36/95). Namely, Article 3 of this law stipulates that " *courts judge on the basis of Constitution and laws and international treaties ratified in accordance with the Constitution*". Further on, in Article 4 of the already mentioned Law, in the group of instruments the courts dispose of in exercising their aims and assignments, has listed international treaties besides the Constitution and laws.

Far more complex and therefore much more complicated is the question of hierarchical relation among the Constitution, laws and international treaties. In responding to this question it is irrecommendable to make a simple linguistic interpretation, sinse it might be misleading. Namely, the formulation "courts judge on the basis of the Constitution and laws and international treaties" might imply identical hierarchical position

of laws on one hand with the international treaties on the other. Further on, we could start from the order in listing of particular formal legal sources in the legal order of Republic of Macedonia, and draw a conclusion that the continuum begins with hierarchically the highest legal act and ends with hierarchically the lowest one - international treaty. But, both approaches are not the right ones, because they have in mind only the provision embodied in Article 98 of the Constitution as the only basis for interpretation. It seems to be the right way of interpretation the one which is not isolated from Article 118 of the Constitution, incorporated within the framework of Section VI dedicated to the international relations. This article forbids international treaties to be modified by a law. *A contrario*, international treaties can be modified by the Constitution - the highest legal act of the state. The last fact means that the interpretation of Article 98 together with Article 118 of the Constitution of the Republic of Macedonia, leads to the conclusion that the place of international treaties in the hierarchical structure of legal order should be searched, however, between the Constitution on one hand and the laws on the other. International treaties stand higher than laws, but lower than the Constitution of the Republic of Macedonia .

The explicit statement about the place of international treaties in the hierarchical structure of legal order of Republic of Macedonia, seems not to refer to the specific group of inter-governmental treaties - treaties on human rights. Namely, fundamental human rights and freedoms incorporated in the key international legal instruments, both universal and regional, have already been embodied in Section II of the Constitution of the Republic of Macedonia, dedicated to human rights and freedoms. This fact, in itself, gives the human rights and freedoms constitutional significance and constitutional power. International treaties on human rights possess greater legal power than "ordinary", "normal" international treaties. Additionally, such a conclusion can be drawn out from Article 8 paragraph 1 count 1 of the Constitution of the Republic of Macedonia unequivocally points at. Technically, through the constitutional provision which states, "*fundamental human rights and freedoms recognized by international law and determined by the Constitution of the Republic of Macedonia*" human rights have been defined as one of the fundamental values of constitutional order of Republic of Macedonia. Such a formulation has been designed with the aim of being a normative precondition of international legal rules on human rights and freedoms, together with the practice of organs for protection of respective international pacts on human rights and of the European Convention on Human Rights, to be applied as a guideline in the process of interpretation

of constitutional norms dedicated to human rights and in their operationalization through respective laws and other legal acts.

The formulation of Article 8 paragraph 1 count 1 of the Constitution includes exclusively those human rights and freedoms which are concurrently subject of regulations both of international treaties and of the Constitution of the Republic of Macedonia. Apparently, certain rights and freedoms remain out of the grasp of such a formulation. However, this fact shall not pose a problem in regard to a significant number of norms which have already become an integral part of international common law, because international common law rules bind the Republic of Macedonia by the very fact that it is widely recognized international law subject. Besides, the Republic of Macedonia, pursuant Article 8 paragraph 1 count 10 of the Constitution, additionally undertakes an unequivocal obligation in the mentioned direction.

Having in regard the above presented considerations, it arises that the European Convention on Human Rights, though it was signed by the minister for foreign affairs of the Republic of Macedonia in November 1995, still does not represent an integral part of the legal order of the Republic of Macedonia. Consequently, courts in the Republic of Macedonia still do not directly apply it. According to this, the act of ratification of the European Convention by the Parliament of the Republic of Macedonia shall represent an act of its transformation into an integral part of domestic legal order, which shall produce an unavoidable consequence - its direct application by domestic courts.

In that sense it is unwise to make comparisons with former Yougoslav legal order, within the framework of which there existed an identical constitutional provision like the already elaborated one, but still, it in fact, they did not refere to the International Covenant on Economic, Social and Cultural rights and to the International Covenant on Civil and Political rights as to an integral part of domestic legal order, i.e. this acts were not applied directly by courts. It was due to the fact that in the former Yougoslavia, as well as in other East European countries was not paid sufficient attention to the human rights issue. That's why, the question whether or not international treaties posed part of domestic legal order, should be assessed by the fact whether other types of international treaties, such as treaties on international legal aid, extradition and the like, were directly applied by courts. Practitioners with a long year experience offer positive answer to this question.

RIGHT TO LIFE:
ARTICLE 2 OF THE EUROPEAN CONVENTION

I

Article 1o of the Constitution of the Republic of Macedonia envisages that *"human life is irrevocable"*. Such a provision means unconditional (unlimited) protection of human life. It does not speak of the right to life, but of life itself.

Article 2 of the European Convention of Human Rights, on the contrary, speaks of the right to life and its protection: *"Everyone's right to life shall be protected by law"*. This provision implies an obligation for the authorities to protect *"the right to life"* followed by the prohibition for deliberate deprivation of life of any person. This prohibition relates only to cases where the breach of this rights includes guilt or insufficient protection by the authorities, merely because the appeal against the breach of this right can be submitted only for carrying out acts or omission by authorities. The prohibition for deprivation of life of a person poses an obligation for the authorities to restrain from undertaking activities endangering human life without any reason.

It arises from Article 10 of the Constitution of the Republic of Macedonia that the prohibition does not refer only to the authorities, but to any other subject, as well, including individuals. This provision, also, refer to the conclusion that guarantees have been offered against all possible threats to human life, an not only against deliberate deprivation of life. Unlike this provision, Article 2 of the European Convention, covering the right to life, does not offer guarantees against all kinds of threats to human life, but only against deliberate deprivation of life: *No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provide by law"*.

Article 10 of the Constitution of the Republic of Macedonia guaranties irrevocability of human life, but it does not define who is responsible for its protection. In this sense, Article 2 of the European Convention is more clear: this obligation rests, first of all with the legislator, because *"the right to life shall be protected by law"*. However the European Commission has confirmed that not only the legislator is charged with this obligation, but also all other state bodies, being

responsible for providing appropriate measures for the protection of human life.

Legislative protection of human life involves two ways of its operationalization: threat by punishment against those who shall commit, try or make somebody else to commit a homicide, ore who shall commit any other act whose consequence is death, including helping or inspiring to suicide. Such crimes have been covered by Articles from 123 to 128 newly passed Criminal Code of Republic of Macedonia ("Official Gazette of RM" N.37/96). This threat also includes the right to compensation against damage where death has been caused intentionally or due to negligence.

The right to life is not an absolute one. Article 2 of the European Convention recognizes circumstances and conditions, featuring other interests, restricting the right to life. Sometimes it seems to be a private interest (in the case a person has been attacked and defends himself of an unlawful attack), but sometimes is of public interest (where the state is entitled to punish by death, or where death has been caused as a result of use of necessary force).

The European Convention specifies two groups of circumstances in which states are authorized to abridge right to life, without it being violation of Article 2 of the Convention. The first follows a judicial hearing; the second covers situations in which the right to life can be limited without a judicial hearing. By becoming effective the Protocol Number 6 to the European Convention, the member countries having ratified it have no possibility of depriving a person of his life for committing serious criminal offence. In other words, this Protocol excludes the possibility of passing a death penalty.

Naturally, by guaranteeing the irrevocability of human life, the Constitution of the Republic of Macedonia has accepted and incorporated the solution from Protocol Number 6, thus excluding the possibility of handing down a death penalty as a way of depriving an individual of his life, even for committing the most serious criminal offences. Namely, in Article 10 paragraph 2 it has been envisaged that *"a death penalty can not be passed on no ground in the Republic of Macedonia"*. Article 54 of the Constitution of the Republic of Macedonia also excludes the possibility of restricting the right to life on any ground. Formulated in this way, provisions from Articles 10 and 54 of the Constitution of Republic of Macedonia are entirely compatible with Protocol Number 6 to the European Convention.

In Article 2 paragraph 2 of European Convention there have been mentioned three circumstances under which deprivation of life may not be subject to the prohibition from paragraph 1 of that Article. It is the matter of particular cases where deprivation of life is result of use of force for a particular purpose, such as:

"a) in defence of any person from unlawful violence;

b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

c) in action lawfully taken for the purpose of quelling a riot or insurrection."

In the first case, the state takes into account not only self-defence, but also the necessity to rescue others from unlawful violence, although not from lawful violence or threats of natural or accidental disaster; while in the second and third cases the action taken usually, but not necessarily by law enforcement agencies must be "lawful".

There has not been provided for a possibility in the Criminal Code of Republic of Macedonia to cede from the irrevocability of life, even in cases where it is a question of depriving of life by homicide in anger, when the offender, by assault or heavy insult caused by the killed, has been brought against his will in a situation of serious irritability and anger (Article 125 of the Criminal code of the Republic of Macedonia). Thus formulated, this provision excludes the possibility of the use of deadly force by a person acting in self-defence, but which has been permitted by Article 2(2)(a) of the European Convention, thus clearly confirming the unconditional (unlimited) protection of human life, and not only protection of the right to life.

Though the right to use deadly force by a person acting in self-defence has been sanctioned in principle, it is not the case where the bearer of that right is a police officer. It is indisputable that Article 2 of the European Convention has recognized the police officer the right to use deadly force in order to protect other persons against unlawful violence. In this particular case it is not a question of the right to self-defence of an individual, but it is a question of performing a particular kind of official duty.

In this sense, article 35 of the Law on governing home affairs ("Official Gazette of RM" N.19/95) has envisaged that:

"An authorized officer shall resort to fire arm, unless by other means it is impossible to:

1) protect life of citizens;

2) withstand immediate attack threatening his own life;

3) withstand an attack on buildings or persons protected;

4) prevent from escaping a person found wile committing a criminal offence being punishable by prison not lasting less than five years, as well as to prevent from escaping a person being detained and a person against whom a warrant of arrest has been issued for committing such a crime."

Similar solutions for the use of deadly force may be found in article 188 of the draft bill on the execution of penal sanctions. (Expecting that at the time of ratification of the European Convention and after, the existing Draft Bill on Execution of Penal Sanctions shall pose a valid source, in examining the compatibility of the domestic legislation with the Convention only the provision from that draft bill are being taken account, and the provision from the existing law are being mentioned only in case of historical considerations.) Differences in relation the Law on home affairs concern the possibility of use of deadly force by a serviceman guarding prisons. According paragraphs 4 and 5 that serviceman can use a fire arm in order *to prevent a convict from escaping from a penitentiary, or while taking him to prison if convicted for a criminal offence condemned to a life imprisonment of 15 years or longer."*

Article 35 of the law of home affairs and Article 188 of draft bill on the execution of penal sanctions in principle are compatible with Article 2 paragraph 2 of the European Convention. These provisions closely follow the need indicated in the European Convention that the force and the use of police forces and other forces for guarding, as well as their kind and scope, must be provided for by law. These articles also confirmed the need of transparency and availability for the public the action undertaken by the person entitled by law to use deadly force. The action by police officers must always be followed by the need, and force used must be appropriate to the danger threatening which must be eliminated, as well as to the extent of danger to goods which have to be protected. In this sense, in a case before the European Commission, the widow of a person being killed by police in demonstrations in Belgium appealed against a breach of Article 2

of the Convention, but her complaint has been repealed as evidently baseless because the policemen acted only within the framework of lawfully permitted self-defence: the policemen used fire arm because his life was threatened. The Commission was convinced that there was no reason for any doubt that his action was intended to kill (*Appl. 2758/66, X. v. Belgium*).

Requirements from Article 2 of the European Convention allowing for deprivation of life refer to the use of force which is absolutely necessary. They assume the amount of force which is to be used, without prescribing any tangible standards for the assessment when and what amount of force was necessary to be used by police. Because of different interpretation of the term "absolute necessary force" in different countries, the European Court on Human Rights allows for each member country to determine independently its own standards for the assessment of the force used as "absolutely necessary", within the framework of guidelines outlined by the Convention. According these guidelines, it is very important, in each particular case the assessment whether or not the deadly force used by police was "absolutely necessary", pursuant facts of each cases, to be granted in competence of independent judiciary, which implies careful analysis of the contents of the action, of the fire arm used and tactics applied by police (*Appl. N.10044/82, Appl. N.9013/80 and McCann and others judgment from 1995*).

According to Article 35 of the Law of home affairs, *"the justifiability and appropriateness of the use of means of force or fire arms in each particular case shall be judged by the immediate superior in rank."* A similar solution is contained in Article 189 of the Draft Bill on Execution of Penal Sanctions: *"The prison guard compiles a minutes for any use of force. The Directorate for the execution of criminal sanctions shall be informed for each use of means of force and it shall judge whether such a use of force has been justifiable."*

Legislative provisions mentioned above link the assessment for the necessity for the use of deadly force to the one applying it, excluding the possibility for independent judiciary to decide on it, as it has been required by practice in interpreting the Convention. Without the assessment of the independent judiciary whether or not the deadly force used in each particular case was "absolutely necessary", the accountability of police before the law for the deprivation of an individual of his right to life is not expected to be realistic.

The "absolute necessity" for the use of deadly force by police may also be interpreted as a need the force used to be proportional to the aims to be attained by the police action. It implies two questions: first, whether or not the use of deadly force by police in arresting a person is "absolutely necessary" when the person who is to be arrested tries to avoid the arrest by pushing the police officer; and second, whether or not the law may justify deprivation of life an escaping prisoner having not threatened the police officer's life chasing him (Article 2 paragraph 2 of the European Convention, Article 35 paragraph 4 of the Law on home affairs and Article 188 paragraph 1 counts 4 and 5 of the Draft Bill on Execution of Penal Sanctions).

According to the practice of application of the European Convention the use of force resulting in death is not justifiable in case of an escape of a prisoner and when a person is subject to arrest, unless the life of police officers has been threatened (*Farrel case*). By such an interpretation of the term "absolutely necessary" in the use of deadly force by police, the condition of justified use of force from Article 35 paragraph 4 of the Law of home affairs and Article 188 paragraph 1 counts 4 and 5 of the Draft Bill on Execution of Penal Sanctions, is excluded.

Chapter XIV of the Criminal code poses best illustration for the width of protection of the right to life in the legal order of the Republic of Macedonia. In this chapter there have been sanctioned homicide, making and helping someone commit suicide, exposing someone to danger, abandoning a helpless person, as well as not giving help to a person being in a situation endangering his life. Provisions from Chapters XVI and XVIII are also in the function of protection the right to life. They are sanctioning criminal offences against safety of life and property and security in public transport. The contents of the Criminal Code of the Republic of Macedonia indicates that anywhere where there is a danger the fundamental right of each person - the right to life - to be threaten, the legislator has responded properly through appropriate sanctioning of such acts.

II

The most difficult interpretative problems of the provisions of the Convention guaranteeing the right to life are connected with the question of commencing and ending of human life. The European Convention insists on its member countries to protect the right to life, but is not define the width of life, above all because of big cultural differences between them in treating life. Mainly the problems are coupled with two questions: first, whether or not the life of unborn foetus should be protected; and second, the problem of euthanasia, i.e. whether or not the right to life demands from the state life to be protected in a paternalistic manner, despite the will and choice of person to die.

The European Court of Human Rights has not decided yet whether or not the foetus has the right to life. However the European Commission of Human Rights has deliberated whether the notion "life" from Article 2 of the Convention relates only to life of a born person or it also relates to life of an unborn child (*Bruggeman and Scheuten v. F.R.G.).* The Commission has differed three possibilities: first, Article is not applicable to the foetus; second, Article 2 recognizes the right to life of the foetus, but under specifically defined restraints; and third, Article 2 recognizes an unqualified right to life of the foetus.

Having in mind that Article 2 protects the right to life of the mother, the Commission firmly excludes the third of the above mentioned possibilities. In the case *X. v. United Kingdom*, the Commission has deliberated on the width of the notion "everyone's" from Article 2 of the Convention, but there appeared the dilemma whether or not it includes the foetus itself. The Commission has arrived at a standpoint that abortion should be allowed in order to protect the life and health of the mother. Such a standpoint of the Commission has been also applied in the case *Paton v. United Kingdom*, where the father of the unborn child was trying to convince British courts to dissuade the mother from abortion. The Commission has concluded that article 2 of the European Convention is applicable only to already born children, because the life of the foetus is closely linked to the life of the mother. The Commission reasoned that if article 2 is applicable to the foetus too, that would mean a ban on abortion, even when sustaining pregnancy may seriously endanger mother's life. In that way bigger value would be given to the life of the foetus the life of the

mother, which nevertheless defies Article 2 not allowing intentional termination of one's life in order to safe the life of another one.

The Law on Termination of Pregnancy ("Official Gazette of RM" N. 19/77) in its Article 1 has distinctly envisaged that abortion is permissible: *"Termination of pregnancy is a specific medical intervention for which the expectant mother freely decides on. The right to termination of pregnancy may be restricted only for the purpose of protecting the pregnant woman's life"*. It can be concluded that the right to abortion has been entirely granted to the pregnant woman without any restraints, save for the protection of her health. This calls into question whether the solution from Article 1 of that Law nevertheless endangers the right to life of the foetus. By not protecting the right to life of the foetus, the European Convention has not vested the pregnant woman with the unlimited right to abortion at her direct request, or as one of the aspects of respect of her right to privacy from Article 8 of the Convention. In the practice of bodies in Strasbourg they have come to the standpoint that pregnancy is not entirely a private affair, because the right to respect of the mother's privacy has been restraint by the right to life of the foetus (*Bruggeman and Scheuten v. Federal Republic of Germany*). In its judgments in the cases *Open Door Counseling Ltd. v. Ireland* and *Dublin Well Woman Centre Ltd. v. Ireland* the European Court of Human Rights has permitted the possibility of some restraints of abortion under Article 2 of the Convention. The Court considers that a certain balance between the right of a mother to respect her privacy from Article 8 of the Convention and the right to life of the foetus from article 2 of the Convention should be laid down. The relationship between the right of the pregnant woman and that of the foetus does not affect the relationship between rights of the pregnant woman and the responsibility of the state to protect interests of those who can not do that by themselves. The final outcome would be that the right to abortion of a pregnant woman must be granted only in specific cases, in order to prevent the groundless deprivation of the right to life of the foetus.

The Criminal Code of the Republic of Macedonia envisages a criminal offence "illegal termination of pregnancy". It criminalizes the unlawful termination of pregnancy, in spite of the pregnant mother's consent, which offers additional protection of the right to life of the foetus. Whit this the Macedonian legislator has confirm that the foetus deserves protection of his right to life when this right has been endangered in an unlawful manner.

Undoubtedly, member countries have come to a consent that abortion should be allowed with the aim of protecting mother's life.

Whether or not it is permissible to restrict the right to life of an unborn child, according to the Commission, should be judged on the basis of facts in each separate case individually. That means that there is no general standpoint in this question. However it is a fact that neither unconditional right to life of the embryo, nor the unconditional right of a pregnant woman to decide on the right to life of the foetus have been recognized.

With its birth the child has as much right to life as any other. But, there arises a question what about those children who have been born handicapped or with such deformities preventing them from taking part in the life of the community; what about those ill from heavy deadly diseases, where dying is under any norms of human dignity; how long can one ask a doctor to support one's life; what about those whose life, due to a heavy disease, is so miserable that they have better be dead. This question has not yet been given ethic and legal answer. According to the Convention it is clear that member countries have not been allowed to legalize killing out of mercy without the victim's consent. Nevertheless, euthanasia represents intentional termination of life, being contradictory to Article 2 of the Convention. That's why victim's consent does not make any difference and it is totally irrelevant.

In the legislation of the Republic of Macedonia euthanasia means homicide, thus confirming that every intentional termination of life, whether or not there has been given consent by the victim, is considered to be unlawful and inadmissible. Even making and helping someone commit suicide is a criminal offence. With the establishment of these criminal offences Macedonian legislation had confirm irrevocability of human life, which is nevertheless wider than simple protection of the right to life.

FREEDOM FROM TORTURE, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT: ARTICLE 3 OF THE CONVENTION

Article 11 of the Constitution of the Republic of Macedonia guarantees "*Irrevocability of physical and mental integrity of person*" (paragraph 1) and prohibits "*any type of torture, inhuman or degrading treatment or punishment*" (paragraph 2). Article 54 paragraph 4 of the Constitution of the Republic of Macedonia excludes any possibility of restricting this right. The approach in the Constitution to this freedom is the same as the one in the Convention.

Both the Constitution and the Convention define freedom from torture, inhuman or degrading treatment or punishment in a negative manner - as a ban of these and similar acts. Just because of this fact, in regard to other international documents dealing with torture, both of them are sketchy in defining the notion of torture and other acts forbidden. Both the Constitution and European Convention do not define the doer of torture. It can be any person torturing another person or who treats or punishes the other person inhumanly or degrading. Such an approach expands the circle of potential and possible doers of torture, in regard to the one other international documents insist on - agent of public power or any other person acting in conducting his office.

In this sense, Article 142 of the Criminal Code of Republic of Macedonia ("Official Gazette of RM" N.37/96), operationalizing Article 11 of the Constitution, has strengthened the protection of the right to freedom from torture, emphasis the possible doer of torture as "*an officer who in carrying out of his duty implements force, threat or any other unlawful means or manner with the aim of extorting confession or statement*". Granting special protection to individuals from possible malpractice by public authorities can be its justification in the fact that certain public services (police and army) who are legally entitled to use force in conducting their duties. A big number of examples in practice confirm that torture is not unknown to police officers as a method of extorting confession from the suspect, as well as in form of use of force disproportionate to the aims to be achieved. Just because of this, the mentioned provision from the newly passed Criminal Code seems to be a practical and necessary supplement to Article 11 of the Constitution.

Solutions in the Law on home affairs, as well as in the Draft Bill on Execution of Penal Sanctions, seem to be directed at the dame aim. Article

34 of the Law on home affairs, with the aim of inframing force used by police, has defined conditions under which a police officer may use means and methods of force. Conditions justifying the use of force are: a)when public peace and order has been broken to a large extent; b) for the purpose of overpowering a person breaking public peace and order or person to be arrested, detained or deprived or his liberty; c) for the purpose of resisting an assault against himself or against another person or any other object under protection; d) for the purpose of forceful evicting persons from a certain place, as well as a person resisting to subdue to the order of an authorized officer.

Article 187 of the draft bill on the execution of penal sanctions has determined conditions when means and methods of force may be used against a convict. They may be used in order to avoid a) escape from prison or escape during transfer; b) physical assault; c) inflicting wounds; d) self-wounding; e) causing material damage; or f) overpowering the resistance of convicts to obey the order of an authorized officer.

These legal provisions prohibit the possibility for an authorized officer to use force with the aim of extorting confession, obtaining information or punishing. Such a provision offers the basis for a realistic rather than subjective assessment whether or not the use of force poses an act of torture or inhuman and degrading treatment or punishment. Perhaps there should in the mentioned provisions be specified to a greater extent the kind of resistance that the police officer has to use in order to overpower (in the sense to be an active resistance), as well as the extent of force used (in the sense of being proportional to the targets to be achieved).

In regard to the control of justification and appropriateness of the use of means of force, the Law on home affairs and Draft Bill on Execution of Penal Sanctions refer to immediately higher in rank officer in charge, i.e. in the second case, the Ministry of justice. Due to the seriousness of the threatened value - physical integrity of person - the control of use of force must not remain within the framework of body implementing the use of force. It shall have to be by an outside subject - impartial court.

Article 144 of the Criminal Code defines torture, intimidation and humiliation of human dignity and personality in carrying out office as criminal offences. The provision is not clear enough in defining the contents of "intimidation and humiliation of human dignity and personality", but for these notions the interpretation of European

commission (*Greece v. United Kingdom*) is relevant: humiliation is believed to exist there where the individual has been humiliated in front of other persons or has been forced to act against his will or conscience. In this context, Article 64 paragraph 2) of the Law on secondary education ("Official Gazette of RM N.33/95) and Article 51 of the Law on elementary education ("Official Gazette of RM N.33/95) prohibit corporal and psychical punishing and maltreating of schoolchildren.

The principle of humanity in the execution of penal sanctions by the Constitution of republic of Macedonia and has been elaborated by the Criminal Code and Law on execution of penal sanctions. They oblige the competent authority in charge of carrying out penal sanctions to treat convicts humanly, to respect their personality and dignity, to take care of their physical and moral integrity, self-respect of their personality and protection of their physical and mental health. All these principles have been interwoven into the entire Draft Bill on Execution of Penal Sanctions, no matter what kind and what extent of sanction is being implemented, with the aim of avoiding unnecessary pains and suffering of convicts, as well as circumstances worsening their position in serving their prison sentences. The highest level of implementation of these principles in Republic of Macedonia has been achieved by the abolition of death penalty. Due to it, there do not exist norms for execution of death penalty.

Article 178 paragraph 1 of the Draft Bill on Execution of Penal Sanctions stipulates that "*in putting a convict in a solitary confinement he shall be provided with all sanitary and health services, as well as books and newspapers. The solitary confinement must contain daily light, sanitary facilities, running water, bed and linen, a desk and a chair and heating. The convicts is provided with fresh air out of confinement one hour a day, a doctor's visit once a day and a governor's visit once a week. When this measure threatens the convict's health, it may not be exercised or its exercising to be cut off*". Apparently, this measure does not mean complete sensor and social isolation of convicts and it does not constitute violation of Article 3 of the European Convention and of Article 11 of the Constitution of the Republic of Macedonia.

In the assessment of compatibility of legislation of Republic of Macedonia with the European Convention, the Report of European Committee on Prevention of Torture, Inhuman and Degrading Treatment or Punishment must be borne into mind. According to this Report, cumulative effects of overcrowd of prisons, lack of sanitary conditions and their inadequate maintenance constitute inhuman and degrading treatment of convicts. It remains to be seen whether or not the European

Commission shall accept this report and shall act upon it, and dependable on it, the plight of living conditions in prisons in the Republic of Macedonia would shed new light upon obligations taken over from the Convention in regard to the respect of its Article 3.

A common principle defined by European Court and Commission is that every medical treatment may pose a threat to the physical integrity of a person and may be unlawful if it has been undertaken without the consent of the patient, save in situations when there is a need to save the patient's life not having opportunity to express clearly his consent. In this sense Article 50 of the Law on health protection ("Official Gazette of RM" N.73/92) has envisaged that "*surgical and other intervention shall be undertaken only upon consent in writing by the sick person or by his parents or his custodian, in case such a person is a minor or does not have civil capacity. In an emergency, when the sick person's is in danger or when such a person is in a situation to take decisions for himself and, due to the emergency, it is impossible to obtain the consent by a member of his family, i.e. by his parents or custodian when a minor or unable is in question, a surgical intervention can be undertaken without the consent, the decision being taken at least by two doctors of medicine - specialists in the appropriate surgical branch of medicine*".

In the framework of chapter so called "Criminal offences against people's health", Article 208 of the Criminal Code criminalize unconscientious treatment of patients including "*implementation of inappropriate means or method of treatment, non-appliance sanitary measures or any manner of unconscientious behaviour which has brought about to worsening of the person health*". In the above mentioned chapter of the Law it has also been envisaged punishment due to not offering urgent medical assistance, as well as due to quackery. Provision of this chapter guarantee that a patient shall not be brought into a situation of being a victim in the sense of Article 3 of the European Convention. These guarantees are sufficiently strong for the avoidance of the possibility the patient to be inhumanly and degradingly treated at the time of medical assistance or after.

In this context, Article 20 of the Draft Bill on Execution of Penal Sanctions prohibits "*medical and other kinds of experiments violating psychical and moral integrity of convicts. A consent by convict for their part in the experiment does not exclude the responsibility of the person permitting the experiment*". These provision have been taken over from Article 27 of the European Prison Rules.

Search of intimate openings of the human body most surely pose penetration into the privacy of a person and it may represent maltreatment of a person, entailing grave consequences upon his physical and psychical integrity. If the intensity of such a search is to high, it may be easily included among elements of the degrading treatment from Article 3 of the Convention. The only provision in the legislation of the republic of Macedonia stipulating such kind of search is Article 254 of the Draft Code on Criminal Procedure, according to which "*a bodily examination of the accused shall be undertaken even without his consent, if it is necessary to gather facts important for the criminal procedure. External bodily search can be conducted by other expert persons apart from a doctor, whereas inside search can be carried out by a doctor only, with or without the help of medical devices. Which facts are necessary for the criminal procedure shall be defined by the authority conducting the procedure, and those facts depend on the criminal offence, its characteristics, venue and manner of its committing and the like. It is not permissible to use medical interventions with the accused or witnesses or to be given medicines which would influence their will in making any statements. The application of hypnosis or narcotics is forbidden in criminal procedure*".

It can be concluded that the legislation in the Republic of Macedonia, confirming human rights and freedoms as fundamental and civilized acquisitions, has undertaken a wide range of legal actions to secure appropriate prevention of individuals from being subjected to torture, inhuman and degrading treatment or punishment, which are sufficiently strong to deter all of those prone to such a behaviour and to severely punish all those having done it.

PROHIBITION OF SLAVERY AND FORCED LABOUR: ARTICLE 4 OF THE CONVENTION

The legal order of the Republic of Macedonia does not contain an explicit provision prohibiting slavery or servitude similar to slavery, in the sense of article 4 paragraph 1 of the European Convention. This fact however in no way implies legal permissibility or tolerance of behaviours or acts which could be included under institutions mentioned. On the contrary.

Absence of explicit provision prohibiting slavery or servitude can be very simply explained by the fact that slavery, as well as all types of servitude on the basis of labour, in this regions have never posed objective existing categories. They are being treated only as a historic reminiscence. But, the following facts from the point of view of the international law have far more specific weight: First, international law explicitly forbids slavery of any kind, and the norm this has been done by poses an example for an absolute obligatory legal rule in regard to all subjects of the international community; Second, from the very moment of its appearance up to now, this norm has being posing a constituting part of the international common law, equally obliging both countries having participated in its creation as well as those which did not exist at the time, i.e. appeared later. According to this, such a rule undoubtedly obliges Republic of Macedonia as well, no matter whether or not she has declared her will in that sense. Third, Article 8 paragraph 1 count 10 of the Constitution of the Republic of Macedonia has determined the respect of commonly accepted norms of international law (those referring to slavery inclusive) as one of the fundamental values of the constitutional order of the Republic of Macedonia; Fourth, a series of Convention of the International Labour Organization previously obliged Yougoslavia, as they do the Republic of Macedonia nowadays in accordance with the Constitutional law on the implementation of the Constitution of the Republic of Macedonia of 17 November 1991 and with the explicitly delivered note to the General Director of International Labour Organization of 14 June 1996, by which he was informed that all those Conventions mentioned have become a constituting part of the domestic legal order of Republic of Macedonia.

All this facts should be borne into mind in the process of interpretation of the relevant Article 32 paragraph 1 of the Constitution of the Republic of Macedonia, which, among the rest guarantees: right to free

choice of employment and right of protection at work. The right to free choice of employment is being interpreted as prohibition of slavery in the sense of Article 4 paragraph 1 of the Convention(*van Droogenbroeck case*), any kind of servitude on the basis of labour in the sense of Article 4 paragraph 1 of the Convention (*van Droogenbroeck case*) or forced or compulsory labour in the sense of Article 4 paragraph 2 of the Convention (*X. v. Federal Republic of Germany* and *X. v. Netherlands*).

Apparently, the Macedonian legislator does not interpret this constitutional provision restrictively, as it does the European Commission (*ibid*), but extensively, as the European Court (*Van der Mussele case*). Pursuant this, compulsory labour according to the Constitution of the Republic of Macedonia and the Law on labour relationships, does not pose only the one practiced exclusively under circumstances in absence of explicitly expressed will, but as well the one practiced after the act of expressing such a will, but under drastically changed circumstances leading to "unjust or oppressive work or service or avoidable hardship". In this sense, the Constitution of the Republic of Macedonia has formulated the right to protection of work, and the Law on labour relationships ("Official Gazette of RM, N.80/93 and 14 95) deals with it in a series of provisions listed under Chapter III, called "Rights of workers and their position" (articles 30-72). It is a word of the following rights:

a) the right of workers to 40 working hours a week;

b) the right to proportional cutting of working hours of a worker working under specially difficult, hard and harmful to health pursuits (such shortened working hours is being treated as full time working time);

c) the right the work between 10 p.m. and 6 a.m. to be treated as night work, as a special circumstance which entails rise in the workers salary for 35% an hour at least;

d) right to redistribution of working hours, which on average must not exceed the full time working hours (40 hours working week a year);

e) the right to rest, the workers can not give up from: paid daily rest (the time of rest during working hours is counted as working time), paid weekly rest (at least 24 hours uninterrupted), paid annual holiday (18 working days at least and 26 working days at the most);

f) the right to leave from work without the cut in salary;

g) the right to protection at work, securing safety at work and protection of health (the employer must provide all necessary condition for the protection at work prescribed by law);

h) the right to special protection of women, youths and disabled people;

i) the right to special protection of pregnant women and mothers;

j) the right to salary and special allowances; and

k) other rights determined by law and collective compacts.

Interpretation of relevant constitutional and legal solutions concerning labour relationships does not leave space for any doubt that institutions of slavery, servitude similar to slavery or any kind of compulsion on the basis of labour exist in the legal order of Republic of Macedonia. The practice of working relationships in Republic of Macedonia also has no knowledge of legally possessing of persons by other persons, or any other kind of dependence similar to slavery. However there are serious indications that various forms of pressure upon workers are frequent phenomena, not only with private employers, but with other types of enterprices as well. The big unemployment poses a grave circumstance in the process of accomplishing workers rights i.e. guarantees against forced or compulsory labour, causing fear among workers to invoke to his own rights even in situations when they are being apparently violated. Article 111 of the Law on working relationships, envisaging firing from work on the basis of non-performance of working assignments, not defining what it meant by it, contributes to such a uncertainty with workers, owing to which this legal provision should be reexamined and reformulated.

Legislation and practice in Republic of Macedonia do not imply any dilemmas neither concerning exceptions from the basic rule on prohibition of forced or compulsory labour. More over, the legal order of Republic of Macedonia contains almost identically formulated exceptions from that rule, as they are formulated in Article 4 Paragraph 3 of the European Convention.

Article 4 Paragraph 3 count a) of the Convention refers to work practiced "*in the ordinary course of detention imposed according to the provisions of Article 5 of the Convention, or during conditional release from such detention*". A series of provisions incorporated in the Draft Bill on Execution of Penal Sanctions are in line with this provision of the Convention. These provisions, (Articles 110-119) all together imply that the work of convicts represents a primary form of their social readjustment. The aim of such a work is educational and technical training one, targeted at creating working skills and love to work (where such skill and love are lacking) and sustaining working fitness (where they have already been acquired). Its target is also trough process of labour to encourage the sense of mutual respect, cooperation and friendship. Its ethic function is the development of sense of order and self-discipline, as well as prevention of different forms of neurosis, depression and misbehaviour. The economic function of convict work ha s never been excluded, but it is not a primary one. All this function of convicts' labour are in line with the stance of the European Court spelled out in *Vagrancy case*.

The above mentioned law also develops the following principles: the work must not be humiliating; in defining the type of work to take into account physical and mental abilities of a convict; opportunity for a choice of the type work of a convict; productive work within the framework of fixed working hours; professional and technical training; equal working condition as those at large; and just payment for their work.

According to Article 4 Paragraph 3 count b) of the European Convention "*any service of a military character*" does not constitute prohibited compulsory or forced labour.

The Law on defence of the Republic of Macedonia contains a special chapter on the rights and obligations of citizens in the defence (articles 2-35). Pursuant this law, military service is of a general nature and all male citizens from the age of 18 to the age of 55 are liable to. Women, by exception can serve within reserve troops. Article 11 of the Law on defence envisages a working obligation for citizens, which can be imposed only in war, and not in other cases, such as immediate war threat, in time of peace, state of emergency, threat to world's peace and the like. Working assignments which can be performed within the framework of this obligation have been precisely defined. They are as follows: production and services in enterprices, institutions and services of a special significance for the defence; construction and maintenance of roads,

railways and airports; construction and maintenance bridges; fire extinguishing and clearing of wreckage and ruins; construction of shelters for the protection of the populations; and sowing, harvest and other farming pursuits.

Citizen carrying out this working obligation enjoys, in principle, the same rights and duties arising from labour, but still, it is unavoidable for such a regime of work to be somewhat stricter. The working time, for instance, in a state of war can be far more flexible and it is directly dependable on war necessities. The guarantee that such work can not last longer than 12 hours a day, i.e. 5 days a month poses an institutional obstacle for the unreasonable an inhuman exhaustion of workers. The worker is entitled to reward to the amount of a monthly average salary.

The exception incorporated in Article 4 paragraph 3 count b) also covers situations of practicing service the performance of which is prescribed as an alternative to the military one. It is a question of the institution "conscientious objections". Pursuant Article 7 of the Law on defence, optional military service has been permitted only on religious grounds, in the form of unarmed service in the Army of Republic of Macedonia. Various kinds of pursuits within its framework are not considered as forced or compulsory labour, in the sense of Article 4 paragraph 3 of the European Convention.

Working under circumstances of emergency calamity threatening the life or well-being of the community, included under Article 4 paragraph 3 count c), also does not constitute forced or compulsory labour. This provision includes implicitly the need of a temporal character, and not long term or long lasting structural upheavals in a certain economic field or a large social scale.

In this view, Article 35 of the Law on labour relationships has permitted the possibility "*by exception, working time to last longer than 40 hours a week, but no longer than 10 hours a day, in cases precisely defined. Such situations are the following: earthquake, flooding, fire, epidemics, epizootic or any other vis major that has happened or is pending; offering assistance to another employer that has suffered a disaster or being threatened by it; completion of some work already started the interruption of which might cause considerable material damage or endangering people's life or their health; starting or ending urgent medical (human or veterinary) intervention or any other urgent health measure*".

Article 4 paragraph 3 count d) of the European Convention pertains to acts constituting an integral part of everyday contractual relationships. Contractual working obligations, having no character of labour relationship, under provision, also do not constitute forced or compulsory labour.

Article 10 of the Law on contractual relationships ("Official Gazette of SFRY" N.29/78, 39/85 and 57/89) has guaranteed "*free arrangement of contractual relationships by the parties to the legal trade*". According to Article 11 of the Law, the only limits in the freedom of contracting are "*fundamental principles of social order, obligatory regulations and social moral*". It arises from these provisions that any kind of work can be subject to contracting, save the one which is explicitly in contravention of law, and in that sense, only work prohibited by domestic law to be subject to contracting, may be judged as forced or compulsory labour under Article 4 paragraph 2 of the European Convention.

THE RIGHT TO LIBERTY AND SECURITY OF PERSON: ARTICLE 5 OF THE CONVENTION

1. General significance of the right to liberty and security of person according to the Convention and the legislation of Republic of Macedonia

Article 5 of the European Convention on Human rights is of a crucial importance for entire system of the Convention. Unlike the General Declaration on Human Rights, proclaiming the general principle of personal liberty and forbidding arbitrary arrest and detaining, unlike the formulation of other rights guaranteed by the European Convention as well, article 5 is more comprehensive and detailed. It does not prescribe a comprehensive and relatively list of permissible bases for deprivation of liberty only, but it also offers accessory procedural rights for securing quick and efficient judicial decision on the lawfulness of his deprivation of liberty.

The main principle of Article 5 of the Convention is contained in the first sentence of its paragraph 1: "*Everyone has the right to liberty and security of person*". Though liberty and security of person are mentioned together, in the rest of this provision only the right to liberty of person is elaborated. Yet, in the practice of application of the Convention, these two rights are treated as a single one. In on of the Europe Commission's decision (*Appl. N.5573/72* and *5670/72, Adler and Bivas v. Federal Republic of Germany*) clearly has been stated that notions "liberty" and "security" may be read as one and that they include implicitly physical liberty and security only. "Liberty of person" means freedom from arrest and detention, and "security of person" means protection against arbitrary implication in the enjoyment of that freedom.

The jurisprudence of the European Court of Human Rights contains many statements on the significance of this right in a democratic society, explaining that the general sense of this guarantee is to ensure that no one shall be deprived of his liberty arbitrarily. Its substance being that the right to liberty of person is not an absolute one, but an individual may be arrested or detained only of the basis of a law consistent with established European standards. The large number of cases arising in the practice of the European Court and Commission at Strasbourg refer to arrest and detention in the context of the criminal procedure, but there are a number

of other significant cases in connection of detention of minors, mentally deranged or deported and extradited persons.

Arrest and detention in the sense of article 5 of the Convention poses and extreme form of restriction of the right to liberty of movement generally protected by Article 2 from Protocol Number 4 to the European Convention. Article covers only the fact of deprivation of liberty or detention, and not condition the detained is kept under, which otherwise may be subject to Article 3 of the Convention.

In the European Court's and Commission's practice in most of the cases deprivation of liberty and detention have been carried out by police. It is considered that when a police officer, by physical force, words or other behaviour demonstrates that the person is nor free to leave, in principle there is deprivation of liberty pursuant Article 5 of the Convention. But, whether or not it is a word of deprivation of liberty of a person taken to a police station for questioning, depends on the intention of police (*Appl. N.8819/79, X. v. Federal Republic of Germany*). The court has come to a conclusion that a person may not be detained on the basis of Article 5(1)(c) of the Convention only for questioning, unless there is a reasonable suspicion that the person has committed an offence (*Fox, Campbell and Hartly v. United Kingdom*).

Provision of the Constitution of the Republic of Macedonia guaranteeing the right to liberty and security of person are rather strict, and the rights guaranteed to the person taken, arrested or detained in some cases exceed those from the comparative and international law on human rights. Article 12 of the Constitution of the Republic of Macedonia envisages that "*The liberty of person is irrevocable*". The Constitution avoids to envisage and guarantee liberty and security of person in parallel and separate manner, because it is indisputable that liberty and security are integrally linked together, that's why it is unnecessary to mention the latter one, which is only a modal condition for enjoying the former one, and without which, liberty might be a mere abstract projection, and nor a real state.

Similar to Article 5 of the Convention, Article 12 of the Constitution of the Republic of Macedonia offers protection exclusively against unlawful deprivation of liberty, and not against the restraint of physical liberty of person in general. In their substance, both provisions regulate exceptions from the fundamental rule on the "liberty of person", i.e. they establish, but at the same time, they frame and condition the capacity of the state to deprive a person of his liberty when it is justified by law.

Article 12 of the Constitution of the Republic of Macedonia contains in itself a general formulation when the liberty of person can be restrained: "*No one's liberty shall be restrained save on the basis of a court's order and in cases and procedure prescribed by law*". Unlike it, Article 5 paragraph 1 of the Convention lists in an orderly manner exception for deprivation of liberty, and they can refer to the following:

"*(a) the lawful detention of a person after conviction by a competent court;*

(b) the lawful detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or hid lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind. alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition".

All cases listed in Article 5 paragraph 1 permit the restraint of liberty of person, making it conditional upon procedure prescribing by law. It means that every deprivation of liberty must be clearly envisaged and prescribing by the state in question, available and understandable to each individual, in order to secure lawfulness in depriving of his liberty. Though the European Convention does not explicitly insist on absolutely all cases of deprivation of liberty being followed by a judicial procedure (such as in cases of counts e) and f)), yet, as a basic condition for each case of deprivation of liberty envisages its lawfulness. It means that deprivation of liberty must be determined by the domestic law. In connection with this, the European Court and Commission in cases submitted before them

examine whether deprivation of liberty has legal foundations, whether they are consistent with conditions from the Convention and whether the decision of the domestic court is evidently an arbitrary one on the question of lawfulness of the deprivation of liberty.

The Constitution of Republic of Macedonia does not orderly list cases and conditions under which a person may be deprived of his liberty, but offers a firm guarantee that the deprivation of liberty may not be arbitrary one and out of the procedure proscribed by law. More over, according to the Constitution, no deprivation of liberty shall not be carried out without a court's order. Stipulating the court as a unique and exclusively competent authority which can order restraint of liberty of person, the Constitution of the Republic of Macedonia, has pursued guidelines from the European Convention. In that very spirit is the insistence on deprivation of liberty of person being decided upon by an independent judicial body, without any possibility such a power to be vested with police, public prosecutor, military commander or an administrative body.

The requirement the deprivation of liberty to be lawful does not exhaust itself in that deprivation of liberty to be justified by the court's decision, but it also entails that the offence being decided on to have been determined and the penalty for it to have been prescribed by law at the time when it was committed. In this sense, Article 14 of the Constitution of the Republic of Macedonia stipulates: " *nobody shall be punished for an offence which, at the time of its commitment, was not stipulated by law or other regulation as a criminal one and for which a sanction had not been envisaged*". Article 1 of the Criminal Code ("Official Gazette of RM" N.37/96) of the Republic of Macedonia also envisages that "*nobody shall be punished with a penalty or any other penal sanction for an offence which, before it was committed, was not stipulated by law as a penal offence and for which a penalty was not prescribed by law.*"

2. Special bases for deprivation of liberty

Article 5 paragraph 1 of the European Convention of Human Rights orders each deprivation of liberty to be carried out "*in accordance with procedure proscribed by law*". The term "procedure" suggests proceedings conducted by a court when a detention has been ordered (*Van der Leer v. Netherlands*) as well as the rules regulating the deprivation of liberty (the arrest) (*Fox, Campbel and Hartley v. United Kingdom*). The procedure

being conducting for deprivation of liberty must be in accordance with valid domestic law, as well as with the Convention, including general principles comprised in it, an not to be arbitrary one (*Winterwerp v. Netherlands*).

Along with the requirement from the first part of Article 5 paragraph 1 each deprivation of liberty to be in accordance with a procedure prescribed by law, each particular count of third paragraph, where cases of permissibility of deprivation of liberty are listed, also implicitly includes lawfulness. This two requirements could be understood as complementary ones, where "procedures" must differ from the bases for deprivation of liberty. An yet, the Court interprets "lawfulness" in a manner which equally reefers both to the form (the procedure) and to the contents (particular bases), so that the two requirements usually coincide. The formula "*save in the following cases*" clearly indicates that the determined list exhausts situations in which deprivation may be lawful.

a) ***Detention after conviction***

Article 5 paragraph 1 of the European Convention starts with something which is evidently most acceptable exception from the liberty of person - serving a sentence for a committed criminal offence. Its count a) stipulates that lawful detentions of a person may takes place after conviction by a competent court. In the opinion of European Court of Human Right it does not mean that detention must be followed by conviction, in the sense of timely order of developments, but only that detention must result from and depend on the conviction characteristics (*the case X. v. United Kingdom*). Further the Court found out that in the Convention there shall not be a conviction unless it has been delivered in accordance with the law, i.e. there have been an offence committed either it was a penal or a disciplinary one. As well as in other points in the Convention, here the classification of the offences determined in the domestic legal order is not crucial. Thus, the criminal offence shall be deemed as a penal one, if it is followed by a criminal sanction which consists of deprivation of liberty, no matter whether it has been formally classified as a trespass or as a disciplinary one (*Engel v. Netherlands*). Besides, the term "conviction" includes found guilt with the offender (*Guizzardi case*). Article 5 paragraph 1 count a) does not include detention as a preventive or security measure (*Guizzardi case*), nor cases in which the person has been found guilty for an offence, and instead of sending him to prison as a criminal sanction, he is being taken to a mental asylum for treatment. Still when the convicted person is released and a treatment in a

mental asylum has been decided upon afterwards, only Article paragraph 1 count e) shall be applied (*Ashingdane v. United Kingdom*).

Under the term of "conviction" it means an order by a court of first instance, so every detention during the time of the appeal shall be justified by invoking to Article 5 paragraph 1 count a), but not count c), which pertains to detention as a measure of securing presence of the person under reasonable suspicion for having committed a criminal offence (*Wemhoff v. Federal Republic or Germany*).

Another aspect of interpretation of the term "after conviction" pertains to the warrant of an investigating judge to order arrest. Though at this stage of the procedure still there is no conviction, the Commission has found that it is not in contravention of Article 5 paragraph 1 count a) of the Convention. In this sense Article 185 of the Draft Code on Criminal Procedure (expecting that at the time of ratification of the European Convention and after, the existing Draft Code on Criminal Procedure shall pose valid source of criminal procedural rules, in examining the compatibility of the domestic legislation with the Convention only the provision from that draft bill are being taken account, and the provision from the existing Code on criminal procedure are being mentioned only in case of historical considerations) stipulates detention as a measure of securing the presence of the accused person for the successful conduct of the criminal procedure as well, that can be ordered by the investigating judge of a competent court. Though, detention precedes conviction, still this provision, having in mind the above mentioned Commission's opinion, is not in contravention of Article 5 paragraph 1 count a) of the European Convention.

b) Arrest or detention for non fulfillment of any obligation

Article 5 paragraph 1 count b) of the European Convention permits lawful deprivation of liberty for "non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law". This provision does not justify the policy of preventive detention of persons who are predicted to break the law on future. In this sense, in the case *Lawless*, assertions by the Irish government that preventive detention of persons who are suspected of being members of IRA can be justified by Article 5 paragraph 1 count b) of the European Convention, have been rejected. The Commission found out that this provision does not pertain to arrest or detention for the prevention of offences against public peace and order or against the security of the country (*Lawless case*). In this sense as well, in order to justify detention on the basis of this provision invoking to

the obligation of conscripts to subdue to military discipline, as well as the general obligation of everyone to obey law, is not sufficient, but there must be a specified obligation an individual has failed to fulfill (such as the obligation of testimony in *Appl. N.5025/71, X. v. Federal Republic of Germany*), and detention must be ordered with the aim of securing the fulfillment of that obligation. Taking a person for a blood test (*Appl. N.8278/78, X.. v. Austria*), psychiatric expertise (*Appl.6659/72, X. v. Federal Republic of Germany*) and paying a fine (*Appl, N.6289/73, Airey v. Ireland*) is of a similar character. Such a distinction is essential because it indicates that detention can not be justified under provision of Article 5 paragraph 1 count b) of the European Convention if it has been imposed as a punishment. Of course if the state wants it, it can decide to stipulate as a criminal offence the non-fulfillment of a certain obligation, that can be justified by Article 5 paragraph 1 count a), but not by Article 5 paragraph 1 count b) of the European Convention.

Forceful bringing of a witness, orderly summoned but failing to appear at the hearing, nor has justified his non-appearance, can be subject to the provision of Article 5 paragraph 1 count b) of the European Convention. Such provisions, as well a provision stipulating imprisonment of a witness rejecting to testify, are contained in Article 232 of the Draft Code on Criminal Procedure. A certain dilemma can be raised by paragraph 4 of previously mentioned provisions, which does not permit arrest or detention of military servicemen or policemen rejecting to testify. Though the court can notify their competent command for their arrest or detention, it remains vague why they have been exempted from the possibility to be arrested or detained for non-compliance with the lawful order of a court. Having in mind that their responsibility for law abiding is fare greater due to their assignments, such an exception is not clear at least, more over rejecting to testify from the above mentioned provision do not refer to making statements by which the duty of preserving military or official confidentiality may be abused.

The second reason for deprivation of liberty under Article 5 paragraph 1 count b) of the European Convention (in order to secure the fulfillment of any obligation prescribed by law) is somewhat vague. This reason prejudice arrest or detention beyond any judicial intervention - simply by invoking to a legal provision. In the case *Lawless* the Commission has found out, and the Court has accepted, that the words "any obligation prescribed by law" must refer to a specific obligation and that general invoking to prevention from breach of a provision defining that obligation, is not sufficient.

A possibility "an authorized officer from the ministry of the interior to be able to send to an investigating judge persons found at the place of committing a criminal offence, or to keep them until his arrival, if those persons can provide evidence relevant for the criminal procedure, and if their questioning is not likely to be conducted at a later time or if it entails considerable prolongation" has been stipulated in Article 143 of the Draft Code on Criminal Procedure.

It is indisputable that the retention of those persons by police is considered to be deprivation of liberty because it has been done against their will. However, whether it is a lawful deprivation of liberty, the provision of Article 12 of the Constitution of the Republic of Macedonia, according which it is possible only on the basis of an order by a competent court, must be taken into account. That means that deprivation of liberty must be lead to criminal procedure against that person. However, it is evident that retention of persons from the above mentioned legal provision is not followed by criminal procedure. Such retention neither poses an arrest. That's why, a question arises what is the basis for such an authorization of the police to conduct that retention.

In accordance with Article 29 of the Law on home affairs, police are authorized to retain a person breaking public order, if securing such an order or preventing it from being threatened, can not be accomplished by other means. This provision might absorb the authorization of police to retain persons found at the place of crime. But it specifies the reason for retention, which is not the case with the provision of Article 143 of the Draft Code on Criminal Procedure. That's why, a dilemma arises whether such a provision is in the framework of Article 5 paragraph 1 count b) of the European Convention, i.e. the justification of "retention of persons by police" to be looked for in "the fulfillment of any obligation proscribed by law". The obligation for making a statement from the above mentioned provision has not been specified sufficiently, thus invoking to the general prevention from breaching it is not sufficient to justify this manner of deprivation of liberty. That' why it must be clarified in the law where does the authorization of police for retention of persons found at the place of the crime come from.

The problem of non-specifying is also characteristic for forceful taking of persons to a police station for giving information, stipulated by Article 142 paragraph 3 of the Draft Code on Criminal Procedure. In this case it is a question of forceful taking persons which, due to the way it is being conducted, is nothing else, but an arrest. Though the person has not

been suspected of committing a criminal offence, this provision makes his forceful deprivation of liberty possible on the basis of extremely ambiguously prescribed obligation. On the other hand, pursuant Article 177 paragraph 1 of the same bill, only a competent court can order deprivation of liberty of a person. Thus, a conclusion may be drawn that the authorization of police to take persons to police station forcefully, not being suspected of committing a criminal offence, is entirely baseless. Another possible argument in this direction: According to the same legal provision, if the person forcefully taken to a police station refuses to give information, that very person shall not be summoned again. In that case a logical question arises: what was the purpose of his previously forcefully conducted taking to a police station if he as a lawful right to reject to give information. Under such circumstances it is evident that neither condition of count b), nor any other condition from Article 5 paragraph 1 of European Convention may justify a forceful taking to a police station of a person not being suspected of committed of a criminal offence.

But, having in mind the opinions of European Commission and Court, according to which whether or not it is a word of deprivation of liberty of a person taken to a police station for questioning, depends on the intention of police (*Appl. N.8819/79, X. v. Federal Republic of Germany*), i.e. that a person may not be detained on the basis of Article 5(1)(c) of the Convention only for questioning, unless there is a reasonable suspicion that the person has committed an offence (*Fox, Campbell and Hartly v. United Kingdom*), there is a dilemma whether taking to a police station for making a statement poses deprivation of liberty at all, i.e. whether Article 5 of the Convention refers to this taking to a police station at all. But, in any case, the Draft Code on Criminal Procedure shall have to precise and mutually distance from each other institutions of arrest and detention, on one hand, from the institution taking to a police station for questioning, on the other.

An insight in the legislation of Republic of Macedonia on criminal procedure (Article 253 of the Draft Code on Criminal Procedure) demonstrates that the institution taking of the accused to a health clinic for observation (in order to assess his accountability) ordered by an investigate judge, can be placed under Article 5 paragraph 1 count b) of the European Convention. It is similar to bodily examination of an accused person and other persons without their consent (Article 254 Paragraph 1), blood taking and other medical activities without consent of the person (Article 254 paragraph 2) and search of a house or a person (Articles 201-205).

c) Arrest or detention because of reasonable suspicion of having committed an offence, for preventing from committing an offence or preventing from fleeing after having done it

Article 5 paragraph 1 count c) of the European Convention pertains to arrest and detention during the criminal procedure. The term "reasonable suspicion of having committed an offence" has been given an autonomous significance in the Convention, by which limits in connection with the gravity of the offence for which the state can deprive persons of their liberty have been laid down in a way. The Commission has long hesitated to examine whether domestic authorities have really acted upon the basis of reasonable suspicion, that's why this requirement was considered to have been met in all cases save in cases of mere arbitrariness. Somewhat greater tolerance for the criteria of "reasonability" the Court showed towards criminal acts linked to terrorism. This situation has been changed in the case *Fox, Campbell and Hartley*, where the Court and the Commission arrived at a conclusion that the Convention had been violated, because Article 5 paragraph 1 count c) of the European Convention asks for reasonable (well founded) and not only *bona fide* suspicion. Thus, the government in question shall have to present facts and information which shall be able to satisfy the Court that arrested persons were under reasonable suspicion of having committed the offence being charged for. The reasonable suspicion includes implicitly facts and information which are able to satisfy any impartial observer that the person in question might have done an offence. However, what may be considered as reasonable, nevertheless to a great extent depends on circumstances of each particular case. The question arising before the Court and Commission is not whether any domestic law is compatible with the Convention *in abstracto*, but whether on the basis of facts of that particular case there existed reasonable suspicion pursuant Article 5 paragraph 1 count c) of the European Convention. Besides, the extent of suspicion required for the justification for the deprivation of person of his liberty on this basis is not exactly the same with those from the next stages of the procedure required for writing out an indictment and conviction (*Murray case, Judgment of 28 October 1994*). It mustn't be forgotten that on this basis a person may not be detained simply for the purpose of questioning, unless there is well founded suspicion having committed an offence (*Fox, Campbell and Hartley v. United Kingdom*). On this basis, neither group arrests or detention are not permissible. Article 5 paragraph 1 count c) of the European Convention demands from member countries in investigating a particular criminal offence and in arresting persons having

been suspected of committing it, to act from case to case, and not in groups.

Article 5 paragraph 1 count c) of the European Convention raises the question of meaning of the expression "reasonable suspicion" as an indispensable condition for deprivation of liberty of person. The reasonability of suspicion for deprivation of liberty must be both in regard to the offence committed and to person having committed it. It is a word of to separate foundations. In view of the first, the police must reasonably believe that the offence having been committed or is being committed poses a criminal offence, which as such has been stipulated by law and upon which power for arrest can be exercised. It is not sufficient enough for the police to believe it is a word of an offence upon which power for arrest can be exercised, but they must carry out a legal qualification of such an offence. The second foundation is coupled with an assumed guilt of the person upon whom an arrest shall be exercised. Neither the Convention, nor domestic legislation, have defined standards for assessment of reasonability of suspicion. The stance of the European Commission is that reasonability of suspicion for deprivation of liberty (arrest or detention) is being assessed on the basis of conditions existing at the time of taking a decision for an arrest or detention, and not on the basis of facts becoming known at the time when the complaint against detention is being decided on (*Stogmuller v. Austria*).

The requirement for lawfulness in arrest or detention on this basis poses a foundation for controlling modals of one's deprivation of liberty, such as the necessity of a court's warrant. Otherwise, arrest without a warrant is permitted by Article 5 of the Convention, in some cases at least. If it is not required by the domestic legislation, the arrest may not be ordered in advance by a judge, but judicial control of arrest shortly after it is guaranteed by Article 5 paragraph 3 of the Convention.

Authorization of police without prior warrant by a court must not be interpreted as an original one in the pre-criminal procedure. According to the Draft Code on Criminal Procedure, save in urgent cases (when there is a danger of protraction of procedure), arrest is being ordered by court. Article 12 paragraph 2 of the Constitution of the Republic of Macedonia guarantees that "*nobody shall be restrained from his liberty, save by an order by court*". The Constitution, by the way, requires a judicial warrant even with less serious forms of restriction of person's liberties (such as, search of the house, ceding from the confidentiality of letters and the like). When it is not a question of urgent (emergency) cases, if there is a

foundation for suspicion that a person has committed an offence, as well some of the lawful foundation for his detention, there are really no reasons for the police first to arrest the person, and then *post facto* to bring him before an investigating judge with the aim of his assessment whether the deprivation of liberty has been well founded and lawful. Preferring a prior judicial warrant for an arrest essentially lessens the prospect for mistakes and malpractice. In this sense Article 188 paragraph 2 of the Draft Code on Criminal Procedure precisely defines that police shall be authorized to arrest without prior judicial order only (by exception) when the offender was found *in flagranti* and if there is a danger of protraction.

Otherwise, out of the three options listed in Article 5 paragraph 1 count c) of the European Convention, the first one is the widest, because, save the suspicion that an offence has been committed, no other additional condition for an arrest is required. Of course, other conditions cumulative with the reasonable suspicion, may be required by domestic law, and they must be fulfilled so that the detention can be deemed as lawful. The option, permitting preventive detention, does not justify the policy of general prevention directed at individuals or groups of individuals threatening the community with their continual inclination to crime doing. On the contrary, it does not permit anything else but prevention of concrete and specific offences. In this sense, the Court' stance that everyone detained pursuant Article 5 paragraph 1 count c) of the European Convention in principle must be brought before court, is of a special importance. Of course bringing one before court has its sense only if there were a suspicion that the person has done something punishable, and having in mind the first option, in such cases, the second one becomes superfluous. The third option does not add anything more to the first one, because the person fleeing after having committed an offence, in any case may be arrested pursuant the first option.

Arrest or detention pursuant Article 5 paragraph 1 count c) of the European Convention includes implicitly an intention the person in question to be brought before competent judicial authority. The European Court has always reiterated that bringing one before court refers to all three options from count c), but, as we have already seen, in fact, there is only one. That's why paragraph 1 count c) and paragraph 3 from Article 5 of the Convention should be read as a whole. Still there is no violation of the Convention, if the arrested or detained person has been released immediately or investigation has been ceased, on condition deprivation of liberty to have been ordered in belief that the law is being obeyed in good faith (*Brogan and others case*).

The Constitution of the Republic of Macedonia operates with the term "deprivation of liberty" as a general one, indicating restriction of the right to liberty of person. It also mentions summoning and bringing, probably as forms through which deprivation of liberty is conducted. Chapter XVII from the Draft Code on Criminal Procedure, has stipulated, among the rest, "bringing", "detention" and "imprisonment for the purpose of trial", as measures for securing the presence of the accused and for an successful conduct of criminal procedure. Pursuant its contents, these measures cover "deprivation of liberty", "arrest" and "detention" - terms exploited by European Convention. Neither in this law, nor in any other (especially the Law on home affairs) the term "arrest" has been met, as it is the case with the term "imprisonment for the purpose of trial" in the Convention.

Having in mind that according to Article 33 of the Criminal Code of the Republic of Macedonia penalty with imprisonment can be delivered only for penal offences to penalty responsible offender, the institution "imprisonment for the purpose of trial" from Article 193 of the Draft Code on Criminal Procedure, as a measure for securing presence of the accused in the criminal procedure, can produce some dilemmas, especially such an institution has not been stipulated by the Convention. Namely, the expression imprisonment for the purpose of trial" suggests a punishment, which includes implicitly guilt of the offender, and not a measure for securing his presence in criminal procedure, where, before delivering a sentence, the presumption of innocence is sill valid. Otherwise, stipulating this institution in the Draft Code on Criminal Procedure has been extorted by the constitutionally limited of the duration of detention to 90 days (Article 12 paragraph 5 of the Constitution). Under such circumstances the Draft Code on Criminal Procedure ought to have permitted offenders of particularly grave criminal offences to be released to defend themselves from free (because in practice such trials have never been completed for a period shorter than 90 days), or to make up a new institution in order to replace a longer duration of detention if there were not the constitutional provision previously mentioned. Such an incompatibility between the Constitution and the law remains within the domestic legal order, but in regard to the Convention, there is a necessity the law on criminal procedure to harmonize its own institutions and terms among themselves, with the aim of exact defining the offender's positions at different stages of the criminal procedure and rights and guarantees arising from such a position of his.

Article 5 paragraph 1 count c) of the European Convention stipulates that arrest and detention must be lawful and that its aim is the offender to be brought before "competent legal authority". Having in mind paragraph 3 of Article 5 "Competent legal authority" means a judge or other officer authorized by law to exercise judicial power. In this direction are solutions in the Constitution of the Republic of Macedonia and in the Draft Code on Criminal Procedure. Namely, according to Article 12 paragraph 4 of the Constitution "*the person deprived of his liberty ... must be brought before court*" i.e. according to Article 188 paragraph 2 of the Draft Code on Criminal Procedure "*the person deprived of his liberty for an offence persecuted ex officio must be promptly taken to an investigating judge*".

d) Detention of a minor

Article 5 paragraph 1 count d) of the European Convention stipulates detention of a minor on the basis of a lawful order for the purpose of educational supervision or for the purposes for bringing him before the competent legal authority. Most legal orders permit such a detention of a minor, which nevertheless is in his own interest, even when there is no reasonable suspicion that he has committed an offence. This provision allows member countries to have big powers in deprivation of liberty of a minor for educational purposes. What the term "minor" implies, it is exclusively up to the domestic law to decide on. On the contrary, if this measure is undertaken against a person who pursuant domestic legal order is not a minor, it shall not be deemed as a lawful one.

Deprivation of liberty on the basis of this very provision, must always serve educational purposes, either directly or indirectly. Sheer criminal sanction have been excluded from this, and in this sense, this provision requires the existence of appropriate institutions and well trained staff for conducting education (*Bouamar case*). Still Article 5 paragraph 1 count d) of the European Convention also covers detention which is still not educational by itself, but whose purpose is the transfer of a minor to institutions where such education shall be provided (*Bouamar case*).

Article 5 paragraph 1 count d) of the European Convention also contains a provision on detention of a minor with the aim of bringing him before a competent legal authority. This basis for detention of a minor differs from the one envisaged by count c). If a minor is reasonable suspected of committed an offence, his arrest and detention can be justified by Article 5 paragraph 1 count c), and if he has been convicted, he may be imprisoned pursuant Article 5 paragraph 1 count a) of the

European Convention. That's why, provision from Article 5 paragraph 1 count d) justifies only that detention of a minor, when it is not question of a crime, but when it has been required on some other grounds, such as, supervision over a child necessary because of being neglected or abused, for being out of his parents' control, or simply because there is no one who is to take care of him. In such cases it is not necessary to have suspicion of having done an offence (at it has been required by count c), nor guarantees from paragraph 3 of Article 5 refer to them. It is evident that educational supervision over a child, without any connection with crime, may be not only justifiable, but necessary as well. Still, this part of the provision must be interpreted in such a way that, unlike detention for having committed an offence, detention for educational purposes must be strictly limited in time.

Pursuant legislation of the Republic of Macedonia, detention of a minor may be only asserted by a juvenile judge within the framework of a criminal procedure against a minor, in the sense of Article 5 paragraph 1 counts a) and c) of the Convention. According to the Law on social welfare ("Official Gazette of RM" N.9/86) a minor with lighter forms of misbehaviour (pick-pocketing, vagrancy or simply negligence) for the purposes of reform and education are being taken to a reform-school on the basis of a ruling passed by center for social work. Judicial control over such ruling, in sense of Article 5 paragraph 4 of the Convention, has not been stipulated at all. Such a treatment of a minor, can hardly be justified under the regime of detention pursuant Article 5 paragraph 1 count d) of the European Convention, due to which it should be reexamined in the light of previously provision already mentioned.

e) Detention for the purpose of preventing infectious diseases, mentally ill persons, drug addicts, alcoholics and vagrants

Reasons due to which the Convention permits detention for the purpose of preventing infectious diseases, mentally ill persons, drug addicts, alcoholics and vagrants, do not consist only of the danger such persons poses for public order, but it also in their own interest their liberty to be restricted (*Guizzardi case*). Invoking to lawfulness in sense of this provision of the Convention refers primarily to domestic legislation. As far as the procedure is concerned, The Convention does not require the decision for a detention to be taken by a judicial authority, but judicial control over deprivation of liberty, promptly after detention or later in reasonable intervals, is required pursuant Article 5 paragraph 4 of the Convention.

In the practice of the bodies at Strasbourg up to now there have not been registered cases of detention for the purpose of preventing from spreading infectious diseases.

Detention of mentally ill persons draws greatest attention due to possibility of malpractice and abuse. The Court has established three minimum condition under which a person may be considered mentally ill an be deprived of liberty: 1) There must be a proof (foundation) for the existence of such an illness; 2) Mental derangement must be of such an extent that justified detention; and 3) Validity of extending detention depends on persistence of such a derangement. Domestic authorities enjoy freedom in deciding on these matters, because it is up to them to assess all circumstances and proofs in each case separately (*Luberi case, X. United Kingdom, Winterwerp case*). It is quite wise that the Court and Commission have not assumed upon themselves the dangerous, if not impossible, task to define the mental illness. Still, sufficient guarantees shall be provided by the formal request for expertise whether such an illness exist. It is important that, besides the existence of such an illness, the existence of the danger must be reliably proved by medical means and methods.

The person detained as mentally ill must be released shortly after the existence of conditions required have ceased. In this sense, regardless of periodical checks within the framework from Article 5 paragraph 4 of the Convention, continual care by the medical staff involved in pursuing the progress of the detained person is of a special significance. It is something quite different whether the person detained under this provision may request a special type of treatment. The Court has concluded that the detention of a mentally ill person shall be lawful, if hi is placed in a hospital, clinic or some other kind of a specialized institution (*Ashingdane*). Such a stance is expected and arises from the very sense and aims of this detention, regardless of the fact that Article 5, in principle, does not refer to appropriateness of conditions or treatment.

The possibility of detaining alcoholics and drug addicts poses a similar problem, but bodies at Strasbourg have not dealt with such cases so far.

Detention of mentally ill persons, alcoholic or drug addicts in the legislation of the Republic of Macedonia has been regulated by Law on non-litigant proceedings ("Official Gazette of RM" N.19/79). Forceful hospitalization shall be permitted only when movement or contacts with the outside world of the mentally ill person are to be restricted. A decision

of court is indispensable, and health clinics are obliged to notify the court, within of 48 hours, of any detention of person without his own consent. The court must also be notified when a person has been admitted to hospital with his own consent, but later it has been denied. The Law insist of the detained person being heard by court and examined by two physicians, one of which must be a neuro-psychiatrist. Upon gathered proofs, the court shall decide whether such a person shall be held in a health clinic or released. The very existence of a mental illness is not a sufficient reason for a person to be hospitalized and treated against his own will, but there must be additional reasons. The court shall be periodically notified of the health of the hospitalized person, and it can decide the person to be released somewhat earlier if reasons for detention have ceased to exist. An appeal against detention is permissible within three days, and the appeal must be taken in consideration within the next three days.

f)Detention for the purpose of deportation and extradition

In the Convention there is no provision explicitly binding on the state to deport or extradite individuals it wants to evict out of territory, though, under circumstances their rights pursuant to Articles 3 and 8 may be affected. The sense of Article 5 paragraph 1 count f), also referring to unauthorized entry into the country, is to secure lawful exercise of such an authorization, which is considered to be legitimate by itself. Thus, it is a word of guarantees being of a limited scope, but not unworthy, because a clear connection between detention and the procedure for extradition and deportation is required, and the length of detention must not be unreasonably long, or longer than that considered to be necessary.

3. Informing for the reasons of deprivation of liberty

Article 5 paragraph 2 of the European Convention stipulates that "*everyone who is arrested shall be informed promptly, in a language which he understands, of the reason for his arrest and of any charge against him*". Arrest and detention shall be deemed unlawful, unless national authorities meet requirements from this provision, even when it can be justified by one of the condition from Article 5 paragraph 1 of the Convention.

Article 5 paragraph 2 of the European Convention requires the detained person to be inform for the reasons of his detention and it purpose

is enable the person to admit or deny the offence he has been charged for or to be able to make use of judicial guarantees from Article 5 paragraph 3 and 4 of the Convention. Otherwise, the requirement is being applied to all arrests and detentions on all bases, and not only in relation to criminal procedure. In this sense, the right of the person to be informed pursuant Article 5 paragraph 2 must be ascertained from his right to "*be informed promptly ... and in detail of the nature and cause of the accusation..*" pursuant Article 6 paragraph 3 count a) of the Convention. The latter one has been designed to enable the accused person to prepare his defence, and that's why the information must be detailed. Article 5 paragraph 2 pertains only to the early stage of detention and it is easier to be met. That's why this provision does not require him to be notified in writing, nor any formality is required. What is more important it is not even required the person to be enabled to make use of legal aids in this stage (*Appl. N.8828/79, X. v. Denmark*). The guarantee under this provision is considered as an instrument that will make *habeas corpus* procedures in the sense of paragraph 4 to be efficient. Namely, it is quite logical it will be very difficult to dispute the lawfulness of the detention without the knowledge of the detained person upon what the action of authorities has been based on. On the other hand, this provision has its humanitarian aim, because and regardless of the opportunity of disputing lawfulness of the detention, the detained person has the right to know what is going on with him.

Article 12 of the Constitution of the Republic of Macedonia follows guidelines of the Convention, stipulating that "*the person summoned, detained or deprived of his liberty must promptly be informed of the reasons for his summoning, detaining or deprivation of his liberty and of his rights stipulated by law...* " Article 3 paragraph 1 of the draft law on criminal procedure entirely takes over solutions from Article 5 paragraph 2 of the European Convention. So, "*the person summoned, detained or deprived of his liberty has the right to be promptly informed, in a language he understands, of the reasons for his summoning, detention or deprivation of liberty and of any indictment against him, as well as of his rights, and he shall not be required to make a statement*". Article 29 of the Law on home affairs obliges authorized officers "*to inform the person arrested or deprived of his liberty of the reasons for his arrest or deprivation of liberty an of his rights stipulated by the Constitution and laws*".

Following and incorporating solutions from Article 5 paragraph 2 of the European Convention, the domestic legal order has provided a legal

framework for assessment whether the deprivation of person of his liberty was lawful. The only failure is that the Law on home affairs has not pointed out at what time the person must be informed, whereas the draft law on criminal procedure, by envisaging deprivation of liberty without court's warrant (Article 188), does not stipulate at all an obligation for the person to be informed of the reasons for deprivation of his liberty. However, the constitutional provision above mentioned, establishing a general obligation for the detained person to be promptly informed of the reasons for his detention, is directly applicable and together Article 3 paragraph 1 of the Draft Code on Criminal Procedure, also covers these situations.

As far as the speed, at which the person deprived of his liberty to be informed of the reasons for that, is concerned, Article 12 of the Constitution of the Republic of Macedonia uses the term "promptly", which is the very same one from Article 5 paragraph 2 of the European Convention. Article 3 paragraph 1 of the Draft Code on Criminal Procedure also uses the term "promptly". In the interpretation of the term "promptly" there can be raised the question whether the person arrested is to be informed of the reasons for deprivation of his liberty at the very moment of arrest, or later, even after the interrogation. It is apparent that the police officer must make clear to the arrested person the reasons for his arrest, which can be done promptly - at the moment of arrest - or as soon as possible after his detention. If this has been prolonged, arrest can easily be turned into unlawful deprivation of liberty. It is significant that the European Court has accepted that standards from Article 5 paragraph 2 of the Convention permit a person to be taken to a police station even before having been informed of the reasons of his arrest and indictments against him (*Fox, Campbell and Hartley v. United Kingdom*). Because of the urgency required for the person arrested to be informed, it is impossible to insist on precisely defining such information at the moment of the arrest. That's why the entire information for accusations against him can be provided even after his arrest, as soon as possible.

The form in which the arrested person shall be informed of the reasons for his arrest is not relevant (*X. v. Netherlands*). However, Article 177 paragraph 3 of the Draft Code on Criminal Procedure has clearly defined the form in which the arrested person shall be informed of the reasons for his arrest: the warrant for arrest shall be in writing and it shall contain name and surname of the accused, criminal offence charged for and reasons for his arrest.

Article 5 paragraph 2 of the European Convention does not guarantee the right of the detained person to inform somebody of his arrest and to contact a counsel. In this sense the legislation of the Republic has made a step forward. Pursuant Article 12 of the Constitution as well as Article 29 of the Law on home affairs, besides of reasons for his arrest, the detained person has the right to be informed of his rights guaranteed by the Constitution and laws. This rights, include, *inter alia*, that very right of the detained person to inform somebody of his arrest and to contact a counsel. Namely, Article 12 paragraph 3 of the Constitution stipulate that "*the person summoned, detained or deprived of his liberty has the right to counsel in the police and judicial procedure.*" The right to counsel is not explicitly contained in Article 5 of the European Convention, but according to the practice of the Court and Commission, the right to counsel, under certain circumstances, can be drawn from Article 5 paragraph 4 and from Article 6 paragraphs 1 and 3 count c). In this sense, the explicitly stipulated right to counsel even in the procedure before police, exceeds standards of the European Convention.

4. Right to be brought before a judge and to trial within a reasonable time

Article 5 paragraph 3 of the European Convention exclusively refers to persons detained under count c) of the first paragraph of this article. According to this provision "*everyone arrested or detained in accordance with provisions of paragraph 1 count c) of Article 5, shall be promptly brought before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial*".

The aim of this provision is to provide judicial control over deprivation of liberty, as a guarantee that nobody shall be deprived of his liberty arbitrarily and, what is more important, to secure that each arrest or detention shall be as short as possible. Once detained, the right of person not to be exposed to unnecessary deprivation of his liberty, converts into the right his forceful detention not to be prolonged unreasonably. Article 5 paragraph 3 of the European Convention has the task to minimize risks from arbitrariness in arrest and detention, which has been achieved by securing judicial control over the acts of executive authorities directed at restricting this liberty within the framework of criminal procedure. Deprivation of liberty poses a flagrant penetration into the fundamental

rights of individuals, that executive authorities are competent to pass temporal decisions only until a judicial representative meets the person in question and decides on lawfulness and necessity of deprivation of liberty.

In fact, by this provision, two separate right are being guaranteed: first, the person be promptly brought before judicial authorities; and second, the person be tried within a reasonable time or released pending trial. The right of the person detained to be promptly brought before a judge must be ascertained, on one hand, from the right to a fair and public hearing from Article 6, and, on the other hand, from the right to defy lawfulness of detention from Article 5 paragraph 4. In the case of Article 5 paragraph 3, it is a word of an obligation for competent domestic authorities to secure the arrest and detention to be approved by a judge at an early stage of the procedure, with the aim of avoiding prolongation of police detention. During this first examination, the representative of judicial authority must make an initial assessment whether conditions for detention from Article 5 paragraph 1 count c) of the Convention, as well as respective conditions from domestic legislation, have been fulfilled. Such examination most frequently is very short, because at this early stage of the investigation there exist only rudimentary elements of evidence and information. The European Court and Commission have not so far imposed a strict time limit for bringing the detained person before a judge, but still it seems that the time limit of 4 days (*Brogan v. United Kingdom*) expresses the maximum that can be tolerated in democratic Europe.

The role of the judge is to supervise circumstances which are favourable or are against the detention, ant to decide whether there are reasons justifying deprivation of liberty and to order a release if such reasons have ceased to exist (*Schiesser v. Switzerland*). In relation to this, it is very important the judge to be able to pass a legally binding decision (and not a recommendation) regarding lawfulness of deprivation of liberty. Otherwise, judicial control pursuant Article 5 paragraph 3 of the Convention is automatic, and an initiative by the person deprived of his liberty is not required. It is interesting that the Convention does not bind the judge, the detained person has been taken to, to permit a counsel to be present at examination (*ibid*).

The Constitution of the Republic of Macedonia (Article 12 paragraph 4), the draft bill of criminal procedure (Article 33 paragraph 3) and the Law on home affairs (Article 29 paragraph 1) proscribes the person detained to be promptly or within 24 hours brought before a judge. If within the period of 24 hours the person has not been accused, he must

be promptly released. The provisions mentioned must not be interpreted as a right of the police to hold arrested person 24 hours. Despite frequent malpractice, arrest and detention must not be used as a means of exerting pressure upon the detained person to admit the offence. That's why Article 188 of the Draft Code on Criminal Procedure has clearly stipulated that, in principle, police are obliged to bring immediately the person deprived of his liberty to an investigating judge. Detention of such a person up to 24 hours has been envisaged only as an exception, and only for those cases in which the police had once the right to order police detention of three days. Otherwise, abolition of police detention is one of the greatest novelties in the Constitution of the Republic of Macedonia.

Article 188 paragraph 2 of the Draft Code on Criminal Procedure stipulates an obligation for police "*to notify the investigating judge for the reasons and time of deprivation of liberty*". This shall only partly prevent the existing police practice arrested persons to be taken from one to another police station and in that way to get around stupidly with the constitutionally set deadline (guarantee) of 24 hours for holding person without judicial control.

Pursuant Article 186 paragraph 4 and 5 of the Draft Code on Criminal Procedure "*after the examination the investigating judge must decide whether the person detained shall be released. If the investigating judge does not agree with the public prosecutor's proposal for ordering a detention, he must ask the court chamber to decide on it*".

The manner of formulating provision of Article 5 paragraph 3 of the Convention at first sight seems to be leaving to the judicial authorities to decide of their accord whether the detained person shall be tried within reasonable time, or shall be released pending trial. However, in *Neumeister case* the European court has rejected such literally interpretation of the provision. The Court does not link the word "reasonable" to the length of criminal persecution and trial, but to the length of detention. The lengthy trial can be reasonable regarding the complexity of the case and number of witnesses and the like, which does not mean that the lengthy detention must be also reasonable (*Wemhoff case*). On the other hand, after releasing him pending trial, an obligation for the state from Article 6 of the Convention still lingers on to complete the trial within a "reasonable time".

Whitout any special guidelines in the Convention, the Constitution of the Republic of Macedonia has set very high standards in view of the length of detention. Pursuant Article 12 paragraph 5 of the Constitution,

"*detention upon court's decision can last not longer than 90 days from the date of detention*". In formulating this provision, the constitution maker has not at all taken into account standards for the assessment of the reasonable time of detention from Article 5 paragraph 3 of the Convention.

The European Court and Commission do not set special time limits beyond which extended detention becomes unacceptable. 13XThey suggest that all circumstances of the case must be taken into consideration. In many cases they have accepted as reasonable the length of detention of several years (three and half years in the case of a member of the *Baader-Meinhoff*, two a half years in *Schertenlieb case* and 19 months in the case *Di Stefano v. United Kingdom*).

The provision of Article 12 paragraph 5 of the Constitution of the Republic of Macedonia poses a unique example in the legal theory and practice in the world. That's why the Macedonian law maker has entered into a situation to make up and create artificial institutions by which it can justify the reasonable detention of a person beyond the expiry the period of 90 days, as it is being done with the institution of "imprisonment for the purpose of trial" stipulated by Articles 193 and 194 of the Draft Code on Criminal Procedure.

It is apparent that constitutional provision on maximum period of duration of detention has been clumsily designed, more as a result of insufficient care, than as an intention of establishing of such a high standard. The interpretation that links the detention only to the first stage of the criminal procedure and introduces a similar measure (but now under another name) at later stages of the procedure, does not by itself mean a restriction of rights and liberties which poses a standard in comparative and international law. As the Convention does not limit the time of detention, it seems that the inconsistency between the constitutional guarantee and the legislative solutions remains as a problem for the domestic legal order.

On the other hand, there is a danger the constitutional limitation of duration of detention, from guarantee to be converted into a threat to the rights of the detained person, because pressure that it causes can stimulate some kind of "martial trials". Namely, in order to prevent the accused for grave criminal offences from running away, the speed of proceedings may be harmful for the correctness and fairness of the procedure and for the rights of the defence, especially for the right of having enough time and opportunity to prepare the defence, from Article 6 paragraph 3 count b) of the Convention. Thus, for instance, in the case *Barbera a.o. v. Spain*, the

very speed in proceedings by domestic authorities, was one of the reasons for the European Court to find that the right to a fair hearing from Article 6 paragraph 1 of the European Convention had been violated. In this sense, the "reasonability" must not be transformed into its opposite.

Dilemmas about formulation of Article 5 paragraph 3 of the Convention mainly refer to the interpretation of the words "judge or other officer authorized by law to exercise judicial power". Though the latter is not identical with a judge, he above all, must exercise "judicial power" and to meet other conditions each of which constitutes particular guarantees for the detained person. Of course, the central one is independence in exercising judicial power.

In this sense, in the legal order of the Republic of Macedonia there are no dilemmas who can exercise judicial power in the sense of Article 5 paragraph 3 of the European Convention. Article 98 of the Constitution stipulates that "*judicial power is exercised by court. Court are autonomous and independent. Organizational scheme of courts is uniformed. Relief courts are forbidden*". In supplementing of this constitutional provision, Article 185 of the Draft Code on Criminal Procedure stipulates that the investigating judge from a competent court is the only one who can order detention. This exhausts the need of further elaboration of the practice under the European Convention about the term "other officer authorized by law to exercise judicial power", because in the legal order of the Republic of Macedonia the possibility for somebody else, and not a court, to order detention, has been entirely excluded.

Article 5 paragraph 3 of the Convention also stipulates release from detention conditioned by the guarantee that the person having been detained shall appear before court. But, this provision, however, does not guarantee an absolute right to release from detention having given guarantees. In this sense, the detained person must be released to defend himself free pending trial, unless the state indicates that there are "relevant and sufficient" reasons justifying the extension of detention. The European court has identified four foundation for rejection of guarantees offered: fear of escape, obstruction of implementation of justice, prevention of criminal offences and preservation of public peace and order.

In accepting guarantees the court must be convinced that they shall accomplish the same aims as the detention itself. If there are sufficient indication for it, but the detained person has not been offered a guarantee, detention loses its reasonability and it has to be justified by some of the conditions from Article 5 paragraph 1 count c) of the Convention. If the

detained person has been offered a guarantee and he refuses it, not offering another acceptable alternative, he himself is to blame for extension of detention.

Pursuant Article 12 paragraph 6 of the Constitution of the Republic of Macedonia, "*the detained person, under conditions prescribed by law, may be released pending trial*", and according to Article 179 of the Draft Code on Criminal Procedure "*the accused person to be or having been detained or imprisoned for the purpose of trial only on the basis of fear of escape, may be left or released free if he himself or any other person offers a guarantee on his behalf that until completion of criminal procedure he shall not run away, or the accused person promises that he shall not hide and that he shall not leave his place of residence without permission*". Apparently, the above mentioned constitutional and legal solutions meet and are compatible with solutions for giving guarantees for release from detention prescribed by Article 5 paragraph 3 of the European Convention.

Requirement formulated in the practice of the European court (*Neumeister case; Wemhoff case*) for equivalency between the guarantee offered and the reason for detention has also been respected by the Macedonian legislation. In this sense, Article 180 of the Draft Code on Criminal Procedure stipulates that "*the guarantee shall be provided in money and its amount shall be determined regardful of gravity of criminal offence, private and family plight of the accused and property status of the person giving guarantees*".

In respect of the possibility of ordering detention in the legislation of the republic of Macedonia, the unreasonable introduction of detention in the trespass procedure causes worries, especially by the fact that all over the world it is considered that detention linked to light trespasses should be avoided. Member states are required to stick to the principles of necessity and proportionality. In this sense, the restrictive approach of Article 422 of the Draft Code on Criminal Procedure towards detention by summary criminal procedure (for criminal offences condemned to imprisonment to 3 years) is entirely compatible with the European Convention.

Unlike the draft law on criminal procedure, Article 55 of the Law on criminal trespasses for ordering detention does not required the existence of well founded suspicion of having committed a trespass, explicitly insisted on by Article 5 paragraph 1 count c) of the Convention. It is especially troublesome that, besides the danger of escape, as autonomous foundation for detention by Article 55 paragraph 1 have been listed:

inability of the person to identify himself; having no permanent place of residence; evasion, by going abroad, the sanction to be executed and evasion of imprisonment being executed, which is contrary to the presumption of innocence.

5.Proceedings for deciding on lawfulness of detention

According to Article 5 paragraph 4 of the European Convention "*everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful*". Unlike provision from paragraph 3 of the same article referring only to the arrest or detention for the purposes of criminal procedure, guarantees from paragraph 4 refer to all types of deprivation of liberty. It is question of judicial control over lawfulness of deprivation of liberty, both from the aspect of the requirements by the domestic law and from the aspect of the Convention.

European Court and Commission insist on periodical control of lawfulness. How often this judicial control shall be required depends on the type of the case and its circumstances. In the *Bezicheri case* the Court has found out that, owing to the assumption from the Convention that detention criminal procedure should be strictly restricted in length, a judicial control in short intervals is necessary. In this case the Court has also found out that monthly judicial control of detention was reasonable regardful of the circumstances of that case. Unlike detention in criminal procedure, deprivation of liberty in other procedures, as it is the case with persons held in mental hospitals, as satisfactory can be reckoned even longer periods of time between judicial controls over deprivation of liberty. Apart from automatic judicial control, the possibility of introducing such a control in reasonable intervals by the person in question is also acceptable. In *Vagrancy case* (*De Wilde, Ooms and Versyp v. Belgium*) the Court has found out that Article 5 paragraph 4 of the Convention does not refer to detention based on judicial order, because judicial order by itself secures the respective guarantees.

In this sense, Article 185 paragraph 5 of the Draft Code on Criminal Procedure lies within the framework of Article 5 paragraph 4 of the European Convention, because it envisages that "*detained person can appeal to the panel against the ruling for detention, within 24 hours from the hour of receipt of ruling.*

Judicial control over lawfulness of detention in reasonable intervals has a special significance in the cases of deprivation of liberty of an uncountable person having committed an offence. According to the stance of the European Court, this deprivation of liberty is under Article 5 paragraph 1 count a) and e) of the Convention, and out of characteristics of Article 5 paragraph 4 of the Convention it arises that a person of unsound mind being held in a psychiatric clinic for an undefined period of time, unless automatic periodical examination of legal foundation for extension of his detention is stipulate, is entitled in reasonable intervals to take proceedings before a court for examination of the lawfulness of his detention (*X. v. United Kingdom*).

Article 63 paragraph 4 of the Criminal Code of the Republic of Macedonia is entirely compatible with Article 5 paragraph 4 of the European Convention, because in stipulating the measure of security "compulsory psychiatric treatment and holding in a health clinic", has envisaged that "*the court examines the need of treatment and holding the offender in a health clinic every two years*". Article 242 paragraph 1 of the draft bill on execution penal sanctions also stipulates that "*the court shall be informed of the health of the person detained in a health clinic where the measure of compulsory psychiatric treatment and holding is being conducting, at least once a year*". In connection with the speed of procedure in which it is being decided on the deprivation of liberty Article 5 paragraph 4 of the Convention insist on, the Macedonian legislator has envisaged a period of 24 hours.

6. Right to compensation for unlawful detention

Article 5 paragraph 5 of the European Convention stipulates that "*everyone who has been victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation*". The formulation of this provision refers to the conclusion that the European Commission and Court shall act upon requests for compensation of person deprived of their liberty, when they find that the provisions of Article 5 have been violated. Article 5 paragraph 5 of the European Convention does not prevent domestic law to permit compensation only in cases where the person proves he has suffered either tangible or intangible damage, and in that sense not to permit compensation in cases where it has not really existed.

European Commission examines application for compensation only when, either by bodies in Strasbourg or by domestic authorities, any other provision of Article 5 has been violated. The Commission usually restraints itself only to express its own opinion, whereas the Court and the Committee of ministers pass binding decisions for the compensation expected and they fix the amount of compensation that should be paid. In the case *Cuilla* the Commission has pointed out that Article 5 paragraph 5 of the European Convention guarantees a practical and effective right equal to other rights guaranteed by the Convention. It shall be respected, as in the case of other rights, provided in the domestic legislation, with a satisfactory extent of certainty, an appropriate provision and procedure for compensation have been envisaged. In the case *Wemhoff*, though it has noted a violation of provision of Article 5 paragraph 3 of the Convention, the Commission has stated that the application for compensation Article 5 paragraph 5 of Convention is not permissible until the Court or the Committee of ministers have not confirmed violation of Article 5 paragraph 3 of the Convention.

Article 13 paragraph 2 of the Constitution of the Republic of Macedonia stipulates that "*the person unlawfully deprived of liberty, arrested and detained or unlawfully imprisoned is entitled to compensation.* Special provision for compensation of persons unlawfully convicted and unlawfully deprived of liberty are also being contained in Chapter XXXII of the Draft Code on Criminal Procedure. These provisions clearly confirm seriousness of the legal system of the republic of Macedonia in referring to asserting guarantees that deprivation of liberty shall not be an arbitrary one and beyond the framework set by law.

RIGHT TO A FAIR TRIAL: ARTICLE 6 OF THE CONVENTION

1. General observations

Unlike the guarantees relating to deprivation of liberty, the right to fair trial and most of the guarantees which as fundamental rights granted to each person accused of a criminal offence by Article 6 of the European Convention on Human Rights have not been incorporated in the Constitution of the Republic of Macedonia. They have been explicitly incorporated in the general provisions of the Draft Code on Criminal Procedure, as elementary, personal, affirmative rights, and not only as an obligation by state authorities. They do not simply represent ornaments in the law, nor a mere wish to meet international standards in words. It is a word of guarantees in relation to which rich practice of international bodies for the protection of human rights and freedoms has been developed, which soon after the ratification of the European Convention on Human Rights shall make domestic courts put up with it, not only as persuasive authority, but as well by the efficiency of protection mechanisms.

a) The right to fair trial, "equality of arms between prosecution and defence" and adversarial hearing

Adversarial hearing, as "equal arms between prosecution and defence" before impartial court, is considered to be the essence of fair trial. It is possible to assume a fair procedure, which shall not be adversarial, or not to a considerable extent of adversarial elements, as the Anglo-American system of criminal trial is. This still seems to be dominant stance of European continental law, where the principle of adversarial hearing is being accepted along side with preserving the inquisitorial principle . What proceedings shall be deemed as unfair may depend of type of procedure applied and the way it works. To a certain extent one's sense of justice and fairness has historically been linked to the legal folklore. The fact that some features of a procedure hurt one's sense of justice may be only the result of one's familiarity with a procedure of a definite type. And yet, it should be borne into mind that international instruments on human rights guarantee not only fairness of trial, but a procedure of a certain type (public, speedy, impartial and with explicitly listed rights of the defence) has been envisaged as well.

In the domestic law it is deemed that as a fair may be considered the trial at which evidence liable to adversarial testing is being presented before an impartial court. It is necessary the accused to have adequate opportunity to inform the court of his own point of view on the facts and arguments relevant for the accusation. The goal of the rights of the accased, in this context, is to secure the other side of the story to be heard. In this sense, the European Court of Human rights deems that, in principle, all evidence must be brought in presence of the accused at a public hearing before (impartial) court, with the view of an adversarial argument (*Barbera case; Kostovski case, Windisch case*).

The active role by the court need not mean it obstructs the provision of the rights of the accused, but, on the contrary it may be a significant guarantee for them. In other words, the paternalistic attitude or care of the court towards the accused and the excessive belief in the objectivity and impartiality of the court can not and must not be cover or justification for limitation of the rights of the accused.

b) The right of the accused to be present - trial in absence

Pursuant practice established under the European Convention the prospect of a trial in absence in the domestic law (Article 295 of the Draft Code on Criminal Procedure) seems not to be troublesome, especially on ground that in this cases all required guarantees have been secured, above all the provision of a counsel (Article 66 of the draft bill) and the prospect of renewal of procedure when the accused has been convicted in absence, within a year since the day he became aware of the judgment (Article 401).

Trial in absence is undesirable from the aspect of the right to be present at the trial as an element of fairness of trial. However, it is being admitted, because the postponement of the trial can sometimes lead to loss or fading away of evidence, expiration of the prospect for persecution and the like. The prospect of eviction temporarily of the accused from the trial for breaking the order in the court room is an exception admitted by the bodies of the Convention. Similar to it is the eviction of the accused from the trial in a situation when some of the co-accused person or a witness refuses to make a statement in his presence, or if circumstances indicated that they shall not tell the truth in his presence, which is also being admitted, on condition the counsel is present at hearing and the accused to be acquainted with the contents of those statements.

From the aspect of compatibility with the Convention, the only difficulty might be the prospect of a trial in the absence of the accused person within a summary procedure, when he does not appear at the principle process, though he was properly summoned or the summons could not be delivered to him due to change of his address or place of residence, on the assumption his presence is not necessary and that he has been examined before (Article 431 of the Draft Code on Criminal Procedure). Namely, practice by bodies at Strasbourg requires the accused to have been efficiently informed (summoned) to court, which means to have been informed in good time and in the language he understands. In the leading case referring to this question (*Collozza and Rubinat v. Italy*) the European Court has found that authorities have not acted dilligently as they could to uncover the new address of the accused and that the trial in absence is an disproportionate sanction for omission by the accused to inform of the change of his address. Thus, it seems to be wise that the Draft Code on Criminal Procedure has abandoned the prospect the accused to be tried in absence when the summons could not be delivered to him because of the change of his address without reporting it to the court.

c) Evidence

A radical novelty in the Draft Code on Criminal Procedure represents the "*exclusion of all evidence gathered unlawfully and by breach of human rights and freedoms determined by the Constitutions, laws and international treaties, as well as evidence arising from them*" (Article 15 paragraph 2). This solution seems to be very strict and it is close to the American doctrine of "exclusionary rule". It signifies a determination the efficient criminal persecution to be sacrificed in favour of legitimacy of procedure and individual rights and has the aim of "disciplining" persecution authorities.

d) Adequately reasoned judgment

According to Article 351 of the Draft Code on Criminal Procedure, "*The court shall specifically and completely state which facts and on what grounds it find to be proven or unproven, furnishing specifically an assessment of the credibility of contradictory evidence, the reason why it did not sustain the various motions of the parties, the reasons why it decided not to hear the witnesses or expert in person whose statement or written findings and opinion where read without the consent of the parties, the reasons guiding it in ruling on points of law, and especially in ascertaining whether a crime was committed and whether the accused*

was criminally responsible and in applying specific provisions of the criminal code to the accused and to his acts". Provisions on the length of reasons of the judgment entirely meet requirements by the Convention, and a good number of judges in practice think that such comprehensive reasons of judgment unreasonably burdens courts.

e) Right to a public hearing

Fundamental sense of the right to public hearing is protection of parties from casual abuse or malpractice by undercover carrying out of justice and it poses keeping public trust in courts. That's why, this right represents a fundamental corner stone of the constitutionally guaranteed principle according to which, "*hearing before courts and passing the judgment are public*" (Article 102 paragraph 1 of the Constitution of Republic of Macedonia). This principle has not been explicitly formulated as a right of parties in the procedure, nor it has placed in the section of the Constitution covering fundamental human right and freedoms, but in the section concerning state power, more exactly judiciary (Section III, subsection 4 of the Constitution). Such place of its implies the conclusion that it is a question of organization of work of courts.

Further elaboration of the principle of public hearing has been presented in Chapter XXI of the Draft Code on Criminal Procedure titled "Public hearing". Article 282 of this bill stipulates an obligation for the court to hold public trial. The right to public hearing implies the right of everyone to attend the trial, regardless of the fact whether or not the person in question has direct interest in attending it. The court is also obliged to enable everybody to attend the public hearing, without any discrimination on any basis what so ever. Furthermore this principle implies an obligation to enable (by operative acting) or not to obstruct (withholding from setting up obstacles) the process of free information by the media. In this sense, the court is obliged in an appropriate manner (through Radio, Press or on the billboard in the court) to announce venue and time of holding the trial in good time, thus enabling presence of the public.

The obligation of the court to secure public presence at the trial in not of an absolute character. Article 102 paragraph 2 of the Constitution of the Republic of Macedonia has precisely defined that restricting the public to attend the trial is a legislative matter. Parties under no condition can be excluded from trial, but Article 283 of the Draft Code on Criminal Procedure regulates foundations for exclusion of general public. Such an exclusion poses a matter of the court, which is in line with the

jurisprudence of the European Court of Human rights (*Engel case*). But, however, no matter on what grounds the public have been excluded from the hearing, and regardless of the fact whether exclusion has been proposed by the parties or *ex officio*, according to the bill on criminal procedure, the parties must always state their opinion on the exclusion of public. Their opinion must be clearly and unequivocally spelled out in connection of specific reason under which exclusion has been required, which is also in line with the jurisprudence of the European Court (*Albert and Le Compte case*).

Reasons for exclusion of public have been orderly listed in the bill. The first of them being keeping secret. The secret may be state, military, industrial, official, professional and even artistic one. It is a question whether such a wide range of reasons for exclusion of the public from part of the trial can be justified by any of the foundation determined by the Convention (national security interests, protection of public order or interests of justice). Of course, whatever the state or any other prefers to keep secret, does not affect by itself "national security" in the sense national security has been protected by the Convention.

The interest of protecting morals in the jurisprudence of the European Court is implied by the term "penetration in the private sphere of the parties involved". This term has apparently a wider meaning, and refers not only to the sexual intimacy of the parties involved (the formulation "interest of morals" primarily refers to), but it also embraces all cases of revealing other intimate, above all family, intercourse. Under the influence of practice by bodies at Strasbourg, Article 283 of the Draft Code on Criminal Procedure stipulates the interest of "*protection of personal and private life of the accused*" as a new and particular foundation for the exclusion of the public from the trial. In that manner, in further practice there won't be any need this interest to be met by invoking to morals.

Protection of interests of juveniles, according to Article 470 of the Draft Code on Criminal Procedure, poses a reasons for compulsory exclusion of the public, which is also in line with the jurisprudence of the European Court and Commission. When a juvenile is being tried together with an adult, the exclusion of the public is an optional one.

The interests of national security can also be a foundation for a restriction of the right to public hearing. The existing Code on Criminal Procedure has not stipulated it as a particular foundation, but it has been covered by the formulation "*other special interests of the community*". The Draft Code on Criminal Procedure, in its article 28, omits this

foundation, because it is too wide and enables anything to be included, leaving space for numerous opportunities for misuse. Otherwise, the fact that the interest of keeping secret has been envisaged by the draft bill as a general foundation for exclusion of the public, enables the interests of national security to be protected by invoking to state, military or other kinds of secrets.

It is the same case with the "interests of justice". Such interests can imply the general public to be excluded if the room where the public hearing takes place is crowded to an extent making impossible the procedure to be conducted. Restricting of public with the aim of overcoming such a situation is permissible, only in case when the court has provided reasonably enough space for the public.

Pursuant Articles 283 and 284 of the Draft Code on Criminal Procedure, the order for exclusion of the public shall be passed by panel deciding on the merits, an it must be well spelled out an publicly announce, which is in line with the jurisprudence of European Court (*Engel and others case*).

The principle of public hearing also implies publicity in pronouncing the judgment, as it has been stipulated by Article 102 paragraph 1 of the Constitution of the Republic of Macedonia. It has been further elaborated by Article 347 of the draft bill of criminal procedure: "*In case the public have been excluded from the trial, the judgment shall always be red out at a public session. The panel shall decide whether the public shall be excluded from the announcement of the reasons for the judgment.* This solution is compatible with the stance of the Court and Commission revealed in *Pretto case* and *Crcianiet oll v. Italy*. It is apparent that the legislation in the Republic of Macedonia does not enable the public to be present only at the stage of the proceedings in which factual and legal questions are being examined, but also at the announcement of the judgment, which is a proof that the stance of the European Court, according to which the right to public hearing must be practiced throughout the entire proceedings, is observed (*Le Compte, van Leuven and De Meyere case*).

According to the jurisprudence of the European Court and Commission, the publicity must also be provided in the proceedings upon legal remedies, especially when both legal and factual issues are being examined. Article 365 paragraph 1 of the Draft Code on Criminal Procedure stipulates an obligation for the court to notify the parties of the time when the hearing upon appeal shall take place, if they have requested

to be informed of the session or propose a hearing before apelate court, or if their presence would be helpful to clarify the matter. The public may be excluded from the session attended by the parties only under the circumstances defined for the hearings in first instance.

f) The right to independent and impartial court

The right to independent and impartial court most generally has been guaranteed by Article 98 paragraph 2 of the Constitution of the Republic of Macedonia. Article 2 of the Law on Courts comprises a provision on the same level of generality, but at the same time, this Law by a large number of provisions (articles 39-49) elaborates the principle of independent judiciary. This guarantees cover following questions:

Judges are being elected and relieved from office by the Parliament of the Republic of Macedonia in a procedure determined by law. The Parliament elects and relieves judges from office upon proposal by the Judicial Council of the Republic of Macedonia. Jurors are being elected and dismissed by the Parliament upon proposals by municipal or courts of appeal. The Parliament also determines the number of judges in each court upon the proposal by the Supreme Court of the Republic of Macedonia in a plenary session, and the number of jurors upon proposals by municipal or courts of appeal. It is apparent that the Government has no influence upon the make-up of courts in the Republic of Macedonia, which contributes to the thesis that, at least formally, they are independent from the political influence in the process of their constitution.

The right of the accused to court established by law has been met by Article 98 paragraph 5 of the Constitution, which reads: "*Types, competence, establishment, abrogation, organization and make-up of courts, as well as the proceedings before them, shall be regulated by law, which shall be passed by a two third majority vote from the total number of representatives in the Parliament*". This is a far wider approach than the one arising from Article 6 paragraph 1 of the European Convention, as well in regard to the stance of the European Court and Commission upon this issue (*Piersack case*).

The European Court has not envisaged life time duration of term of judges as a condition for independence an impartiality of courts (*Ringeisen case*), but still, Article 99 paragraph 1 of the Constitution of the Republic of Macedonia has envisaged election of judges without limitation of the duration of their term, as additional institutional guarantee for the independence and impartiality of judiciary. This provision also forbids

relief of a judge against his own will, which proves how much more radical is the legislation of Republic of Macedonia in comparison to the jurisprudence of the bodies at Strasbourg in regard to this questions. Namely, this jurisprudence is being satisfied only by factual non-dischargeability of judges (*Engel and others case, Campell and Fell case*).

Article 100 paragraphs 2 and 3 of the Constitution of the Republic of Macedonia legally and institutionally prevent giving instructions to judges in carrying out their judicial duties. It imposes "*incompatibility of carrying out judicial function with any other public function or profession or membership in a political party. Political organization and activities in judiciary is forbidden*".

The principle of independence and impartiality of judges has been strengthened by paragraphs 1 and 2 of the same provisions, granting guarantees on the immunity of judges, the Parliament, as the most democratic body in the political structure of the country, decides on.

Subjective impartiality of judges, which otherwise is expected by itself, is based on human and professional qualities of the person being elected. For the purpose of securing subjective impartiality, the Draft Code on Criminal Procedure contains an entire chapter III, titled as "Withdrawal". Within its framework, Article 36 comprises a list of foundations which may cause suspicion in the impartiality of a judge or juror, due to which his withdrawal may be requested.

The Law on Courts has many a time spoken of independence of courts and judges. Its article 3 has guaranteed "*impartial implementation of law, regardless of position and capacity of parties*". According to Article 4 "*In the performance of their functions, courts shall be bound only by the Constitution, laws and international treaties ratified in conformity with the Constitution*". Article 7 has guaranteed "*to everyone the right to impartial trial*". Article 11 has explicitly forbidden "*any form of influence upon the judge, especially public appearance in media with the purpose of exerting influence upon the outcome of the judicial proceedings*". The judge is bound by Article 14 to pass impartial judgments, "*upon his own assessment of evidence and implementation of law*". This also forbids "*any kind of restrictions, influence, incitement, pressure, threat or interference, either directly or indirectly, by any subject whatsoever, or by any reason, in the process of passing his decision*". Finally, Article 15 paragraph 2 has guaranteed that "*public authorities shall withhold form acts or omissions by which the passing or carrying out a judicial decision may be obstructed*".

In short the wholeness of quoted constitutional and legal guarantees poses a firm basis on which is founded, otherwise, refutable supposition that the court in course of criminal proceedings shall found its own decision only on the basis of its free conviction in factual and legal questions of the case, without any influence by parties or public authorities. But, far more important is these institutional solutions to be accomplished in practice in the light of particular contemporary political and social circumstances in the Republic of Macedonia. Thus, for example, financial independence of courts, as an essential element of impartiality in carrying out judicial function, has not been provided yet.

g) The right to trial within a reasonable time

With the ratification of the European Convention, Republic of Macedonia undertakes an obligation to organize the judicial system in a way it meets requirements from Article 6 paragraph 1 of the Convention, including the "*right to trial within a reasonable time*". The European Court of Human Rights on many occasions has drawn attention to the importance of this requirement for sound administration of justice (*Guincho case*). As a matter of fact, the largest number of judgments by the Court pertain just to this right of the accused in criminal procedure to final decision within a reasonable time. The aim of this guarantee is to protect parties in judicial procedure against excessively long proceedings.

Article 6 of the European Convention demands judicial proceedings to be expedient and efficient, but it also establishes a more general principle of fair judiciary.

Up to now, in the legislation of Republic of Macedonia the demand for expediency has not been set as a right of the accused, but as a general obligation of the subjects in the procedure. Thus, according to Article 14 of the still existing Criminal Code Procedure, "*the court is obliged to insist on the procedure being conducting without any delay and to prevent any abuse of rights persons participating in the procedure*". The obligation from this provision should discipline the court, as well as other participants in the procedure, in accordance with the procedural rules.

As a personal right of the accused, the right to trial within a reasonable time, for the first time has been introduced by Article 7 of the Law on Courts and by Article 4 paragraph 2 of the Draft Code on Criminal Procedure. An entire series of novelties in the Draft Code on Criminal Procedure have inspired by the need of speeding up of procedure, such as: summary procedure, disposal of the indictment by the prosecutor even in the second instance, possibility of cutting short of deadline between

delivery of summons and trial with a consent of the accused and the like. The introduction of the principle of "limited disposal" by the prosecutor to assess whether or not he shall initiate a criminal procedure, among the rest, with the aim of partial unloading of judiciary from trifle crime. So, the public prosecutor, with the consent of the victim, may postpone criminal persecution for lighter offences, if the accused is ready to follow prosecutor's instruction and fulfilled some obligations lessening or eliminating harmful consequences of the criminal offence (Article 145 of the Draft Code on Criminal Procedure). Seemingly, the public prosecutor is not obliged to start persecution or give up persecution, if he comes to an conclusion that in certain, precisely defined cases, criminal sanction is unnecessary (Article 146 of the draft bill). The period within which investigation must be completed has been shortened from 6 months before to 3 months now (Article 175). After the expiry of the period of three months, the investigating judge must notify the president of the court of the reasons owing to which investigation has not been completed and to undertake measures for completion of investigation (Article 168). Of course, strictly restricting duration of detention to 90 days shall secure greater speed in cases where detention has been ordered, but there is a danger of prolonging other cases where detention has not been ordered.

It should be borne into mind that the duration of procedure largely depends on organization and technical and staffing equipment of courts. It is still uncertain in what manner the recent reorganization of the judiciary in Republic of Macedonia and the complete reelection of judges, the transfer of former first instance competence of courts of appeal to municipal courts shall influense the speed of settling of cases. It is believed that these facts shall considerably slow down the procedure, at least temporarily.

In connection with the legal consequences of exceeding of the "reasonable time" in the sense of Article 6 of the European Convention, domestic courts do not practise any compensation due to lengthy proceedings. It is neither considered as a mitigatory condition leading to mitigating the sentence, nor is material compensation granted, and termination of procedure is inconceivable.

2. Presumption of innocence

Presumption of innocence in the previous legislation of the Republic of Macedonia caused controversy, because did not declare that "*each accused person of a criminal offence shall be deemed innocent..*", but "*nobody shall be deemed guilty*". Article 13 of the constitution of the Republic of Macedonia, as well as Article 2 paragraph 1 of the Draft Code on Criminal Procedure, contain a formulation which is in conformity with the European Convention on Human Rights and other international document on human rights. The well known rule *in dubio pro reo* has been explicitly embodied in paragraph 2 of this provision as one of the most essential consequences of the principle of presumption of innocence. According to Article 345 of the draft bill, "*The court shall pass a judgment acquitting the accused if the criminal offence he has been charged with has not been proven*".

Basic consequences arising from the presumption of innocence are more emphasized by the Draft Code on Criminal Procedure than the existing Code on Criminal Procedure. In this sense, the burden of proof lies with the prosecution, although it is the court which *ex oficio* clarifies the criminal case, because it itself is obliged to truly and exhaustively to assert all fact relevant for a lawful decision. It is important that the accused is free of such an obligation and not to be compelled to give statement and is not forced to testify against himself or against people close to him, which has been provided with several provisions of the draft bill.

According to Article 12 of the Constitution and Article 3 paragraph 1 of the Draft Code on Criminal Procedure, a person summoned, arrested, detained or deprived of liberty, is entitled to be promptly informed, in the language he understands, of the reasons for summoning, arresting, detaining or depriving of his liberty, and for any criminal charges against him, as well as the right to be instructed on his rights and a statement may not be demanded from him. (The constitutional prohibition not to demand a statement from the suspected person is being interpreted as a right to silence or a prohibition to force the suspected person to make or sign a statement, and not as an absolute prohibition to talk to him.) Pursuant Article 3 paragraph 2 of the draft bill, in the procedure before police the suspected person must first in a clear way be instructed on his right to keep quiet and the right to consult a counsel.

Even before his first questioning, the suspected person must be informed that he is not obliged to state his defence nor to answer questions (Article 213 of the Draft Code on Criminal Procedure). Earlier prospect for instructing the accused who does not want to answer questions that by this he makes gathering evidence in his favour more difficult, from the Article 218 of the Code on Criminal Procedure, has been abandoned by the draft bill, on the basis of the assessment that in that way the accused is being exposed to open pressure to make statements.

Extortion of admission is prohibited and punitive (Article 10 of the draft bill), and courts judgment can not be based upon statements made by force, threat or similar means and methods (Article 213 of the draft bill). Before passing effective judgment rights and liberties of the accused may be restricted only to a necessary extent and conditions prescribed by law (Article 1 paragraph 2 of the draft bill). In this sense, pursuant Article 5 of the European Convention and jurisprudence of the European Court and Commission, the accused can be subjected to arrest and detention and to restrictions arising from detention regime (Articles 183-200 of the draft bill), to photographing and taking fingerprints (Article 143), to taking blood for testing and psychiatric and medical examination (Articles 253-254), to bodily search or house search (Articles 201-205), to temporal deprivation of articles (Articles 206-210) and the like (*Austria v. Italy; X. v, Netherlands; X. v. Federal Republic of Germany; Funke c. France).*

In the context of presumption of innocence, it is advisable to abandon domestic practice the accused to seat during the trial alone by himself, between his counsel and the prosecutor, against the court. Such a humiliating position is contrary to the presumption of innocence and respect of person's dignity, as well as to the position of the accused as a party on equal footing with the prosecution. Besides, the accused is being deprived of moral and legal assistance by the cunsel, neither he can consult his counsel, nor confronts face to face witnesses against him. Because it is not only a word of near technical question, but it gains a character of an essential element of the right to defence, it is necessary the Draft Code on Criminal Procedure to be supplement by a provision regulating this question too in the manner mentioned above.

3. Rights of defence

a) The right of the accused to be informed of accusations against him

In the domestic legislation concerning criminal procedure there are several provisions insisting on adequate informing of the accused, pursuant Article 6 paragraph 3 count b) of the European Convention of Human Rights. According to Article 4 paragraph 1 of the existing Code on Criminal Procedure the accused person even at the first questioning must be informed of the offence he has been charged with and of grounds of accusation. "Offence he has been charged with" means an act he has been charged with, and "grounds of accusation" mean evidence the prosecutor's office support its findings upon for the criminal offence and for the part of the accused in committing it. Similar to it, Article 4 paragraph 2 of the Draft Code on Criminal Procedure requires "*every accused person to be informed promptly, in a language he understands and in detail of offences he has been charged with and evidence against him*". Besides, by Article 3 paragraph 1 of the draft bill it has been guaranteed that "*the person summed, arrested, detained or deprived of his liberty is entitled to be promptly informed in language he understands, of the reasons for being summoned, arrested, detained or deprived of his liberty and of any criminal charges against him*". A similar formulation is contained in Article 12 of the Constitution of the Republic of Macedonia.

Mentioned general provision have been further specified. According to Article 213 of the Draft Code on Criminal Procedure, at the first questioning of the accused person in the investigation, the authority conducting the questioning is obliged to tell the accused person what is he accused of and what grounds of accusation there exist against him. The same obligation has been stipulated as well as when, before passing the ruling for conducting investigation, the investigating judge examines the person against whom investigation has requested (Article 152 of the draft bill). Pursuant 257 of the draft bill, the indictment contains detailed information of the offence the accused is being charged with, its legal qualification, evidence it has been based on ("*a description of the act pointing up, the legal features which make it a crime, the time and place of its commitment, the object on which and means with which the crime was committed, and other circumstances necessary to as precise a definition of the crime is possible; the legal name (qualification) of the crime, accompanied by situation of the provisions of the Criminal Code*

which are to be applied to the prosecutor's charge; a recommendation as to evidence which should be presented at the trial, along with the names of witnesses and experts, documents which should be read and articles which would serve as physical evidence)...and the like. Somewhat a bit poorer information is being contain in the summons (Article 176), in the ruling for detention (Article 185), in the ruling for conducting investigation (Articles 151 and 152) ("*...a description of the act which has the legal attributes of a crime. The legal name of the crime, the circumstances justifying suspicion and the existing evidence".)*

Up to now practice of the European Court and Commission in view of informing the accused is rather relenting regarding this guarantee, because the relevant information neither must be given to him in writing, nor adherence to other formalities is required in informing the person accused of committing a criminal offence in the sense of Article 6 paragraph 3 count a) of the Convention (*Kamasinski v. Austria*). Similar to it, the requirement for detailed and speedy informing, no matter they are explicitly mentioned in the Convention, in practice they have been rather underrated. (*Kamasinski v. Austria; Brozicek v. Italy*). It is apparent that the respective guarantee in legislation of the Republic of Macedonia surmounts the standards established in the practice of bodies in Strasbourg.

Still it must be noted that in the summary proceedings the information mentioned are rather poorer. Thus, for examples, according to Article 424 of the draft bill, the "bill indictment" contains only a short description of the criminal offence, and the accused, as a rule, has not been examined before, thus no oral information could be given in the sense of articles mentioned above.

b) Adequate time and facilities for the preparation of defence

A most general provision for securing adequate time for preparation of defence is contained in the Article 4 paragraph 2 of the Draft Code on Criminal Procedure guaranteeing minimum rights of each accused. The accused is provided adequate time for preparation defence in the trial. Namely, pursuant Article 276 paragraph 3 of the draft bill, "*The summons should be delivered to the accused so that between the delivery of summons and the trial the accused to have sufficient time for preparation of defence, 8 days at least*". In the summary proceedings for criminal offences for which a penalty with imprisonment up to 3 years can be pronounced or a fine, the accused should be given 3 days at least (Article 428). Otherwise, if the accused has not received the summons in good

time, is not obliged to appear at the trial, and his non-appearance does not entail any procedural sanctions.

For the purpose of preparation of defence, the court can disrupt the trial, if the prosecutor at the trial has orally modified the indictment (Article 332 of the draft bill), or if he issues an indictment for a criminal offence having done or uncovered during the trial (Article 333).

Provision of adequate time for preparation of defence does not refer to the questioning of the accused at the preceding procedure, because between the informing the accused person of the offences he is being charged with and grounds for charges against him and the questioning itself, there is not time space. The accused is being given 24 hours before the first questioning if he wants to employ a counsel, but before that he has not been informed of the charges. Thus, the accused can prepare his defence in the time after receipt of summons until the first questioning only on the basis of the poor information contained in the summons.

From the point of view of his defence it would be best the accused to be informed in detail of offences he is being charged with and grounds of charges against him before he has been questioned, as a condition he has adequate time for the preparation of his defence, including the prospect of consulting a counsel. This is very important, because of significance the first questioning has to bear upon the outcome of the proceedings. Any how. Such high standards have not been provided even by the bodies at Strasbourg. Namely, the Court and the Commission are more concerned for providing adequate time for preparation of defence in the first instance procedure, and that is the time between the day of delivery of indictment or the day of notification of the date of hearing or the day of arrest of the accused or the day of appointing counsel *ex officio* and the day of holding of the hearing. Great attention is also paid to the time left for the preparation of legal remedies. In connection with this, a question on the appropriateness of the deadline of 15 days for appeal (8 days in a summary procedure) prescribed by domestic legislation, if we have in mind that in the practice of the European Court the period of 15 days in a procedure of cassation has been considered as troublesome (*Huber v. Austria*).

Article 173 paragraph 1 of the existing Code on Criminal Procedure refuses to grant the counsel the right to access to files and evidence before the person to be examined in the capacity as accused, which use to bring defence in an inferior position. Similar is the solution according to which the accused can contact the counsel after he has been questioned (Article 74 paragraph 1). The Draft Code on Criminal Procedure has strengthened

the rights of the defence, by avoiding several restrictions in connection with the defence's insight into the files and in connection with the control of the communication between the counsel and the accused person in detention. In both cases making rights of the defence conditional upon previous questioning of the accused has been abandoned, safe the right of the accused to get an insight into the files himself. Thus, the counsel has the right to look into files and articles serving as evidence from the very moment when the request for raising criminal procedure has been delivered, i.e. from the moment when the investigating judge, before passing the decision for the commencement of investigation, has carried necessary investigating activities (Article 69 of the Draft Code on Criminal Procedure). According to Article 124 paragraph 5, the accused can have a look at files and articles, after he has been questioned (the solution we think should be re-considered).

The right to get an insight into the files in the domestic legislation surpasses requirements established by the practice of the bodies of the Convention, because they do not recognize the right to access to the case files at early stages of the procedure. The request such a right to be recognized at stages preceding the indictment has been rejected by the Commission in several cases, because has such a right after the indictment has been issued (*Appl. N.4622/70, Appl. N.1816/63, Appl. N.1216/61*).

The Draft Code on Criminal Procedure has also abandoned restrictions of getting an insight into the case files based upon national defence and security interests. Otherwise, such restrictions have been admitted by the European Commission (*Haase v. Federal Republic of Germany*).

Unlike the insight into the case files, there are no standards for rules of disclosure of evidence by courts and other state authorities taking part in the procedure of gathering evidence, especially in favour of the defence. There are to kinds of rules of disclosure: first, those enabling the defence to get acquainted with the case of the prosecutor before trial; and second, those enabling the defence to be provided with materials possessed by the prosecutor and which are relevant for the defence and which might lead to acquitting of the accused or to commuting of sanction. Pursuant the stance of the Commission, both persecution and investigation authorities are bound by the Convention to reveal the material they possess if it can help the defence in the above mentioned sense (*Jespers v. Belgium*). Still, the Commission is reluctant in dealing with these rules and it can do it only in those cases where those materials are of a unique and indispensable value

for the defence, and not for any material that might by useful for the defence.

Article 166 of the Draft Code on Criminal Procedure has envisaged that "*If the investigating judge before completion of investigation finds that it is in the interest of the defence the accused and his counsel to be acquainted with relevant evidence gathered during investigation, shall inform them that within a determined period of time they can have a look at the articles and files concerning that evidence*". Nevertheless, domestic law and practice are not familiar with rules binding the prosecutor to reveal to the defence knowledge and evidence he possesses in the interest of the defence, though the prosecutor's obligation for objectivity from Article 14 of the draft bill (with equal attention to study and gather both evidence charging the accused and evidence in his favour) must not be ignored.

c) The right to defend himself in person or through legal assistance

The right a counsel is a constitutional category in the legal order of the Republic of Macedonia. Pursuant Article 12 of the Constitution, the right to a counsel has been extended even in the procedure before police. The right to a counsel has been defined by many provision of the law regulating criminal procedure, including those according to which the omission of informing the accused of his right to a counsel entails strict procedural sanctions consisting of a ban courts judgment to be based upon the statement made without a counsel being present. The accused can defend himself in person and, as a rule, he can freely decide whether and who he chooses to be his counsel. Yet, this right is not an absolute one, because the accused may employ as a defending council only a counsel registered with the bar association (Article 3 of the Draft Code on Criminal Procedure), and circumstances where the accused person must have a counsel have been defined be law. In this sense, a significant novelty in the Draft Code on Criminal Procedure is that the accused must have a counsel if detention has been ordered and while in detention. If the accused has not chosen a counsel of his own accord, he shall be provided one by the court *ex officio*. Apart from cases requiring obligatory defence, *ex oficio* is also possible even in cases when the accused can not bear defence expenses.

The Draft Code on Criminal Procedure contains some provisions protecting the accused from unconscientious counsel(Articles 290 and 296). Thus, for example if the counsel provided *ex oficio* does not perform his duties properly, he can be dismissed by the president of the court at the

request of the accused or of his own accord with the consent of the accused. A new counsel shall be assigned to the post of the dismissed one, and the bar association shall be notified of the replacement. The trial can be disrupted or postponed if the counsel does not appear or in case he leaves the trial without permission or is evicted. In this course the practice of the European Court and Commission has been directed (*Goddi v. Italy* and *Artico v. Italy*).

As far as defence expenses are concerned, even when he is pronounced guilty, the accused shall always be exempt from expenses if his counsel has been assigned *ex oficio* by the court, as well as in cases of obligatory defence when payment of such expenses might lead to calling into question the support of the accused or his family.

Free legal aid

It has long been reckoned that was up to each country to regulate the manner and conditions on free legal aid when the accused lacks sufficient funds to meet those expenses. Satisfaction of the requirement in the "interests of justice" started acquiring a concrete substance in the latest jurisprudence of the bodies at Strasbourg. Criteria used by the Court in this sense are the following: gravity of the offence and severity of the sanction possible; complexity of the case; and person's property plight. In the case *Quaranta v. Switzerland* the European Court has found violation of the Convention, starting from, above all, from the fact that the sanction expected might reach imprisonment lasting 3 years. This may also require changes in the domestic legislation, because Article 67 of the Draft Code on Criminal Procedure has stipulated the possibility, in cases when the accused can not bear the defence expenses, of assigning him a counsel only if a procedure is being conducted for a criminal offence for which a penalty of imprisonment over 3 years has been prescribed, and only after an indictment has been issued.

Communication between the accused and the counsel

The existing Code on Criminal procedure (Article 74 paragraph 2) authorizes the investigating judge to conduct supervision over written and oral communication between the accused under detention and his counsel, until the end of investigation. Unlike it, according to Article 70 of the Draft Code on Criminal Procedure, the accused held in detention or in prison for the purpose of trial can correspond and talk to his counsel freely and without any supervision. Only by exception, during investigation, this right can be subject to supervision if detention has been ordered due to the

danger of collusion (Article 184 paragraph 2 count 1). The flaw of this provision being that it has not precisely defined that only the investigating judge can be authorized to have a look at the correspondence in writing or to attend the conversation. Listing reasons due to which such supervision is being introduced has the aim of unabling such a restriction to be imposed upon the accused against whom a detention due to the danger of collusion has not been ordered at all. The draft bill has a restrictive approach the supervision in order to avoid its unreasonable use in practice to the detriment of the defence. It is quite logical that this supervision has been envisaged only in case when there is a danger of influence upon statements made by co-accused persons or witnesses, or in case when contacts with the counsel may be misused for covering up of evidence and for misleading in the investigation.

The European Commission has admitted several exceptions from the right to access to counsel, because this right has never been stipulated explicitly by the Convention. As well as other rights from the Convention, the right to counsel is being subjected to restriction due to other competitive interests and values. Otherwise, neither the Court, nor the Commission have not precisely defined what bases can justify restrictions to the right to unimpeded communication between the accused and his counsel. Up to now practice reveals as acceptable the following justifications: a danger of collusion, security reasons and gravity of the offence. The Commission neither examines the necessity for such restrictions, nor explores whether other less restrictive measures would have achieved the same goal. The Commission only examines whether the scope and time duration of these restrictions are of such nature that might obstruct the defence presentation before court instead. Nevertheless this practice seems to be changing in the case *Can v. Austria*. This case seems to be very interesting, because detention has been justified by the danger of collusion, under circumstances when Article 45 paragraph 3 of the Austrian Law on Criminal Procedure (similarly as Article 70 of Draft Code on Criminal Procedure of Republic of Macedonia) has envisaged the judicial officer to be present at the talks with the counsel until the time of issuance of the indictment. In this case, the Commission has come to a conclusion that neither the danger of collusion was well founded, nor offences under investigation were particularly serious. What is more important, there did not exist indications that the counsel had misused the opportunity when he talked to the accused in private. In this case, bodies in Strasbourg have found that duration of existence of restrictions of communication for a period of at least 3 months, due to the absence of some other particular circumstances, has been exaggerated and that it

poses violation of Article 6 paragraph 3 count c) of the European Convention. The difference between this case and others, with which the Commission was rather tolerant in regard to the duration of restrictions, is in the automatism of the imposing restrictions in all cases of detention due to the danger of collusion, because Austrian law does not leave space for an *ad hoc* order of such restrictions, nor for examining the possibility of undertaking other similar measures pursuant circumstances of each case separately.

In considering the need and proportionality of restrictions the Court and the Commission start from the assumption that the counsel, bound by the professional oath, can hardly be suspected of a plot, due to which the government shall have to turn down such an assumption pursuant the circumstances of each particular case, particularly in cases when the counsel was assigned by the domestic court (*S. v. Switzerland*).

In order the extensive use of the legal authorization of supervision over communication between the accused under detention and his counsel to be avoided and to be exceptional indeed, it seems it would be reasonable the provision from Article 70 of the Draft Code on Criminal Procedure were supplemented by the following words: "*if there exists well founded suspicion that the accused might misuse his communication with the counsel*", that shall to be proved and spelled out within the circumstances of each case separately. In that way, the restrictions mentioned may not be imposed automatically in each case where detention was ordered due to the danger of collusion, which to a grater extent is in compliance with the practice of the European Court and Commission.

Telephone tapping and recording of telephone conversation between the accused and his counsel, also poses violation of Article 6 paragraph 3 count c) of the Convention (*D. v. Austria*). In the legislation of the Republic of Macedonia such a restriction of the right of the accused to communication has been covered by the general constitutional prohibition of telephone tapping.

d) The right to examine witnesses

The right to examine witnesses of the accusation, as well the right to secure attendance and examination of witnesses of the defence, has been guaranteed by article 6 paragraph 3 count d) of the European Convention as special, essential, personal and affirmative right. It has not been explicitly guaranteed by the domestic law of the Republic of Macedonia. Neither the Constitution, nor the existing Code on Criminal Procedure

contain explicit provision guaranteeing this right as elementary personal right, despite the fact that the obligation of guaranteeing it arises from Article 14 paragraph 3 count e) of the International Covenant on Civil and Political Rights, the provisions of which, pursuant Article 210 paragraph 2 of the Constitution of SFRY valid at that time, were directly applied by courts. This provision of the Covenant has been wrongly looked upon only as a right to suggest evidence and to undertake evidence activities. Namely in the preceding procedure both the accused and his counsel can attend the interrogation of witnesses, to suggest investigating judge to put particular questions and they themselves to put questions by his permission (Article 168 of the Code on Criminal Procedure.

Rules on criminal procedure truly require all evidence significant for duly deciding to be presented before court (principle of immediacy) and envisage minutes of witnesses' statements to be read out. It seems that all this has been envisaged more from the aspect of the role and tasks of the court in proving the truth, and not as a guarantee to the accused. This becomes clear when it shall be taken in account that a condition for approving these statements to be read is not the existence of adequate and sufficient opportunity the witness to be examined by the defence (*Kostovski case; Windish case; Saidi case; Unterpentinger case*). Permissibility of the statements made out of the trial is being examined only from the aspect the principle of directness. It is very important the witness to be examined by the court itself at the principle process, in order to enable itself to observe his behaviour and to assess the credibility of his statement on this basis. The reading of minutes from the preceding procedure, as a rule, has not been permitted from this aspect. Minutes of statements made before police must be singled out and must not be read, but minutes of statements made by the accused and witnesses in the investigation may be read if some of these people falls ill or does not like to witness or cedes from previously made statement (Article 333 of the Code on Criminal Procedure).

The court is dominant at the examination of witnesses at the hearing, due to its obligation itself to prove all facts *ex oficio*. The opportunity the defence to put question to the witnesses at the hearing (through the court or directly - by the permission of the president of the panel) poses only an accompanying facility, and not a consequence from the recognition of an important personal and affirmative right, and still less as consequence of its sanctioning.

National courts are free to decide whether interrogation of witnesses proposed by the defence could contribute to the asserting the truth, and if they do not consider it relevant, they can refuse to hear them. Pursuant the jurisprudence of bodies at Strasbourg, such wide discretionary authorization of courts has been partly limited by the obligation of the court to spell out in the judgment the reasons for not taking into consideration proposals by the parties (*Bricmont case; Vidal case*), as well as why it has decided not to hear directly a witness or expert whose statement or written findings have been read out at the trial without the consent of the parties (Article 351 paragraph 7 of the Draft Code on Criminal Procedure) .

Though parties can propose forensic expertise, (contrary to *Bonish case*) it still does not mean that they have the right to invite their "own" expert, because only the court has an exclusive authorization to call experts.

Suggestions cross examination of witnesses to be introduced by the Draft Code on Criminal Procedure have not been accepted and it has been left over for some future reform of legislation on criminal procedure. Namely, the alteration of the manner of presenting evidence completely different role by all subjects in the procedure, which exacts more time and preparation. Yet, by joining the Council of Europe and by ratifying the European Convention, domestic judicial practice shall have to achieve standards established by the jurisprudence of the European Court and Commission of human rights. The above is more probable just because the right of the accused to attend the interrogation of witnesses and to put questions, as well as other fundamental right of the defence, have been introduced within the framework of fundamental principle of the criminal procedure by Article 4 of the Draft Code on Criminal Procedure. Besides, the principle of directness has been strengthened by the requirement the person under whose observation a fact is to be proved to be personally examined at the trial. His examination can not be replaced by reading the minutes of previously made statement, or by written statement (Article 328 of the draft bill).

e) The right to interpretor

Former Yougoslav federation, as multinational community, paid a great attention and extensively guaranteed the right to use the language of nations and national minorities before judicial and other state authorities. According to Article 7 of the Code on criminal procedure, the criminal procedure is being conducted in the official language. Parties, witnesses

and other persons taking part in the proceedings (no matter whether they are nationals or foreigners) are entitled in the proceedings (in conducting investigation acts or other judicial acts or at the trial) to use their own language. For that purpose translation is being provided of everything they or others have to present, as well as of certificates and other articles of evidence. The participants in the proceedings must be instructed to this right, and they can waive this if they understands the language the proceedings is being conducting in.

So the participant in the proceedings is entitled to use his own language, no matter whether he understands Macedonian (as a language in which the proceedings is being conducting). And more than that, depriving of the right to follow the trial in his own language and to use his own language at the hearing, has been envisaged as an absolute violation of the rules of procedure (Article 364 paragraph 1 count 3 of Code on criminal procedure), even when the accused followed and participated in the trial without any difficulties. These solutions surpass standards from the international and comparative law, though it has not been required neither from the aspect of the right to defence and fair trial, nor from the aspect of efficiency and thriftiness, and it poses more a cultural and political right than anything else.

On the other hand, despite international standards establish by the European Convention and practice upon that basis, expenses for interpretation and translation having not been caused for the accomplishment of the right of a person belonging to a national minority (foreigners, deaf people and others) are calculated in the expenses covering the proceedings and they are borne by the parties, and they are not incurred by the budget (Article 95 paragraph 2 count 1 and paragraph 5).

According to Article 3 paragraph 1 of the Draft Code on Criminal Procedure, *"every person summoned, arrested or deprived of liberty is entitled to prompt information, in the language he understands, of the reasons for his summoning, arrest or deprivation of his liberty and of any criminal accusation against him, as well as of his own rights"*. *"Every accused person has the right to be promptly informed, in the language he understands, in detail of offences he has been charged with and of any evidence against him"* (Article 4 paragraph 2 count 1). According to Article 6 of the draft bill *"In court proceedings in Macedonia, Macedonian language and its Cyrillic alphabet are in use"*. *"Parties, witnesses and other participants in the proceedings are entitled to free assistance by an interpreter if they do not understand and speak the*

language the procedure is being conducted in" (Article 7 paragraphs 1 and 2 of the draft bill).

According to Article 8 of the draft bill "*Suits, appeals and other applications shall be submitted to the court in the official language. A member of a national minority of the Republic of Macedonia is entitled to submit his application in the language and alphabet of the national minority he belongs to. They shall be translated by the court and so translated delivered toe other parties in the procedure. Other person who do not speak and understand Macedonian may submit their applications to the court in their own language. A foreign national deprived of his liberty has the right to submit his application to the court in his own language, and in other cases - on condition of reciprocity*".

"*Summonses, rulings and other written documents shall delivered by the court in the official language. The summons sent to a member of a national minority of the republic of Macedonia, shall be written, besides in Macedonian and its Cyrillic alphabet, as well as in the language and alphabet of the national minority he belongs to. The accused under detention, serving a prison sentence or sent to a compulsory psychiatric treatment and keeping in a health clinic, shall be provided with a translation of the written documents in the language he used at the proceedings*" (Article 8 of the Draft Code).

As a rule, proceedings before courts in unitary states to be conducted in the unique language. Stipulation the proceedings to be conducted as well as in the language of a national minority poses a political issue an is out of international legal standards. It burdens the procedure additionally and unnecessarily (from the aspect of its efficiency and thriftiness) and has no significance for the right to defence and the right to fair trial. In this sense, the right to a free interpreter must be provided anytime when it is necessary from the aspect of the right to fair trial (as an internationally confirmed human right) and not as a cultural and political right of national minorities.

FREEDOM FROM RETROACTIVITY OF THE CRIMINAL LAW: ARTICLE 7 OF THE CONVENTION

Unlike the larger number of provisions from the Convention granting procedural guarantees for the protection of rights and freedoms of an individual, the provision from Article 7 of the Convention deals with a question from the substantive criminal law. Article 7 of the Convention sets the principle *nullum crimen line lege, nulla poena sine lege*. That does not really represent giving up from the principle that the material criminal law, i.e. determination of criminal offences and prescribing penalties for them is under exclusive jurisdiction of domestic law. Nevertheless, the Convention imposes upon High Contracting Parties an obligation meant for their material criminal law, which is being exhausted in the previously mentioned principle of legality in prescribing criminal offences and penalties for them, as well as in determining responsibility for having committed them and in passing the penalties prescribed.

Provision from Article 7 reads:

1. *No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.*

2. *This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time it was committed , was criminal according to the general principle of law recognized by civilized nations.*

This provision of the Convention imposes two fundamental principles of the criminal law: the principle of legality and from it derived principle of prohibition of retroactivity of criminal law. Basic consequences with the implementation of these principles are the following: first, nobody can be punished for a criminal offence which was not clearly envisaged as a criminal offence at the time when it was committed; and second, the doer can not be punished with a heavier penalty that the one prescribed for that offence at the time when it was committed. Unlike Article 11 paragraph 2 of the Universal Declaration on Human Rights using the term *"penal offence"*, Article 7 of the Convention uses the term *"criminal offence"* as a wider one, including in itself not

only penal offences as the heaviest sort of criminal offences, but also all human behaviors which have been prohibited by law and for which sanctions have been prescribed. Thus, this provision of the Convention imposes its effect not only upon law prescribing penal offences, but also upon any other law prescribing other criminal offences besides penal offences and prescribing sanctions for such criminal behaviors.

According to provision of Article 7, only the law valid at the time when the criminal offence was committed can be considered as a legal source in determining whether or not a criminal offence was committed, in determining the responsibility for its offender and in passing the sentence due to its committing. In two cases (*Welch v. United Kingdom* and *Jamil case*) the European Court has confirmed its firmness that both the offence and the sanction for it must be determined by the law.

The provision from Article 7 of the Convention has not only been directed at the prohibition of retroactive criminalization of human behaviour, but it also has a wider meaning. It confirms and it imposes upon national legislation the general principle of lawfulness in determining criminal offences and in prescribing sanctions for them, in determining the responsibility for their committing and in passing prescribed sanctions. In this sense, besides the prohibition of retroactivity of the law, this provision also prohibits the laws prescribing criminal offences to be excessively undefined and ambiguous (the case *Kokkinakis v. Greece*) and, coupled with it, it prohibits extending the application of criminal law by analogy (*Appl. N.1196/61, Appl. N.1852/63* and *Appl. N.10505/83*). The Commission and the Court several times have come to a standpoint that the fundamental assumption for the respect of Article 7 of the Convention is the national legislator to have defined criminal offences clearly and unambiguously and authorities applying the law to interpret it restrictively and in favour of the offender (cases *X. v. Austria N.8141/78* and *G. v. Liechtenstein N.10980/84*). Yet it does not mean an absolute obligation for the criminal law to be interpreted restrictively in each specific case, but only for a prior lawful determination of criminal offence and the sanction for it, as a pretext for punishment due to its latter commitment, because in certain cases, just a restrictive interpretation of the law may lead to a breach of article 7 of the Convention. To such a standpoint the European Commission has come in the case of application N.8490/70.

With the aim of ensuring minimum level of legal certainty, Article 7 has been directed at both the legislator, i.e. at the process of creating the

law, and the courts, i.e. at the process of application of laws in settling specific cases.

Both the Commission and the Court, however, have been relatively clement in requesting criminal offences to be distinctly, precisely and thoroughly designated by law, and the penalty to be strictly fixed. In some cases they have allowed criminal offences to be formulated relatively unspecified, but on condition such formulations to be followed by rational and convincing explanation, i.e. they have permitted the criminal offence prescribed by national law to be interpreted extensively by court (*Kokkinakis case*).

Article 7 paragraph 1, second sentence, prohibits the offender to be punished with the penalty which is heavier than the penalty proscribed at the time when the offence was committed. In other words, this provision prohibits the changes in the law appearing after the time when the offence was committed, and which relate to the penalty, to have an impact upon the heaviness of the penalty which is to be handed down to the offender. However, this prohibition is relevant only for cases where changes in the law lead to an increase in the heaviness of the penalty, and not in cases where those changes lead to a decrease in the heaviness of the penalty. It implicitly represents an establishment of permissible retroactive effect of criminal law, i.e. it represents reducing the rule down to prohibition the retroactive effect only to stricter laws, an not to more clement ones.

Paragraph 2 of Article 7 of the Convention explicitly determines an exception from the prohibition of a retroactive effect of laws, which relates to especially exceptional circumstances, when the aim of retroactivity of laws is the offenders of excessively heavy criminal offences (war crimes) to be punished, regardless of the fact that, at the time of their commitment, those offences expressly and in an applicable way were not determined by the domestic law as criminal offences and a penalty was not prescribed for them. This provision actually refers to criminal offences against international law. The reason for the existence of this provision lies with trials of leading nazi war criminals at Nuremberg after World War II. One of the arguments of their defence was that, at the time of committing, the offences they were charged for were not considered as criminal offences by German law. Such a defence was denied on the basis of assertions that those acts represented a breach of international law. Paragraph 2 retains the possibility member countries to be able to try war criminals from World War II, as well as other persons who have committed criminal offences against international law either in war or peace, no matter

whether or not such offences existed in a distinct and applicable way in the domestic law of the state in question at the time they were committed. This provision, however, does not demand from member countries to apply international law directly, especially due to the circumstance that many criminal offences against international law contained in multilateral treaties (Geneva Conventions from 1949, Geneva Protocols from 1977, other treaties which have not been commonly ratified, as well international common law) later were adopted in many national criminal codes.

The principle of legality in the legal order of the Republic of Macedonia has been raised to the level of a constitutional one. According to Article 14 of the Constitution of the Republic of Macedonia, "*nobody shall be punished for an offence which, at the time of its commitment, was not stipulated by law or other regulation as a criminal one and for which a sanction had not been envisaged.*" Some more precise formulation of the principle of legality in defining criminal offences and in prescribing criminal sanctions is contained in article 1 of the Criminal Code of Republic of Macedonia ("Official Gazette of RM" N.37/96). According to this legislative provision, "*nobody shall be punished with a penalty or any other penal sanction for an offence which, before it was committed, was not stipulated by law as a penal offence and for which a penalty was not prescribed by law.*"

By raising the principle of legality to the constitutional level it has been furthermore emphasized and it has gained in significance not only for the criminal law, but for the common legal certainty of people in general. At this level, it does not only mean defence of an individual accused of a criminal offence against arbitrariness of judicial authorities, i.e. against volunteer application of laws in treating his behaviour as a criminal one and in delivering him a penalty, but as well a general barrier against the self-will of all state authorities: the legislative ones, in regulating social relationships by laws; the executive ones, in carrying out laws; and the judicial ones, in the application of laws in settling specifying cases.

In the field of criminal law the principle of legality by itself represents a manifestation of self-restraint of the state, first in prescribing criminal offences and sanctions for being committed, and then in the adherence of courts to law in punishing offenders of such criminal offences. This principle serves as a bulwark against malpractice and abuses of power in the course of use of state force. Its practical effects are such legal and factual state of a person in which he may be punished only for those behaviours of his, which, before being done, previously by law were described as criminal ones and for which a sanction was prescribed

by law. By this, defining the demarcation line between the prohibited and permissible behaviours is being exempted from the sphere of voluntariness and is entrusted with an independent authority - the written law with a general and equal effect upon all. Legislative defining of offences and sanctions does not mean restricting of rights and freedoms of individuals, but, on the contrary, a guarantee for their legal certainty in assessing what is permissible and what forbidden and punitive in exercising their rights and freedoms. On the other hand, legal certainty of citizens as individuals is a precondition for their free, creative and inventive behaviour, freed from fear and insecurity whether or not what they are doing today poses a punitive behaviour, by which the principle of legality in the sphere of criminal law becomes an element on the common democratic atmosphere in the society.

Legal effects of the principle of legality are the following: only the statutory law can be the source of criminal law; criminal offences must not be implemented by analogy, but must be explicitly, clearly and precisely defined by law; the law prescribing the criminal offence must at the same time prescribe the penalty as well; and the retroactivity of the law is forbidden.

The first level of requirements arising from the principle of legality is the statutory law as a unique and exclusive source of law by which criminal offences and criminal sanctions can be prescribed. Motives for such a requirement are evidently clear: the possibility of criminal prosecution poses incursion in most important, most worthy and most sensitive human values, such as his life, freedom, property, honour and reputation. That's why, a person is in need of being protected against all other bearers of normative activity having less democratic legitimacy than that of the legislator, i.e. against all other normative acts which, according to the procedure of their enactment and the number of subjects involved in their passing, do not offer enough guarantees, as it does the law, that defining criminal offences and prescribing sanctions for them is well thought over and designed and that the best balance between human rights and freedoms and consequences for their abuse has been set.

The provision embodied in Article 14 of the Constitution of the Republic of Macedonia does not consistently secure this aspect of the principle of legality. Consistent reading of this provision proves that it allows, not only the law, but other regulations as well to be able to prescribe criminal offences and criminal sanctions. The Criminal Code tends to correct this irrational and unnecessary impreciseness of the

Constitution. It stipulates that criminal offences can be determined and criminal sanction can be prescribed only by law (statutory law). The new Draft Bill on Trespasses makes a similar attempt, envisaging that trespasses and sanctions for them can be prescribed only by la (statutory law), and they may be decided by curt only.

However, these attempts in view of the principle of legality bear significance only within the framework of legal spheres where those laws are being passed. The provision from Article 14 of the Constitution possesses a greater extent of generality in view of Article 1 of the Criminal Code, not only because of formal reasons, i.e. the circumstance that it is part of the Constitution as an act possessing the highest legal force, but as well because of its material contents: Article 14 of the Constitution pertains to all criminal offences, while Article 1 of the Criminal Code pertains only to penal offences as one and heaviest sort of criminal offences. Further more, that very Constitutional provision has no defence against an assumed situation where some law, other than Criminal Code, shall contain a provision by means of which it shall authorize the executive power, by its own act hierarchically lower than a law, to determine certain sorts of criminal offences and prescribe criminal sanctions.

The illogicalness of Article 14 of the Constitution can be proved by interpretation of some other constitutional provisions. For instance, Article 13 of the Constitution establishes an obligation that a court judgment can only be the basis upon which a guilt for a committed criminal offence shall be asserted. Article 12 also prescribes that a person's liberty (as consequence of pronounced sanction for a committed criminal offence) can be restrained by effective court decision only. Further more, pursuant Article 98 paragraph 2 of the Constitution, courts can judge by virtue of the Constitution and laws and international treaties ratified in consistence with the Constitution, an not by virtue of regulations lower than a law.

From previously mentioned constitutional provision it arises that the criminal offence and the sanctions prescribed by some other acts different than a law, absolutely can not be relevant for courts, as unique authorities empowered to decide on criminal offences and to hand down criminal sanctions. In other words, the wholeness of the Constitution makes its specific provision, according to which criminal offences can be determined not only by law, but by other regulations as well, to be not only out and contradictory to the spirit of the Constitution, but entirely illogical and inapplicable too. That's why, the examining of compatibility of domestic legal order with requirements comprised in the European Convention on

Human Rights can be a good starting point for drawing attention to the need for changes in the constitutional provision mentioned, with the aim of reaching better preciseness of the principle of legality in the direction of excluding the possibility by regulations, other than law, to determine criminal offences and prescribe criminal sanctions.

Another aspect of the principle of legality in determining criminal offences and prescribing criminal sanctions is the prohibition of analogy. This aspect of legality in the legal order of Republic of Macedonia has been secured by the latest codification of penal offences and penal sanctions conducted by Criminal Code, as well as by current codification of trespasses and sanctions for them. In this sense, the Criminal Code is being characterized by preciseness, by determining distinct, comprehensive, firm and easily ascertainable description of legislative substance of penal offences. With its own provisions, the penal offence has not only been determined, but also described, i.e. all of its constituting features have been asserted precisely. By this, not only the law is being imposed as a unique source of penal law, but, by the clearness and preciseness of describing of punitive behaviours an penalties for them, each possibility of analogy in asserting the responsibility for their committing and in pronouncing the penalty, has been excluded. Of course, the Criminal Code of the Republic of Macedonia does not determine penalties for penal offences in an absolute (fixed) manner, but relatively - either their maximum, or their minimum, or both. By this, courts are given the freedom to align penalties for penal offences committed with the gravity of those offences, taking into account all the circumstances of each particular case under which they have been committed, i.e. courts are given the freedom of individualization of penalties, without abandoning the principle of legality in determining penal offences and penalties.

The third aspect of the principle of legality is the prohibition of retroactivity of law determining criminal offences and prescribing criminal sanctions. The prohibition of retroactivity of criminal law arises directly from the legality in determining criminal offences, in prescribing criminal sanctions, in asserting criminal responsibility and in pronouncing criminal sanctions. That, in fact, poses a technical expression of the principle of legality, when temporal validity of laws is in question. The principle of prohibiting retroactivity of criminal law responds to the question by virtue of what law the offender of the criminal offence shall be convicted, in those cases when from the time of committing the criminal offence until the time of the trial, the law has been altered.

The Constitution of the Republic of Macedonia unequivocally responds to this question. According to Article 50 paragraph 4 *the laws and other regulations may not have retroactive effects, only by exception, when it is more favorable for individuals.* This constitutional provision, which, otherwise, is of common significance, because it refers to all legal spheres, and not only to criminal one, has been specified by the Criminal Code as rules on temporal validity of legal norms determining penal offences and prescribing penal sanctions. Article 3 of the Criminal Code provides that *upon the offender of a penal offence shall be applied the law valid at the time when the criminal offence was committed. If after committing the penal offence the law was altered, once or several times, the law that is more favorable for the offender shall be applied.*

According to the previously mentioned constitutional and legislative provisions, the prohibition of retroactivity of laws is not an absolute one. It refers only to laws passed later which are less favorable for the offender than the law valid at the time when the offence had been committed. The motives for such an approach, which basically means adoption of the respective principle from Article 7 of the Convention, are evident: on one hand, to protect legal certainty and to relieve people of their fear that what they do today as a free behaviour, tomorrow shall, by any new law, be pronounced as a criminal offence and on the basis of such a law penalties to be delivered; on the other hand, the exception from this prohibition means relativization of this principle, that leads to the possibility of retroactive effects of a law, given whether the later passed law is stricter or more clement than the one existing at the time when criminal offence was committed. The twofold aim of such a solution arises from the specific character of the criminal law and from the special value of human life and his physical and moral integrity which can be seriously affected by criminal persecution.

Too much widely set principle of prohibition of retroactivity of laws and other regulations, including too much widely set exception from it, establishes obligations of legal nature for all legal subjects, both for those who are to create the law and those who are to apply it. In this sense, previously mentioned constitutional provision is especially relevant as a prohibition the laws, by themselves, in a normative manner to provide for their own retroactive effects, i.e. they in a normative manner to impose themselves as sources of law in such legal situations which have arisen after their entry into force. Unlike it, the provision from Article 3 of the Criminal Code applies only to the process of application of criminal law. It poses a prohibition for the judge to apply the law having entered into force

after the criminal offence has been committed which is under trial, i.e. an obligation for the judge to apply it (if there is one) if it is more favorable for the offender in relation to the one valid at the time when the criminal offence was committed.

Criteria according to which the strictness or clemency of the later passed law shall be judged have not been defined normatively neither by the Constitution, nor by the Criminal Code, nor can they be defined in an abstract manner. That's why, there are no possibilities, in settling a particular case, for the judge to apply the law simply because it has a provision which pronounces it as more clement than the law valid at the time when the offence was committed. Neither, a simple comparison of contents of the two successive laws in their parts where the offence has been described and the penalty has been prescribed, can not respond to the question which of them is more favorable for the offender. This is connected by the multitude of mutually related circumstances, which have an impact on asserting different criminal responsibility and passing a different sentence by applying the same legal provision in different specific cases. Among them is, for instance, the circumstance whether the later passed law has decriminalized a certain criminal offence, whether it envisages a more clement penalty, whether it provides for a suspended sentence, whether it provides for a more favourable regime of execution of penalties and the like, and all that under the decisive influence of the specific features of each case separately in view of true exploitation of possibilities which later passed law offers in settling that very case. In this sense, the only relevant criterion for the assessment which law is more favourable for the offender can only be the final outcome of the implementation of laws in a specific case, and not the simple contents of laws tending to be applied in such a case.

There exist a certain difference between the formulation used in Article 7 paragraph 1 of the European Convention on Human Rights, on one hand, and the formulation used in Article 3 of the Criminal Code of the Republic of Macedonia, on the other, in determining the possibility or the obligation for the retroactive application of a criminal law. According to the Convention, *a heavier penalty can not be imposed* than the one that was applicable at the time when the offence was committed. This brings to the conclusion that retroactive effects of the criminal force that has entered into force after criminal offence had been committed is permissible only if its application leads to the delivery of a lighter penalty than the one that might be delivered by the application of the law that was valid at the time when the offence was committed. According to Article 3 of the Criminal

Code of the Republic of Macedonia, if after the offence had been committed the criminal law was altered, *the law that is more favourable for the offender* shall be applied.

It is evident that the Convention makes the retroactive application of the law conditional upon circumstances linked only to the gravity of the penalty delivered, while the Criminal Code has a wider approach, according to which the retroactivity of criminal law is made conditional upon circumstances that have wider significance than the gravity of the penalty. At first sight it seems to be a word of two different things, but in fact both formulations indicate a single requirement: the application of the law that was passed after the offence had been committed not to bring the offender into more unfavourable situation than the one in which he might be brought by application of the law valid at the time when the offence was committed.

Favourability or unfavourability of the application of one or the other laws can be relevant for the offender even through the final outcome of the trial, that can be notable only through the type and size of the penalty delivered. As it was said before, the type and size of the penalty delivered depends one numerous circumstances of legal and factual nature. Among them a decisive significance has the legislative determination of the type and the minimum and maximum of the size for a particular criminal offence. The aim of the Convention is prohibiting that retroactive application whose final outcome is delivering a penalty which exceeds the framework of the type and size of penalty determined by the law valid at the time when the offence was committed, and not the application of the law which might lead to a more clement punishment of the offender even without formal changes in that type and size. Thus, the only relevant condition for the Convention is the penalty delivered, no matter what sort of changes in the contents of the law have led to the milder punishment of the offender. It is quite indisputable that towards this very aim the essence of Article 3 of the Criminal Code of the Republic of Macedonia is directed at, because the strictness or clemency of a law can not be abstract and to be measured only according to the type and size of the penalty determined by the law. This circumstance can have a decisive significance, but it does not have to be the only one the penalty delivered may depend upon. Such quality of the law, as is it the case with the Convention, depends only on the final outcome of the criminal procedure. Thus, the differences in the formulation of the Convention on one hand, and the formulation of the Criminal Code on the other, can not pose a basis for their mutual incompatibility.

Unlike Article 3 of the Criminal Code which provides for the principle of prohibition of the retroactivity and it locates the exception from it only in the criminal and legal sphere, the constitutional principle of retroactivity and of the exception from it have universal significance. It is of equal significance for all legal fields and relates not only to the process of application of law, but also to the process of its creation. This principle constitutes a prohibition general legal acts to be given retroactive effect in the process of their application, but also a prohibition the general legal acts themselves to contain provisions envisaging application of those acts upon legal situation having arisen after their entry into force.

Having in regard the legal certainty, such constitutional approach to the principle of non-retroactivity is quite appropriate and desirable, because retroactivity of legal acts, no matter whether they are in the sphere of criminal law or in other legal fields, poses most serious type of threat to legal certainty of people as bearers of rights, obligations and responsibilities. However, just from the aspect of legal certainty , it is problematic that even the exception from the principle of prohibition of retroactivity also has a universal significance. This too widely given possibility for retroactive effects of legal acts causes several types of threatening of the principles of legal certainty, rule of law and legality. The provision of Article 50 paragraph 4 of the Constitution of the Republic of Macedonia enables not only laws, but all other legal acts, to have retroactive effects. By this, deciding whether legal acts are going to have retroactive effects in reality is given to a large number of conductors of normative activity, and especially to those belonging to the executive power being the bearers of largest number of regulations. Allowing for all legal acts to have retroactive effects, not only laws, means offering a chance to too many decision making centres to endanger legal certainty, which are very difficult to be controlled by the judiciary, especially because of the possibility of imposition of retroactivity in an abstract and normative way.

Further more, the possibility legal acts lower than law to have retroactive effects directly on the basis of Constitution, an not only, for instance, in cases when they are passed for the execution of a legislative provision with retroactive effect, may lead to a grave disturbance of inner harmony of legal order, based upon wrung hierarchy in the system of general legal acts, i.e. it may gravely call into question the principle of legality.

Previously mentioned constitutional provision enables every other law and regulation, and not only the criminal one, to have retroactive effects, given such retroactive affect to be more favourable for the individuals. This practically means that the reason, which is characteristic for the exception from the principle of prohibition of retroactivity in the criminal sphere, i.e. in the sphere of application of law, is mechanically and noncritically taken over and spread over all other legal fields, i.e. in the sphere of creating of law. This enables every new law or any other act, which in somewhat other manner arranges respective relations than the previous one, may always have a retroactive effect given its bearer reckons that is more favourable for individuals. This also enables every new law or regulation in an abstract manner (normatively) to envisage its own application even in legal situations and relations generated after its entry into force, no matter whether or not such an effect is really more favourable for individuals depending on the specific features of each particular case separately. In that way the constitutional provision mentioned allows too wide space for calling into question the basic essence of the exception from the principle of the prohibition of retroactivity - that to be placed at the service of individuals' interests only in those concrete situations when favourability really and tangible can be expressed.

The quality of clemency of criminal law, as the only basis for the possibility for its retroactive effects, includes implicitly such a type of legal relations, whose subjects are known in advance: an individual as an offender of a criminal offence, on one hand, and the state as a carrier of the law determining criminal offences and prescribing criminal sanctions, on the other. Those subjects, as well as the nature of relations they enter into, are known in advance, and the Constitution can determine in advance which party to that relation should be protected by the defining cases and conditions under which laws in this fields can have retroactive effects. The protected party in the field of criminal law is the individual, where the retroactive effect, as a means for such a protection, has a precisely fixed target - securing his own life, freedom and personal integrity - in those cases when the state, through changes in laws, has given up the criminal persecution for certain criminal offences, or has commuted in quality or quantity the penalty for them, or has eased serving of sentence and the like, i.e. in those cases when the state has lowered the level of severity toward that type of criminal offences in comparison with the laws valid at the time when the offence was committed.

By mechanical extension of the rules on permissibility of retroactivity from the criminal field to all other legal fields, including those where citizens do not appear as direct bearers of individual rights, obligations and responsibilities, but in which the manner of regulating respective legal relations in a indirect way can have a favourable or unfavorable influence upon their legal or factual position. The notion "favourability for individuals", especially in those legal fields already mentioned, is entirely inappropriate for abstract defining, owing to which the Constitution has not entered into defining its contents at all. As a result of it, the Constitution does not impose any restriction upon the bearers of general legal acts in their assessment which circumstances of legal and factual nature, to what extent and in what manner favourably or unfavourably influense the positions of individuals and their rights and freedoms. In situations when several different groups of individuals are in question, the Constitution does not indicate whose interests should be met for a basis for an assertion that the general act with retroactive effect is more favorable or more unfavourable.

The fact that favourability as a condition for the permissibility of retroactive effects has no constitutional contents demonstrates that its defining is more subject to appropriateness, rather than to constitutionality of general legal acts. Favourability or unfavourability of a general legal act with retroactive effects represent a synthetic expression of ethic stances whether a certain circumstance of legal or factual nature for a certain category of individuals is useful, agreeable, desirable, alleviating and so on, or it is harmful, disagreeable, repugnant, aggravating and so on. Ultimately, it means that the constitutional principle of prohibition of retroactivity has no legal value and it may not be protected in the procedure neither before the Constitutional Court, within the framework of its competence for its abstract control of constitutionality of general acts, nor before other courts, within the framework of their competence to decide on legality of individual acts. Thus, by an euphoric constitutional provision, in the good faith of which we can not be suspicious at all, the principle of nonretroactivity from a legal principle is being transformed into a simple recommendation, which obliges only morally and politically, in enabling retroactive effects of legal acts, individuals with their rights, freedoms and interests, to serve as an inspiration. The Constitution does not offer any legal guarantee that such retroactive effects really and in each concrete case leads to the improvement of the position of citizens. By this, the balance between legal certainty and interests of individuals, which has been established by principle prohibition of the retroactivity and by severity in prescribing cases and conditions for its permissibility, has been

seriously disturbed. Neither legal certainty, nor individuals' interests benefit from such an imbalance, but only possibilities for abuses and arbitrariness are being increased.

As it was said, the Criminal Code of the Republic of Macedonia meets the requirements and standards in view of prohibition or permissibility of retroactivity imposed by the European Convention entirely. That's why, previously mentioned threats to general legal principles arising from the width of the provision from the Constitution of the Republic of Macedonia dealing with retroactivity, can only indirectly influense the relation in the criminal field, and they can not be emphasized as a reason for drawing conclusions for incompatibility of the domestic legal order with the European Convention. But the general debate on compatibility of the two legal orders must be exploited at least to note legal issues which should be debated on and tackled within the framework of a possible future revision of the Constitution.

RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE, HOME AND CORESPONDENCE, RIGHT TO MARRY AND FOUND A FAMILY AND EQUALITY OF SPOUSES (ARTICLES 8 AND 12 OF THE CONVENTION AND ARTICLE 5 OF PROTOCOL No. 7)

According to Article 8 of the Convention, "*Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of rights and freedoms of others*".

The very substance of Article 8 of the Convention consists of guaranteeing the right of each individual of having his private and family life respected. But however, this provision does not intend to define those rights, leaving to member states to do that in their own legal orders pursuant their respective political systems, but respecting commonly accepted norms of international law.

1. Right to private life

a) Non-interference by the state in exercising private life

Although, the fundamental goal of this provision being to provide non-interfering of public power in exercising private and family life, paragraph 2 of Article 8 of the Convention makes this right relative, envisaging cases when such interference is possible: these cases must be determined by law and connected with undertaking measures in the interest of state and public security, social welfare of the country, protection of public order and protections of rights and freedoms of others in a democratic society. With the aim of securing vested rights from a

possible abuse of power by authorities, the above mentioned possibilities of restricting or depriving of the right to private and family life determine the kind and scope of measures the state may undertake.

Article 17 of the Constitution of the Republic of Macedonia guarantees "*the freedoms and confidentiality of correspondence and other forms of communications. Only a court's decision may authorize non-application of the principle of irrevocability of confidentiality of correspondence in cases where it is indispensable to a criminal investigation or required in the interest of the defence of the Republic.*" Pursuant Article 18 of the Constitution *"security and confidentiality of personal information are guaranteed. Citizens are guaranteed protection from any violation of their personal integrity deriving from the registration of personal information through data processing"*. Further, Article 26 guarantees *"inviolability of home. The right to inviolability of home may be only restricted by a court's decision in cases of detection or prevention of criminal offences or protection of people's health"*.

In order to justify the interference with the private and family life, home and correspondence, the state must show and prove that the interference in which the person is a victim is consistent with criteria stipulated by this article. This can be described as a test of consistence of the rules on interference with its purpose, necessity and proportionality. In other words, any interference in accomplishing one's own right to privacy must be consistent with the law. As the European Court of Human Rights has concluded in the case *Malone v. United Kingdom*, the term "consistent with the law" is not a simple invoking to the domestic law, but at the same time, it refers to the quality of the domestic law, because it requires its compatibility with the rules of the Convention.

In this sense, the European Court has developed two principles: first, the law must be available to the citizens in a way they can be aware of the rules applicable to their individual cases, which means that the interference with the right to privacy must be prescribed by law, and not only practiced by public authorities; second, the law must be sufficiently precisely defined, so that citizens can bring their conduct in line with it, i.e. to enable them to predict the consequences of their misbehaviour. Even in cases where certain persons are watched and their telephone conversation tapped for the purpose of investigation for serious criminal offences, or for the purpose of protecting the national security, the law must clearly and precisely stipulate conditions under which and goals for which such an authorization by the state can be carried out in a legal manner. All this is

for the purpose to secure a mechanism for a control over the authorities' conduct.

Even when the interference with private life and family life has been sufficiently determined and it meets the above mentioned criteria, a clearly expressed proof that the interference has been undertaken for precisely defined purposes - national and public security and safety, threat to the economic well-being of the country, prevention of unrest and crimes, protection of health and public moral and protection of other people's rights and freedoms (Article 8 paragraph 2 of the Convention) - must be provided.

Even when the interference with the right to privacy is based on law and is justified by the ends desired to be achieved by it, still it must be proved "the necessity of such an interference in a democratic society". As there are different notions of democracy, thus the necessity for interference can be differently interpreted. In settling these questions, the European Court has been trying to avoid the interpretation of these notions, just due to the above mentioned reasons. It is up to the state to ensure the public interest, which can be accomplished both at the detriment of the state and of the individual. The price for this must not be higher than the one indispensable for achieving these state's goals. It means that the interference with privacy must be proportional to the legitimate goals the state is attempted to achieve.

Unlike sublimity of provisions from the European Convention, the Constitution of the Republic of Macedonia links the right to privacy and its protection to guaranteeing of: private and family life of an individual and his dignity and reputation (Article 25), freedom and confidentiality of correspondence and other forms of communication (Article 17), security and confidentiality of personal data (Article 18) and inviolability of home (Article 26). These provisions confirm the positive obligations of the state in creating legal rules not preventing people in choosing the way of their private life and their family relationships. These rules must also secure respective legal remedies in cases of violation of the right to privacy and family life, as well as in cases of revealing information which could affect private life of people.

b) Search and seizure

Search and seizure, as legal authorization of police, might pose a serious violation of integrity of an individual from the interference by the state with his right to privacy. Determining mechanisms of control in the field, Article 26 of the Constitution of the Republic of Macedonia guarantees the inviolability of home. And yet, it can be restricted by a court's order in the interest of detecting and preventing criminal offences or protection of public health. The Chapter XVIII of the Draft Code on Criminal Procedure, within the framework of investigation activities, determines conditions under which search of a person or his home can be undertaken and carried out. So, Article 201 paragraph 1 stipulates: *"Search of the home and other premises of the accused or other persons can be undertaken if it is likely that by the search the accused shall be caught or traces of the criminal offence or articles relevant for criminal proceedings shall be discovered".* Paragraph 2 of this article stipulates search of a person only if the discovery of traces or articles relevant for criminal proceedings is likely.

Any penetration in a private home without a court's order is unconstitutional and unjustifiable in principle. That's why, Article 26 of the Constitution and Article 202 of the Draft Code on Criminal Procedure stipulate that *"the search must be ordered by a court".* Conditions envisaged by Article 201 of the Draft Code must exist for issuing an order for search and seizure. The only exception from the general principle of court's control over the penetration in one's home by police has been envisaged by Article 205 and Article 147 paragraph 1 of the Draft Code on Criminal Procedure: *"Authorized officers from the Home Office may enter one's home and other premises without a court's order if a person, who by order of the court must be arrested or forcefully fetched, is there in".*

In carrying out search, police may seize anything they have been authorized by a court order for search. According to the Draft Code on Criminal Procedure, *"Police can temporarily seize only those articles and papers referring to the goal of search in that case only"* (Article 203 paragraph 8), as well as *"articles not referring to the criminal offence the search has been ordered for, but which hint to another criminal offence being persecuted for ex oficio"* (Article 203 paragraph 9). Within the framework of activities being undertaken for the purpose of detecting an offender of crime (Article 124 paragraph 1), or due to the danger of postponement (Article 147 paragraph 1), *"police may temporarily seize articles which according to the criminal law should be seized or which can serve as and evidence in the criminal proceedings* (Article 206

paragraphs 1 and 4), *if there exist foundation for suspicion that a criminal offence, the offender of which is being persecuted for ex oficio, has been committed".*

The foundation for the belief that the seized articles can serve as an evidence in the criminal proceedings, as well as the necessity for their seizure due to the danger of their being hidden, lost or destroyed, is the only circumstance justifying previously mentioned authorization of police. It means that the seizure shall be legal only if the person possessing those articles has been accused or in other way has been involved in the criminal offence in question, or he has been connected with the accused person.

Along with the search of one's home, the Draft Code on Criminal Procedure has stipulated provisions covering search of a person for the purposes of the criminal proceedings. According to Article 201 paragraph 2 "*Search of a person shall be undertaken when it is likely that it will help finding traces or articles relevant for criminal proceedings".* Article 202 paragraph 1 offers a guarantee against arbitrary search trough the stipulation that search and seizure of articles can be ordered by court only. In cases of search without a court's warrant, as an exception from the fundamental rule, these guarantees are sufficiently strong to confine the search to the scope of conditions stipulated by law. Those conditions are: *"carrying out an order for arresting or detaining when the person is being suspected of possessing a weapon or any tool of assault, or is being suspected of throwing away, hiding or destroying articles to be seized from him as an evidence in criminal procedure"* (Article 205 paragraph 2).

Article 204 offers additional protection of possible violation of privacy and home, by envisaging for the officer carrying out the search an obligation to make up a minutes for the articles and papers being seized. The aim of this minutes is tripled: first, enables the person searched to have a copy of the minutes an use it in the procedure conducted against him; second, the minutes enables the legality of police officer's behavior to be controlled; and third, it makes publishing and analyzing statistical reports on the number of searches possible.

Unlike the provisions of the Draft Code on Criminal Procedure, which are clear in regard to the authorization of police to carry search of a person, Article 32 of the Law on Home Affairs stipulates: *"Authorized officers conduct search of vehicles, persons and luggage when it is in the interest of the security of the Republic, detecting or catching of an offender of a criminal offence or minor offences, protection of life,*

personal safety and property of citizens, preserving public peace and order, traffic safety on the roads or safety while crossing the state frontiers". The lack of precise determination of conditions for carrying out such activities by police offers prospects for misuse of authorization and violation of the right to privacy and other rights linked to it.

c) Bodily search

The interference with private life of a person can be conducted by the bodily search of the accused and by subjecting him to medical or psychiatric examination, too. In view of this, the European Commission of Human Rights has adopted a stance according to which: *"Compulsory medical intervention, including the least relevant, must be considered as an interference with privacy".*

The bodily search without the consent of the accused, taking blood tests and other medical activities, which according to the medical profession are being carried out in the interest of criminal procedure, can be considered as compulsory medical intervention and as an interference with right to privacy. But however, they can be easily justified and covered by Article 8 paragraph 2 of the European Convention. For instance, in the cases *X. v. Netherlands* and *X. v. Austria*, the European Commission has justified taking blood test simply for the purpose of protection of the rights and freedoms of others.

The Commission has similar stance in cases of taking fingerprints from the accused. According to Macedonian legislation (Article 143 paragraphs 2 and 3 of the Draft Code on Criminal Procedure) fingerprints can be always taken from a suspect or any other person who might have got into touch with articles bearing fingerprints and the origin of which is necessary to be determined. The Code has not stipulated that taking of fingerprints can be conducted on the basis of consent, but it is obligatory for the person fingerprints being taken from when condition from the law have been met. In the case *Mc Veight O'Neill and Evans v. United Kingdom* petitioners complained that police violated their right to privacy by taking fingerprints from them after they had been arrested at the airport of Liverpool. The European Court of Human Rights has concluded that such a violation has not been done, and has justified such an activity by police by the necessity of prevention of crime in a democratic society, and for the purpose the person having committed the crime to be identified.

d) Confidentiality of correspondence

The Constitution of the Republic of Macedonia contains two provision guaranteeing privacy of communication and security and secrecy of personal data. Thus, Article 17 guarantees *"freedom and confidentiality of correspondence and other forms of communication.* Article 18 guarantees *"security and confidentiality of personal data and protection of citizens against any violation of their personal integrity from the registration of personal information through data processing".*

Additional protection of privacy has been guaranteed by articles 147, 148, 149, 150, 151 and 152 of the Criminal Code, through sanctioning violation of confidentiality of correspondence or any other means of communication, unauthorized publication of personal data, abuse of personal data, unauthorized revelation of secrecy and unauthorized tapping and recording.

These provisions are in a complete consistence with jurisprudence of the European Commission and Court in this field, and at certain points they are a step forward. In the case *Malone v. United Kingdom* the petitioner complained that his telephone conversation had been tapped and his own and his wife's correspondence had been looked through. The general stance both of the Commission and the Court was that both the tapping and looking through their correspondence was against Article 8 paragraph 1 of the European Convention and they posed violation of the right to privacy of the petitioner. In the above mentioned case the European Court has confirmed its previous stance on tapping of communications by police set out in the case *Klass v. Federal Republic of Germany: "The power of secretly watching citizens is a characteristic of totalitarian countries and it can be tolerated according to the Convention only given they have not gone to far in its practicing and only on condition it is in the interest of protection of democratic institutions".* The Court has examined the plight the democratic societies were in and their exposition to much sophisticated methods of espionage and terrorism, which produce the need for a secret surveillance over subversive elements, and it has concluded that: *"Authorization for secret surveillance over correspondence, telephone conversations, telecommunications by law is possible under exceptional circumstances and if they are necessary in a democratic society in the interest of national security and for the prevention of crime".* It is up to the member states to determine conditions under which the system of secret surveillance shall work. But, in the

Court's opinion, they are not allowed to adopt any possible kind of such conditions they reckon to be convenient. It is necessary to meet certain standard which could make efficient guarantees against any abuses possible.

Actually, such activities by police must be scrutinized closely by standards enshrined in Article 8 paragraph 2 of the Convention, according to which, tapping of communication must: first, be necessary in a democratic society in the interest of national security (the cases *Kruslin v. France* and *Huvig v. France*); second, be directed at preventing and detecting crime; and third, be directed at protecting economic well-being of the country.

For the purpose of restricting possible malpractice by police, every act of surveillance must be subject to court's control. This is the very essence of the provision of Article 17 paragraph 2 of the Constitution of the Republic of Macedonia, which permits the deflection from the principle of confidentiality of correspondence only upon court's order if it is indispensable for the purpose of conducting criminal procedure or if it is in the interest of defence of the Republic. But however, the Constitution has confined itself to the letters only and does not list other forms of communication. It is very difficult to believe that the basis of this constitutional provision poses the conviction that only by letters mentioned values can be endangered, and not by other means of communication. In other words, it is difficult to explain why the court's order as a condition for the exception from the principle of confidentiality of correspondence has been envisaged only when letters are in question, and not other means of communication. Article 209 of the Draft code on Criminal Procedure tackles such a dilemma providing for that surveillance over telegrammes and other communications extended to the accused are possible only on order by court. Whether or not this statutory provision breaches Article 17 of the Constitution of the Republic of Macedonia remains a question of the domestic law, and it does not affect its compatibility with Article 8 of the European Convention.

The constitutional guarantee on inviolability of the freedom of confidentiality of correspondence and other forms of communication (Article 17 of the Constitution of the Republic of Macedonia), and especially the interpretation by the Constitutional Court of Macedonia of this provision, according to which the exceptions from this guarantee have been permitted when letters are in question only, and not other forms of communication, have prevented the Draft Code on Criminal Procedure

from regulating some new methods in the struggle against organized crime. It is a word of specific actions consisting of tapping, secret stalking and photographing and filming, employment of pitched in detectives, etc., actions which otherwise would be permissible only by court's order, in an exactly defined procedure and only for exactly defined criminal offences, as a way of securing guarantees against their abuse and misuse.

International law on human rights has increasingly been paying special attention to this very sensitive matter. On one hand it has been recognized that such methods pose a danger to democracy for the sake of its protection. On the other hand, the European bodies for the protection of human rights are entirely aware of the fact the democracies nowadays are being jeopardized by highly sophisticated forms of espionage and terrorism, owing to which states must possess efficient means and methods to combat these threats. Thus, a reasonable compromise between the requirement for the protection of a democratic society and the requirement for the protection of an individual's rights and freedoms must be achieved.

But however, the legislation of the Republic of Macedonia, propped up by the mentioned decision of the Constitutional Court (U No.146/93 of October 13th, 1994), unreasonably and unnecessarily makes the individual's rights and freedom in that field untouchable and absolute ones, at the detriment of efficient struggle against organized crime, terrorism and espionage.

e) Personal data

Collection, storing, processing and usage of personal data represent a very important aspect of the right to privacy. The worry for the protection of privacy of citizens, in the circumstances of increasing possibilities for the state to watch over its citizens, represents a leading question for each developed industrialized society. In modern societies the individual is increasingly subject to surveillance through the use of date bases both in public and private sectors, bearing negative implications upon the quality of his life and upon the protection of his rights and freedoms.

Article 18 of the Constitution of the Republic of Macedonia represents the basis of control over the state and its institutions in watching its citizens. The Law on Protection of Personal Data ("Official Gazette of Republic of Macedonia" No.12/94) has been passed on this basis. Article

2 of the Law forbids illegal collection, processing, storing, usage and transfer of data; unlawful access to data and storing devices; casual or deliberate changes in personal data, as well as unlawful smuggling of data out of the country. Pursuant Article 4, compilations of personal data can be set up, run and preserved only on the basis of law or on the basis of written consent by the person they refer to. Article 9 of the Law guarantees that data from the compilations can be delivered or communicated only for purposes proscribed by law or arises from the written consent by the person they refer to. In other words, these provisions guarantee that data gathered for a person shall not be misused in order to affect his private life. Such guarantee seems to be more than necessary, because it is quite possible some false or irrelevant information to be utilized as a basis for making crucial decisions concerning one's life.

Such an example for the previously mentioned situation is the case *Leander v. Sweden*, where confidential information seriously affected the petitioner's life, because they were used as the basis for making a decision his application for an employment to be rejected on security grounds. The Commission and later the Court of human rights have concluded that the security system of the country offers sufficient effective protection against possible abuses and that the decision interfering the petitioner's privacy was indispensable for the interests of the country's security.

The Law on Protection of Personal data provides for a possibility the person for whom the compilation of data has been set up for to have an insight into it and to request a statement out of it (Article 17), as well as to have the compilation supplemented or some data the person reckons to be incomplete, incorrect or out of date, to be corrected or erased (Article 18). In this sense, in the case *Gaskin v. United Kingdom*, the European Commission has evaluated the interest of protecting the confidentiality of personal data in regard to the person's interest to have an access to them: *"The absence of any procedure which is to balance the petitioner's interest for an access to his file, contrary to the requirement for confidentiality of data, and giving automatic advantage to the file keeper over the petitioner's interest, is disproportionate with aims to be achieved, and it can not be qualified as necessary in a democratic society"*. In this case the principle of proportionality, as a general principle of the Convention, has been confirmed. This doctrine states that methods adopted in order to achieve any goals which endangers rights of individuals must be proportionate to the value to be accomplished. The doctrine operates at three levels: first, a general one, requiring rationality in vesting authorization to public servants, which must be proportionate to

the aims desired to be achieved; second, a level of implementation, requiring an institutional system providing sufficient guarantees of citizens' interest affected by authorities action; and third, each authorities' practice must be governed by the respective aim.

The legal system of the Republic of Macedonia has not been developed yet at the second level of operationalization. This particularly refers to the irrational delay of passing the law on public attorney (ombudsman), an obligation which arises from Article 77 of the constitution of the Republic of Macedonia. According to the Constitution, the public attorney must represent an independent body evaluating the interests between the need of an access to confidential data and the need of protecting national security.

Article 10 of the Law on the Protection of Personal Data contains an additional guarantee that files on personal data shall not be kept beyond the need they have been compiled, processed and kept: *"Keeping and usage of date ceases when the need of it has ceased to, or upon expiry of legally determined period of time it has compiled for".* Established in this manner, personal data protected must be respected especially by police and the judiciary, the European Convention insists on in particular, having in mind the way respective services work and the danger upon privacy of individuals their authorizations bear. The Law on the Protection of Personal Data quite successfully has implemented standards in this sphere and it provides just and fair information practice in administering files of personal data. Law guarantees are compatible with the recommendation by the Council of Europe for the protection of personal data gathered by police, which seem to be a very good guarantee that privacy of an individual in the sphere of compiling, processing and keeping personal data shall be properly protected, thus avoiding the breach of Article 8 of the European Convention.

In this context it must be mentioned the files containing names and addresses of citizens doesn't mean interference with the private life of individuals guaranteed by Article 8 of the convention. This issue in the Macedonian legislation has been regulated by the Law on the Registry Records. This Law stipulates the basic personal data must be entered into the register of births, register of marriages and register of deaths (Article 1). The only flaw that can be noticed in this law is that the Home Office is authorized to keep these registers (Article 2), that enables constantly conducting this job without a sufficient control by competent and independent judicial bodies.

e) Sexual aspect of private life

The sexual aspect of private life occupies a significant place in the jurisprudence of the Convention's organs in Strasbourg, among which the question of legalization of homosexuality is of particular interest. General prohibition of homosexuality has been accepted as a justified one in earlier adopted decisions by the European Commission, and they were base on the need of protecting health and public morals in the countries in question. Later decisions both by the Commission and the Court have accepted the reality of legalization of homosexuality in most European Countries. Thus, the general prohibition on sexual intercourse between persons of the same sex has been abandoned, but the interest has been switched to the prohibition of homosexual intercourse between person under 21 years of age. In two cases before the Commission and the Court, petitioners complained about the prohibition on homosexuality between person under 21 in Great Britain and Northern Ireland, and that it was contrary to Article 8 of the convention guaranteeing privacy of an individual's life. In either cases, both the Commission and the Court have justified the prohibition of homosexuality among persons under 21 years of age by the "protection of rights and freedoms of others", although in the second case they have concluded that penalization needn't be justified by the protection of public morals in a democratic society. (*Appl.N0. 7215/75, X. v. United Kingdom and Appl. 7525/76, X. v. United Kingdom*).

Article 25 of the Constitution of the Republic of Macedonia guarantees the respect and protection of privacy of one's personal and family life and dignity and reputation. Pursuant this provision, the Criminal Code does not provides for a possibility of criminalization of homosexuality, but yet, it generally penalizes procuring and enabling sexual acts with a juvenile (Article 192). In that context the homosexual intercourse with juveniles can be led under. Thus, solutions in the legal system of Macedonia governing homosexuality are in complete consistence with general stance deriving from the jurisprudence of the European Commission and Court, according to which, "the prohibition of homosexual intercourse regardless of others' rights means interference with private life from Article 8 of the Convention".

2. Right to marry and found a family

a) The nature of the wedlock and family

According to Article 12 of the Convention *"Men and women of marriageable age have the right to marry and found a family, according to the national laws governing the exercise of this right".*

Article 5 of the Protocol No. 7 guarantees that *"Spouses shall enjoy equality of rights and responsibilities of a private law character between them , and in their relation s with their children, as to marriage, during marriage and in the event of its dissolution. This article shall not prevent States from taking such measures as are necessary in the interests of the children".*

The very essence of the guarantee contained in Article 12 of the Convention is to provide the right of marriageable men and women to get married and found family according to conditions and restrictions provided by national laws. Unlike Article 8 of the Convention, this provision explicitly refers to national laws as sources of rules on wedlock and foundation of family, but at the same time it binds member states to respect common norms on the accomplishment of the essence of this right. This does not mean that the space left to national legislation in regulating this issue is unrestricted, regardless that Article 12 does not contain restrictions as Article 8 does.

According to Article 40 of the Constitution of the Republic of Macedonia, *"The Republic provides particular care and protection for the family. Legal relations in marriage, family and cohabitation are regulated by law. Parents have the right and duty to provide for the nurturing and education of their children. Children are responsible for the care of their old and infirm parents. The republic provide particular protection for parentless children and children without parental care."*

Basic approach of the Constitution concerning the complex of social relationships deriving from wedlock and family life is to fit this within the constitutional framework, with a particular emphasis on the role of the republic on providing special care and protection of family, parentless children and children without parental care. This constitutional responsibility the Republic can conduct through state organs, institutes and institutions determined by law.

Bearing in mind that the basic function of a family is to secure birth of children and their upbringing, support and education, constitutional provisions covering the right to freely decide on procreation of children also refer to the right to get married and to found family. According to Article 41 of the Constitution *"It is a human right freely to decide on the procreation of children. The Republic conducts a humane population policy in order to provide balanced economic and social development"*. The aim of this constitutional provision is not to enable an outside interference with the will of spouses on the number of children and the time of their birth, but on the contrary, to emphasize the humane feature of the policy which is to be conducted in accordance with economic and social conditions in family planning based on scientific knowledge on free and dutiful parentship. This constitutional provision is also binding the state to secure material support in conducting humane population policy, in the kind of certain social benefits, children allowances and educational services. In other words, conducting population policy does not consist of restrictive measures, such as prescription of compulsory contraceptives, sterilization or abortion, but in prescribing and rendering certain benefits stimulating or discouraging birth of children, regardful of the aims desired.

Leading stance of the control organs of the Convention (*Appl. No. 1256*) is that: "National law in establishing these rights may regulate their enjoyment, but they may not exclude them entirely or influence on their substance. Victims by such measures are also empowered to invoke to Article 3 of the Convention, and in the case of abortion, to Article 2 as well".

Respect and protection of privacy and family life means prohibition of interference by anyone (individual, group or state body) with one's family relationships - between spouses and between parents and children, as well as with the manner of leading their lives and their house rules, except when the exercise of these relationships violates the norms in the society. The guarantee of this right, also includes in itself prohibition of disclosing publicly of developments and events within the family life.

The principles on which the Law on Family Relationships ("Official Gazette of the RM" No. 80/92 and 9/96) is based arise from the Constitution, and they are a reflection of views on family and family relationships in the modern world. The legislator has defined family as life community of parents and children and other relatives living within a common household. It also has determined principles which the family relationships are based on. They are as follows: equality, mutual respect,

mutual assistance, support and protection of adolescent children (Article 3 of the Law).

According to the Law, the marriage poses a voluntary life community between the man and the woman, in which the interests of spouses, the family and the society, are being exercising, and within which relationships between spouses are based on free decision by the man and the woman to enter into wedlock. Notably, the Law has defined the marriage as a life community between persons of different sexes, the function of which, among the rest, is to procreate descendants. Inability of procreation descendants may be the reason for invalidity of marriage.

Maturity of persons entering into wedlock, save the freely expressed will before a competent authority, also represents a condition for concluding a wedlock. By their nature, these conditions do not pose a violation of Article 12 of the Convention, because that very provision allows the right to marriage to be exercised under national laws. Besides, they do not represent an interference with privacy and family life in the sense of Article 8, because these conditions are directed at protecting health and morals of persons entering into wedlock. Namely, the formulation from the Convention "men and women of marriageable age have the right to marry" unequivocally leads to the conclusion that: first, it is up to the national legislation to define what "marriageable age" means; second, the marriage is a life community between persons of different sexes capable of producing descendants and it does not include homosexual liaison. The latter ones much more belong to the right to privacy than to the right to marriage. In this sense, in the case *Van Oosterwijk*, the Commission has emphasized that *"marriage requires the existence of relationships between two persons of different sexes... But however, member states are allowed to exclude from the marriage persons whose sexual condition by itself means inability of dissemination, either absolute (in the case of trans-sexuality) or in relation with sexual condition of the other spouse (in the case of marriage of persons of the same sex). The right to marriage guaranteed by Article 12 refers to traditional marriage between persons of different biological sexes. This derives also from the contents of Article 12, which implicitly protects that marriage which is the basis of the family".*

Reckoning that in practice it is possible a person without distinct sexual features (hermaphrodite) to enter into wedlock, or both of persons entering wedlock to be hermaphrodites, Macedonian legislation has stipulated that in such cases the validity of such a wedlock may be called into question. Pursuant Article 35 of the Law on Family Relationships,

such a wedlock is null and void, because it has been concluded under delusion in regard to sexual condition of the future spouse. The spouse in question is the only person who has an active legitimation for annulment of such a wedlock, and he or she can file a lawsuit within a year after becoming aware of hermaphroditism of his or her spouse.

The maturity of persons entering into wedlock, as a substantive condition for concluding a marriage prescribed by national legislation, does not represent violation of Article 12, because it is up to the national legislation to prescribe conditions for entering into wedlock. Of course, national legislation is not absolutely free in prescribing those conditions, because it must stick to commonly accepted norms. The fact that Article 12 places the very right to marriage first, and the authorization of national legislation to define conditions under which that right can be exercised, means by itself that national legislation can not call into question the substance of the right (the *Hammer* case). According to articles 16 and 28 of the Law on Family Relationship, a person out of age (18 years) can not conclude a wedlock. But a competent court may allow a person having completed 16 years of age to conclude a wedlock, given the court asserts that that person has achieved such a bodily and psychological maturity needed for exercising rights and responsibilities arising from the marriage. Maturity (18 years of age) is needed as a condition the persons entering into wedlock to be able to understand the meaning, consequences, rights and responsibilities arising from marriage. This legal condition is in consistence with the formulation used in Article 12 of the Convention "marriageable age".

Future spouses must express their will for concluding a wedlock themselves before competent authority, in a manner and form prescribed by law. On special occasions, the competent authority may allow the wedlock to be concluded with the presence of only one of future spouses and the proxy of the other spouse.

The Law on Family Relationships provides a relatively small number of marital obstacles (adolescence, existence of another wedlock, mental illness, mental retardation, kinship and lack of will), which is in spirit of respect of private life and protection of health and morals of individuals. In the Commission's opinion, "marital obstacles stipulated by national law in most of member states do not violate the substance of the right to marriage from Article 12 of the Convention, except in those cases where persons with limited mental abilities and on bad health and psycho-physical condition have been stripped of their right to marriage, having in

mind that these persons can be reckoned as capable of expressing their own will to conclude a wedlock.

According to Macedonian legislation, the mental illness and mental retardation are considered to be absolute and unavoidable marital obstacle, which causes marriage to be null and void. From socio-medical point of view, such marital obstacles pose immaturity to conclude marriage and they can be judged under the condition "marriageable", as a basic condition for accomplishing the right to marriage pursuant Article 12 of the Convention. That's why, the stipulation of such a marital obstacle is not contrary to Article 12 of the Convention.

Pursuant Article 34 of the Law on Family Relationships, as natural ground for cessation of marriage shall be deemed death of one of the spouses and declaring the missing spouse as dead. Annulment and divorce are considered to be legal grounds for cessation of marriage.

In the opinion of the Commission and the Court (the case *Johnston*) Article 12 of the Convention is not binding member states to stipulate legal grounds for marriage cessation (as it is the case with the Republic of Ireland, where divorce is not permissible), nor to stipulated additional rights to spouses in case of cessation of marriage (Article 5 of the Protocol No. 7). But however, if national law permits divorce, Article 12 of the Convention guarantees to the divorced spouses the right to marry again without any irrational restrictions.

The Macedonian legislation has stipulated divorce as cessation of marriage and at the same time it secures the right to marry again without any restrictions. Pursuant Article 39 of the Law on Family Relationships, the marriage can be divorced by mutual consent of spouses, if the court finds that their consent was given freely and unhesitantly. This secures equality of spouses in their interrelations, stipulated by Article 5 of the Protocol No. 7, in the field and in the course of divorce. If the spouses have their common adolescent children, they are bound by the Law to agree upon the manner of exercising their parental rights.

According to Article 40 of the Constitution of the Republic of Macedonia, the Law on Family Relationships has for the first time regulated out-of-wedlock community and it equalizes it with the wedlock in regard to the right to mutual support and property acquired in the course of duration that community. Thus, the Law follows and accepts standards from Article 12 of the Convention, in the sense of the right to found a family not only through marriage, but also through the factual community

between a man and a woman which has become informally and by their freely expressed will. According to Article 13 of the Law on Family Relationships, the life community between a man and a woman which has not been concluded according provision of that law (out-of-wedlock community), and which has lasted at least for a year, shall be equalized with wedlock in the view of the right to mutual support and property acquired in the course of duration of that community.

b) Parentship, children born out of wedlock and adoption

The legislation of the Republic of Macedonia stipulates that parentship begins with the birth and adoption of children (Article 7 of the Law on Family Relationships). The Law has envisaged two types of adoption: complete and incomplete one. Complete adoption creates relations equal to those created by birth. The basic consequence of it being non-dissolution of this kind of adoption. In that case adopters are registered in the main register of births as parents, thus the adopted child loses all hereditary rights in relation to previous parents, and acquires those same rights in relation to the adopters. Complete adoption can not be dissolved, but it can be declared null and void in case of formal legal grounds - when the child is retarded in his psycho-physical development, and adopters were not aware of it at the time of adoption. Procedure of adoption begins and ends before the Centre for social work, without any presence of the public.

Above mentioned solutions in the legislation of the Republic of Macedonia in view of exercising the right to family life by adoption are in consistence with the standards arising from articles 8 and 12 of the Convention. These provisions from the Convention encourage the foundation of family through exercising the right to marry, not excluding the possibilities of founding a family by other ways and means, as adoption and out-of-wedlock community are. In this sense, the Commission stance is that "family can also be founded by way of adoption children, but it does not derive from Article 12 directly. ... It is up to national bodies to regulate conditions on adoption, assessing the rights of adopters in regard to the rights of the children, which must have the priority".

c) Equality of spouses

The requirement for equality of spouses, imposed by Article 5 of the Protocol No. 7, has been operationalized in the legislation of the republic of Macedonia in the following directions: in exercising parental rights, in relation to one's surname, in the independence of spouses in choosing job and profession, in deciding on the place of common residence, in their property relationships etc.

Articles from 203 to 207 of the Law on Family Relationships regulate property relationships between spouses. They stipulate two types of property: individual property and common property. The latter one is governed and disposed commonly and by consent of the two spouses. In case of divorce, their common property shall be divided by court, as a rule, in equal parts.

One of the spouses having no means of existence and incapable of working or unemployed against his will is entitled to support by his or her spouse in proportion to his or her abilities, except in those cases where the spouse requiring support has rudely and inconsiderately behaved, or in those case where meeting his or her request would mean an apparent injustice towards her or his counterpart (Articles 185 to 193 from the Law on Family Relationships).

Parentship in the legislation of the Republic of Macedonia has been regulated in such a way that secures primarily the protection of the interests of children. Pursuant article 46 of the Law on Family Relationships, parents are obliged to support their adolescent children, to take care of their lives and health, to enable them for self-sufficient life and work and to care for their education, schooling and professional training. Pursuant the principle of equality of spouses in exercising parental rights, the Law secures the mother and the father to exercise their parental rights and obligations commonly and by mutual consent. In cases where parents live apart, parents commonly and by mutual consent decide upon the way of maintenance of personal relations between children and parents, and in case of absence of consent or it is being to the detriment of their children, it shall be decided by court.

d) Restrictions of parental rights

For the purpose of protecting the interest of adolescent children, the Law has stipulated the institutions deprivation or restriction of one's parental rights, in the cases where those rights have been abused or parental obligations have been blatantly neglected. The Law has also stipulated the institution of supervision over the exercise of parental rights by the Center for social work. All these institutions pose a form of exercising of the positive obligation by the state arising from Article 5 of Protocol No. 7 to take such measures as are necessary in the interests of the children.

According to practice by the European Commission and Court, the decision on dissolving the family, even temporarily, must be substantiated by sufficiently firm and relevant understanding of the interests of the children. In *Erikson and Anderson* case, in which it was a word of injunction of not-allowing access to the children being kept, the Court has found omissions in undertaking necessary measures in uniting the children with their biological mother, and that those decisions were not to be deemed as necessary in a democratic society.

The state organizes and arranges its care for family and, particularly, interests of the children, through the following organs: Centre for social work, appropriate ministries, courts and the public prosecutor. Mediation by the state in family relationships is restrictively determined by law and reduced only to a an extent necessary for the protection of the family, health, dignity, morals and protection of rights and freedoms of others, in the spirit of paragraph 2 of Article 8 of the Convention. According to Macedonian legislation, the Center for social work place an emphatic role concerning relationships between parents and children, adoption, custody and the like connected with the protection of the interests of children. The public prosecutor has some authorization when it is a word of annulment of marriage (Article 35 of the Law), being authorized to initiate a procedure on the annulment of marriage when there exist marital obstacles and to suggest measures on keeping, education and support of children of spouses whose wedlock is being annulled.

It arises from the analysis of constitutional and statutory provisions of the legislation of the Republic of Macedonia concerning wedlock and

family relations, that they secure implementation of standards from provisions from articles 8 and 12 of the Convention and Article 5 of Protocol No. 7, as well as from the practice of European Commission and Court in regard to family life, right to marry and equality between spouses, and that they are in consistence with them.

FREEDOM OF THOUGHT, CONSIENCE AND RELIGION (ARTICLE 9 OF THE CONVENTION)

Article 9 of the Convention on Human rights in an extremely extensive manner, i.e. without any defining of the meaning of notions used, guarantees the freedoms of thought, conscience and religion. Actually, it s a question of wide range of intellectual, psychological and spiritual activities, which have a very large scope of manifestation, due to the fact that they are substantive features of each human being. Article 9 of the European Convention deals with a complex issue, comprising the following rights as its components: right to free thought; right to free conscience; and right to religion. On its part, the right to religion implies enjoyment and practicing of the right to change a particular religion or conviction and the right freely, alone or together with others, publicly or privately, to manifest one's own confession or conviction by way of practice of religion, religious teaching, religious ceremonies and rituals.

1. The right to free thought

The right to free thought, as all other rights guaranteed by the European Convention on Human Rights, has been extraordinarily extensively formulated, without any additional qualifications. It means that Article 9 of the Convention covers literally all kinds and qualities of thought, stance or view, regardless of the fact that the European Commission, in the case *Arrowsmith*, has examined if pacifism can be led under Article 9, which implies somewhat a more restrictive scope of this article. This rights means prohibition of any kind of pressure upon a person with the aim of making him or her change his or her attitude or conviction. Such a treatment is not only contrary to Article 9, but to Article 3 of the European Convention as well, because it a *par excellence* inhumane and humiliating conduct.

The constitution of the Republic of Macedonia guarantees the right to free thought in a common way by Article 16 paragraph 1, along with

some others quite similar to it. They are further operationalized by a series of provisions incorporated in various laws. In comparison with Article 9 of the European Convention, Article 126 paragraph 1 of the Constitution of the Republic of Macedonia does not contain any restrictive clause. On the contrary, Article 54 paragraph 1 of the Constitution of the Republic of Macedonia prohibits any restrictions of the right to free thought, even in a war or in emergency state. This fact is of a particular importance, because all cases dealt with before the Commission and the Court referred to improper operationalization of Article 9 paragraph 1 of the Convention in the legislation of some countries.

The Criminal code of the Republic of Macedonia, in principle prohibits any kind of coercion, therefore and any force with the aim of changing certain attitudes or conviction of people. The Law on Legal Status of religious communities prohibits any action of coercion upon a citizen with the aim of his joining a particular religious community, to remain its member or to leave it.

The Commission of Human Rights has come to a conclusion that the prohibition on exercising a certain profession exclusively on the basis of the fact that the person in question has a particular political or philosophical attitude or conviction, i.e. the obligation for the person to reveal his political or religious conviction in applying for a job, poses a doubtless violation of Article 9 of the European Convention (*Appl. 2854/66, H. and Y. v. Austria*).

2. The right to free conscience

The right to free conscience in most cases has been manifested as a right to objection on the basis of conscience in conducting of compulsory and common obligation to do military service. In Article 9 of the Convention, particularly in paragraph 2, no restriction in regard to exercising of the right to free conscience while doing military service has been mentioned. But however, in defining what is not meant by hard or compulsory work, in the context of classical military service, Article 4 paragraph 3(b) of the Convention reads a follows: *"any service of a military character or, in case of conscientious objectors in countries where they are recognized, service instead of compulsory military service".*

The analysis of provisions of the Convention, as well as the Commission's stance, shows that member states are not legally bound to stipulate the right to objection on the basis of one's conscience, i.e. alternative doing military service in their respective legislation. By this the Convention does not prevent member states from establishing their own defence systems and from determining duties of their citizens towards defence in a manner member states consider most convenient.

But however, beyond this restrictive approach, another tendency must be borne in mind being present in a large number of European countries, as well as in the work of the Council of Europe itself for decades. Namely, the attitude that the right to objection due to conscience to the citizen should be recognized apparently and surely is penetrating. In other words, there is a need of enabling citizens to do military service in a way different from the traditional one, that shall be in consistence with his conscience, his ethical, philosophical or religious convictions, in all cases where it can be assessed doing military service in a classical way would cause with the conscript hard mental or psychical derangement. The increase of the number of national legislation introducing the prospect of alternative doing military service (in the form of unarmed doing military service in the armed forces or in the form of so called "civil service") causes a slow but continuous process of accepting by the Council of Europe the need of debating and resolving such problems.

In the Resolution 337(1967) passed by the Parliamentary Assembly of the Council of Europe, as well as in the Resolution 816(1977), the following principle have been defined: *"Firs, persons liable to military service recruitment, who, owing to their conscience or profound conviction arising from religious, ethical, humanitarian philosophical and similar motifs, refuse to do military service, shall enjoy the right to be relieved from the obligation to do such service; and second, this rights shall be deemed as a logical derivation from the fundamental rights of an individuals in democratic and legal states, and which have been guaranteed by Article 9 of the European Convention on Human Rights".*

Later, in 1987, the Committee of Ministers adopted the recommendation No. P(87)8 dealing with the same question, defining and precisely elaborating fundamental principles in relation to the regulation of the objection on the basis of one's conscience. Nowadays, the right to objection on the basis of conscience and alternative military service exist in the legal systems of most member states of the Council of Europe. In this sense, it can be noted that this right somehow becomes a feature of modern legal state.

There are two fundamental forms of application of alternative way of doing the military service: According to the first, it can be done unarmed within the framework of armed forces, i.e. in a traditional way, except in view of carrying weapons and training for its use. According to the second one, it can be done as a civil service out of armed forces (which does not mean out of the defence system), most often in medical and humanitarian institutions. There exist two variants of doing civil service. The first is characterized by laying the accent on reexamination of foundations (trustworthiness) of the objection on the basis of conscience of military conscripts, while the second by the readiness and consent of the military conscripts to accept obligations deriving from their relief from doing military service (usually, it is a word of prolonged duration of civil service).

In the legislation of the Republic of Macedonia, Article 16 paragraph 1 of the Constitution of the Republic of Macedonia poses relevant source for objection on the basis of conscience and alternative doing military service. According to it, *"The freedom of personal conviction, thought, conscience and public expression of thought is guaranteed"*. According to Article 28 paragraph 1, *"The defence of the Republic of Macedonia is the right and obligation of every citizen"*. The second provision particularly shows that the defence is considered more widely than traditional military service, and which offers more than one forms of doing it by citizens.

At the time of preparing the Constitution of the Republic of Macedonia from 1991, an initiative for constitutional guaranteeing the right to objection on the basis of conscience was raised. Yet, it was decided that in the face of guarantee of freedom of conscience there is enough constitutional basis for additional regulation of this matter by law. But, the Law on Defence has only partly solved this matter. Namely, according to its Article 7, alternative doing of military service, in variant of unarmed service within the framework of the Army, may be founded only on religious grounds. Besides, such an alternative service lasts five months longer than the ordinary one.

It can be noted that the solution in the legislation of the Republic of Macedonia in regard to this matter is rather rigid and inflexible. Not allowing civil service, as the only true alternative to the military service, represents a certain deflection from the general attitude of the Constitution towards concept of human rights and freedoms. The guarantee of freedom of conscience and personal conviction becomes pointless and without any

sense if does not entail, among others, the rights to objection on the basis of conscience. In the Republic of Macedonia, not only there do not exist constitutional obstacles, but on the contrary, there is a constitutional obligation this right to be secured by law.

The existing legal solutions in regard to the objection on the basis of conscience lag behind European standards concerning this right at three levels: first, because they do not stipulate the civil service as a for of alternative doing military service; second, because they recognize only religious reasons for alternative military services, and not other profound personal convictions requiring refusal of armed forms of doing military service; and third, because they institute unequal status of military conscripts through different duration of service depending on whether the service is being done in a traditional way or in an alternative one.

In other words, if the very sense of the constitutional guarantee of conscience took into account all grounds conscience can be based on, then the legal negligence of all except the religious ones represents a failure of fulfillment of a constitutional order. Duration of alternative doing of military service according to Macedonian legislation seems not to meet the requirement from the Recommendation passed by the Committee of Ministers of the Council of Europe, which insists on rationality in setting differences between duration of armed doing of military service and duration of alternative one. This particularly, because of the fact that before entering into force of the Law on Defence, which is the first introducing alternative doing military service, the military service lasted 12 months only. This calls into question how much justifiable it is to impose 14 months long alternative doing of military service, which is 50% longer than the ordinary one, and two months longer than the former one. It is illogical training on the use, most often extremely sophisticated, arms to last shorter than the training on serving in the auxiliary services within the framework of the defence system.

It can be judged that the provision of Article 7 of the Law on Defence, which is to much general and imprecise, is not a sufficient normative basis for the implementation in practice of the above mentioned legal institute. The Law only mentions the basis for the refusal for doing military service in traditional way (religious grounds), the form of doing alternative military service (unarmed service within the framework of the Army of the Republic of Macedonia) and its duration (14 months). The Law does not further elaborate other rather important aspects of the alternative military service. It remains quite ambiguous which religious

groups and sects can claim this right, what organ, in what procedure and according to which criteria shall judge the basis of individual requests, whether or not there is any possibility for the use of any legal remedy etc. No regulations have been in the legal system of the Republic of Macedonia governing these and other important issues relating to alternative military service. In that way, the legal gap calls into question the very exercise of the right to alternative military service itself.

On the basis of the analysis done, it is necessary to recommend to authorities to reevaluate existing legal provision dealing with alternative military service, in light of the ratification of the European Convention, in particular. Although the Constitution of the Republic of Macedonia does not mention explicitly the objection on the basis of conscience in military terms, the sense of Article 16 of the Constitution entails an obligation by the legislator to respect and to secure all kinds of manifestations of one's conscience, and not only of some of them. It is now clear that within the framework of the Council of Europe the trend of liberalization and democratization, even in military sphere as traditionally rigid and unovert, becomes irresistible when it is a question of implementation of fundamental human rights and freedoms. Thought incomplete, the existing legal solutions do not withstand Article 9 of the European Convention, except in relation to Article 14, creating inequality among conscripts with religious convictions and conscripts with other kinds of conviction. But, regardless of that, existing legal solutions are hoped to be exposed to pressure by democratic public opinion, both domestic and international.

3. The right to religion

The right to religion includes: the right to poses and to enjoy certain religious conviction, the right to change of the existing religious affiliation, and the right to free manifestation, individually or in a group, publicly or in private, of one's own religion or religious conviction through worship, religious teaching and religious ceremonies and rituals.

The right to religious conviction is an integral part, or more precisely a special kind of the general right to freedom of thought. In this sense, Article 16 paragraph 1 of the Constitution of the Republic of Macedonia, guaranteeing the freedom of thought, at the same time guarantees the right to religion. But however, Article 19 contains a special provision securing the guarantee of the right to religion. According to this Article *"The freedom of religious confession is guaranteed. The right to*

express one's faith freely and publicly, individually or with others is guaranteed. The Macedonian Orthodox Church and other religious communities and groups are separate from the state and equal before the law. The Macedonian Orthodox Church and other religious communities and groups are free to establish schools and other social charitable institutions, by way of a procedure regulated by law". The law on legal status of religious communities takes over the contents of above mentioned constitutional provisions. The Criminal Code also contains provisions (Article 229) forbidding every behaviour directed at preventing participation in religious observances.

Apparently, the legislation of the Republic of Macedonia has incorporated all guarantees of the right to religion contained of Article 9 of the European Convention: the right to free individual worship and manifestation of religion or belief, the right to free worship in a group, the right to free worship and manifestation of religion or belief in public, the right to religious teaching, practice and observance.

The Law on Legal Status of Religious Communities does not stipulated any restrictions over the right to religion. Article 18 of the Law is the only exception, stipulated an obligation for foreigners, before doing their worship and observance at gatherings and in exercising their religious activities in general, to obtain permission from the local authorities in charge of home affairs. Such a solution is not in consistence with the generally used expression "everyone" from Article 1 of the European Convention. The convention does not protect the rights of nationals of a country only, but the rights of foreigners and persons without citizenship as well. As the mentioned restriction has been stipulated for foreigners only, it is in collision with Article 14 in relation to Article 9 of the Convention. Besides, it can hardly be justified by reasons mentioned in paragraph 2 of Article 9 of the Convention, which are to be prescribed by national legislation: interests of public safety, protection of public order, health or morals and protection of the rights and freedoms of others. The Convention and the practice of the Commission and the Court allow for legal restrictions over the rights of foreigners (Article 16 of the Convention), but only in cases when it is a matter of political activities of aliens, and not in cases when it is a matter of religious activities in general.

As the preparation for a new law dealing with religious issues is underway, special attention should be paid to the surmounting of the noted inconsistency with the European Convention.

FREEDOM OF EXPRESSION (ARTICLE 10 OF THE CONVENTION)

Article 10 of the European Convention on Human Rights guarantees the right to free expression. This is a complex right, compounded from following rights, explicitly indicated in the provision mentioned: *"freedom to hold opinions, right to receive and impart information and ideas, freedom from interference by authorities and, finally, right to enjoy these freedoms and rights regardless of frontiers"*. The right to free expression poses a premisis for a series of other rights and freedoms. That's why, the European Court of Human Rights has defined this right as *"one of the fundamental conditions for the development of democratic societies and for the development of each individual"* (*Handysude* case).

The right to free expression has been guaranteed by Article 16 of the Constitution of the Republic of Macedonia. Like Article 10 of the European Convention, the Constitution deems this right as a complex one, compounded with the following rights and freedoms: *"the right to express thought in public, freedom of speech, freedom of public address, right to public information, right to establishment institutions for public information, right to free access to information, freedom of reception and transmission of information, right to reply in the mass media, right to a correction in the mass media.*

Insight into the list of rights and freedoms guaranteed by Article 16 of the Constitution of the Republic of Macedonia shows that not only rights and freedoms explicitly mentioned in Article 10 of the European Convention are protected, but also those deriving from them. The right to free expression in the legal system of the Republic of Macedonia has been raised at constitutional level. More over, according to Article 54 paragraph 4), together with the right to life, the prohibition of torture, inhuman and humiliating conduct and punishment, the legal determination of punishable offences and sentences, as well as the freedom of personal conviction, conscience, thought and religious confession, it can not be restricted even in emergency situations provided for by the Constitution (martial or

emergency state). In this sense, the relevant provisions from the Constitution are a step forward in view of the protection of this right in relation to Article 10 of the Convention.

General provisions from Article 16 of the Constitution guaranteed the freedom of expression have been operationalized by laws concerning mass media, as well as by the Criminal Code. Unlike the Constitution, laws concerning different aspects of practice of the freedom of expression regulate a series of circumstances, forms and conditions on its restricting. Mainly such restrictions can be justifiable in the allowing national legislation to prescribe *"formalities, conditions, restrictions or penalties which are necessary in a democratic society in the interest of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary"* (paragraph 2 of Article 10 of the Convention).

Taking the general approach that the exercise of one's right and freedoms can not be at the detriment of others' rights and freedoms as a starting point, the Criminal Code has sanctioned as general criminal offences the following human behaviours: insult, defamation, revealing personal and family events and humiliation; as well as their specific forms - when committed through mass media (articles 172-182). Respecting the fact that the freedom of expression is an indispensable aspect of human self-affirmation provisions from the Criminal Code set out do not consider as criminal offences insulting statements done in scientific, literary or artistic criticism, criticism in carrying out one's office, journalist profession, in defending certain rights or justifiable interests, given from the way of expressing or other circumstances it does not turn out that it has been done with the purpose of humiliating. It is apparent that the law allows certain professions (authors, critics, journalists, politicians and the like) somewhat stronger guarantees of their freedom of expression due to the specific character of their profession and to the role they have to play in public life.

For the purpose of protecting health and morals, Article 193 of the Criminal Code defines as a criminal offence showing pornographic films to children.

The chapter of the Criminal Code covering criminal offences against honor and dignity (articles 178-182) referring to the violation of the repute

of the Republic of Macedonia, mockery of Macedonian people and national minorities in Macedonia, violation of the repute of a foreign state or international organization, causes a dilemma if citizens are restrained in their freedom of expression, of the right to criticize the authorities publicly and of the right to protest. Every society reckoning itself as a democratic one may not allow incrimination of the speech, because in that way it stifles public political activities of citizens as a fundamental condition for maintaining a healthy democratic system. Favouring such climate aims at accomplishing the following values: personal self-affirmation of each individuals, creation of a choice of different virtual policies with the prospect of choosing the best one, supervision over public authorities with the aim of making them more responsible and discouraging public authorities from abuse of their office.

A certain dilemma is caused by provision from Criminal Code (Article 184) dealing with insult, defamation and revealing personal and family events against the President of the Republic in relation to exercising of his powers, or against person being on the list of candidates during elections. The legislator seems to have privileged politicians in protecting their honor and dignity. Contrary to that, the European Commission considers that politicians must be prepared to accept much stronger criticism for their activities and statements than the mob. Such criticism must not be considered as slanderous if it offers sufficient foundations for suspicion in their personal reputation. The discussion on certain moral aspects of the personality of politicians does not affect their privacy, and it is in the interest of the public. The Commission has not accepted that the truth of criticism must be proved, because proving the truth of judgments on merits, as an essential element of the freedom of expression is impossible (*Sunday Times* case). In the Commission's opinion, *"The pluralism of thinking in democratic society is essential, including those being shocking and insulting, but which, basically are permissible. In order to protect the freedom of expression effectively, restrictions must be defined in the spirit of pluralism, tolerance and openness of views, especially when freedom of expression is involved in political pursuits".*

Such stance vests the concept of democratic society with independent meaning in assessing necessity and proportionality in restricting freedom of expression. How far can the wideness of freedom of expression go can best be seen in the case *Barfod.* In question is a journalist accused of hawing written allegedly slanderous article. In his article he criticized two judges who had left the judiciary in order to be employed with the local administration. The journalist was accused of

having expressed an opinion that the judges sacrificed their own independence and impartiality in favor of their comfort offered by their employment with the local administration. In the Commission opinion, such a statement affected a public interest, because it refers to the functioning of public administration and judiciary, but the necessity of interference with the freedom of expression had to be strictly observed: *"Even if the article had been interpreted as an attack upon integrity or reputation of both judges, common interest of permitting public debate on functioning of the judiciary prevails over the interest of the two judges to be protected from criticism as it had been done by the article".*

Unlike such stance by the Commission, giving advantage to the interest of debate on the work of public figures, the provisions from the Criminal Code of the Republic of Macedonia favor politicians and other public figures in relation to the mob, and all this in the situation where the neither the European Convention nor jurisprudence of its control organs insist on such additional forms and ways of protection of public figures from the exercise of the freedom of expression by citizens.

The largest number of laws pertaining to the mass media were passed as federal laws by former Yougoslavia. The only exception from this situation is the Law on Telecommunications ("Official Gazette of the Republic of Macedonia" No. 33/96). The latter guarantees equality and the freedom in public telecommunications i.e. in broadcasting. Restrictions provided for in this law are in line with those "necessary in a democratic society". For instance, the Law forbids transmission, broadcasting and delivery of messages calling for forceful toppling of the constitutional order of the Republic of Macedonia and calling for and inciting to military aggression or flaring up of national, racial or religious hatred and intolerance.

According to the Law, the Ministry of Telecommunications is the competent organ for issuing licences for the work of the broadcasting stations or network, as well as for giving concessions for doing such activities. Such solution does not contradict Article 10 of the European Convention, because it is up to the national legislation to regulate formalities and competencies of national organs in securing an accomplishment of freedom of expression through mass media.

FREEDOM OF ASSEMBLY AND ASSOSIATION AND RIGHT TO FORM AND TO JOIN TRADE UNIONS (ARTICLE 11 OF THE CONVENTION)

Rights guaranteed by Article 11 of the European Convention on Human Rights derive from political and social values in a democratic society. In this sense, they refer to the freedom of thought, conscience and religion (Article 9 of the Convention), as well as to the freedom of expression (Article 10 of the Convention). According to Article 11 of the Convention *"Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests. No restrictions shall be placed on the exercise these rights other than such as are prescribed by law and necessary in a democratic society in the interest of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the state".*

The above mentioned article of the European Convention offers the protection of two rights: first, the freedom to peaceful assembly and second, the freedom of association within the framework of which the right to form and join trade unions has been particularly emphasized. Paragraph 1 of Article 11 refers to the substance of mentioned freedoms and rights, and the second paragraph to permissible restrictions of those freedoms and rights. Following this logic, the approach of the European Commission and the Court to these rights and freedoms is characterized by several phases. The first one refers to whether the filled application pertains to rights and freedoms protected by the first paragraph of Article 11, i.e. whether or not that article is relevant in that very case. In the second phase is being determined whether or not the facts set out affect these freedoms and rights. In the third phase it is being assessed whether or not such and affection poses a violation of these freedoms and rights and whether or not it can be justified by the reasons and conditions sited in the second paragraph of Article 11. Thus, the Commission and the Court interpret the

formulation "necessary in a democratic society" in the following way: any restriction imposed must be proportionate to the legitimate goal it has been established for, owing to which, the sense of the term "necessary" is to be interpreted more flexibly, in the sense of "rational" or "desirable" and not in the sense of "indispensable".

Legitimate restrictions in applying freedoms and rights protected by Article 11 upon the people serving with the army, police and state administration rarely have been subject to complaints before the Convention's organs. But, due to the inpreciseness of the term "state administration", there is a dilemma to the scope of people the mentioned restriction refers to. The Commission came to a conclusion that under this specific restriction are included all those people who directly or indirectly ensure the security of state, military or public communications and those who conduct vital functions in ensuring the national security (*Appl. No. 11603/85*). In order to invoke to this provision, the state in question must prove that this specific restriction has been covered by domestic legislation and that the security of national interest has been threatened.

But however, it must be emphasized that the restrictions under paragraph 2 of Article 11 represent only an exception from the freedoms and rights guaranteed by paragraph 1 of this article. That's why, these restrictions must be interpreted more narrowly. Rights and freedoms guaranteed by this article should practiced without any discrimination on whatever basis, in consistence of Article 14 of the Convention. Besides, they imply the existence of effective legal remedies within the framework of respective domestic legislation.

1. Right to peaceful assembly and protest

In every society there is a specific tension between the desire of citizens not to by disturbed by the state and by others on one hand, and their desire to be able to draw other people's attention to things they reckon to be important, on the other. Different societies settle this tension and establish balance between those two opposing tendencies in different ways, depending on which freedom they favour. Some societies are more decisive to tolerate disorder and disturbing citizens encourage and do not prevent the freedom of expression, especially the political one, considering public political action of their citizens to be useful contribution to the achievement and maintenance of a healthy democratic system. The rights of citizens to take part in political debates and to persuade other people in

the rightness of their political views, are being emphasized in those societies. If by this other citizens, who generally are free from outside pressure for the purpose of imposing any kind of convictions, are disturbed, brings to an upset of the mentioned balance. That's why, the task of the law is to decide when the interest of the society to secure freedom from an undesirable persuasion prevails over the interest for free expression of opinion and persuasion of others in its rightness.

In this sense, two situations are characteristic: first, when the way of expressing or the contents of the message damages some other interest, which seems to be more important and does not allow to be restricted in this way; and second, when the damaged interest is not so important, but the way of expressing the message or its contents are disproportionate to the aims meant to be achieved. An extreme example of this kind of disproportionality would be the murder of a citizen in order to draw attention of the public towards one's political views.

General principle in the context of right to protest is that people can do anything which is not forbidden by law. The protest, as a manner of expressing opinions and political action, implies many requirements towards other people. Firstly, it requires communication between people. The freedom of an individual not to be disturbed is supposed to be restricted by expressing protest by others and by their efforts to explain the nature of their protest and to persuade other individuals or groups to join them in the protest.

In the case *Young, James and Webster v. United Kingdom*, the European Court of Human Rights has drawn a conclusion that the freedom of assembly has being violated when freedom of people to choose when and with whom they do not want to be connected is conditioned with severe sanctions (for instance, cases of threat to employees with losing their jobs if they do not join a particular trade union). The right to protest implies an obligation of providing conditions for protesting, in order to respect the freedom of others from undesirable disturbing and invasion against their privacy. The right to protest must be balanced with the right of others to choose whether or not they want to be affected by the protest.

The following problem is connected with the location of a protest. The largest number of protests are being held in public places, mostly in the street, and only few of them are being held in places of private ownership. It is natural desire of those protesting to hold their gatherings in public places, because in that way they can animate a larger number of people. But in this situation the right to protest automatically is in collision

with interests of others people practicing business activities in such places, as well as with the public interest for free and unobstructed conduct of function of the community in those places.

Article 21 of the Constitution of the Republic of Macedonia guarantees, without any precondition, *"the right to assemble peacefully and to express public protest without prior announcement or a special licence. The exercise of this right may be restricted only during a state of emergency or war"*. The Law on Public Assembly ("Official Gazette of the Republic of Macedonia" No. 55/95) prescribes the conditions for the achievement of this right in detail. Unlike the Constitution, the Law prescribes a series of restrictions and preconditions of this right without any connection with state of emergency or war, as the only situations in which, according to the Constitution, this right may be restricted. The Law prescribes preconditions for holding public protest optionally, but, stipulating penalties for their not-adherence makes them compulsory ones. For instance, pursuant Article 3 paragraph 1, in the interest of safety, the organizer of the assembly may inform the Home office, and pursuant Article 4, the organizer has the obligation to secure the order during public assembly. But, on the other hand, not-adherence to these obligations entails his punishment for committing a minor offence. Police, at the request of the organizer, can assist in preserving order during the public assembly, but at the expence of the organizer (Article 4 paragraph 3 of the Law).

Such restrictive provision in view the freedom of public assembly and expressing protest rests upon the conviction that the community needs a certain level of peace and order and that public assembly of citizens and their expression of protest pose a threat to that peace and order. In other words, the legislator supposed that all assemblies and protests might turn into acts of violence. In this sense provision from Article 5 of the Law prohibits carrying guns and other dangerous tools at the public assembly. The Law seems to relieve police of their obligation to control the risk of breaching public peace and order and to direct their action against those individuals or groups preventing citizens in practicing their freedom of assembly and their right to public protest. Contrary to that, the Law allows police to dissuade citizens from practicing their freedom of public assembly and their right to protest.

The positive feature of the Law being the precise prescription of condition under which police can break up the assembly. They are the following cases: when life, health, personal safety and property of citizens

are threatened; in case of committing or inciting to commit criminal offences; and when human environment is threatened. Though, they are rather precisely prescribed, in practice all of them are to withstand the test of proportionality, rationality and necessity, in order the action of police in the control over public assemblies to be considered legitimate and justifiable.

It is a bit unusual that the restrictive provisions from the Law on Public Assemblies can be more easily justified by Article 11 paragraph 2 of the European Convention on Human Rights, than by the Constitution of the Republic of Macedonia. In considering the case *Platform Arzte fur das Leben v. Austria*, the European Court has come to the conclusion that the possibility of restricting the rights of protestors can linger on as long as it is in consistence with criteria from paragraph 2 of Article 11 of the European Convention and that reasons for restricting public assemblies and protest can be justified by the necessity of protecting national security and public safety, to prevent public disorder or crimes or for the purpose of securing rights and freedoms of others. It is apparent that mentioned restrictions imposed by the Law on Public Assemblies run within the framework of criteria from the Convention and that they meet the necessary level of compatibility, regardless of the possibility they can violate the Constitution.

2. Right to form and join trade unions

The right to form and to join trade unions is only a specific kind of accomplishing the freedom of association guaranteed by Article 11 of the Convention. More precisely, it is a question of *"the right to form and to join trade unions for the protection of one's own interests"*. In the Commission's opinion, the freedom of association is a wide concept implying the right to form and to join trade unions, as constituting elements to that freedom, and not as a separate right" (*Young, James and Webster v. United Kingdom*). In that very case the Court has confirmed the same opinion, pointing out that *"the right to form and to join trade unions poses a particular aspect of freedom of association"*.

By explicitly mentioning of trade union in Article 11 of the Convention, its authors tended to put out of any doubt the fact that trade union activities are subject to protection under this article as well, regardless of whether or not national legislation consider trade unions as associations. In the sense of this article, as association is treated any kind

of voluntary association set up by natural and/or legal personalities possessing particular institutional structure, and the aim of which is achieving certain common goals (*Appl.7729/76*). As for professional organizations, set up by authorities which, as a rule, do not protect the interests of their own members only, but some public interests as well, they are not deemed as association in the sense of this article (*Le Conte, Van Leuven and De Meyere* case). In an earlier case, the Commission found that Article 11 concerns exclusively private associations and trade unions (*Appl. 6094/73*).

The court has unequivocally declared that the Convention does not make any difference between state functions as a bearer of public powers and its responsibility as an employer. Paragraph 2 from Article 11 indicates the duty of the state to observe the rights of its employees to freedom of association. But however, the last sentence of this paragraph explicitly permits lawful restrictions over the implementation of these rights when military personnel, police officers and civil servants are concerned (*Swedish Engine Drivers Unions* judgment). As for the meaning of the expression "for the protection of his interests" the Court found that the Convention ensures protection of the interests of trade union members in relation to their trade union activities, which must be permitted and made possible by member states. In other words, with the aim of protecting the interests of its own members, trade unions are entitled to be heard, under conditions which are not different from those under Article 11 of the Convention (*National Union of Belgian Police* judgment).

For better understanding of those parts of Article 11 concerning trade unions, other international instruments have to be taken into account, above all respective conventions by the International Organization of Labor (ILO). Both the Commission and the Court, in making their decisions affecting trade unions, had in mind provisions from those conventions. It is a word about Convention No. 87 on freedom of association and the protection of the right to organization, the Convention No. 98 on rights to organization and collective negotiations, as well as, Article 6 of the European Social Charter.

a) Setting up trade unions and joining them and protection of outside interference

The provision on protecting the right to form and to join trade unions refers to those associations set up on private initiative. In this sense, associations set up between employees and the employer they work for are not included under this article, because it is a question of contractual relationships between the employer and his employees, and not grouping on a voluntary basis (*Young, James and Webster v. United Kingdom*). Associations set up by the state also are not under the scrutiny of Article 11 of the Convention (*ibid*).

Interpreting the formulation of Article 11, the Commission has come to the conclusion that an employee has the right to choose what trade union he want to join, i.e. that the Convention prevents all kind of trade union monopolism. In case he finds that no trade union is able to protect his interests, he has the right to form a new trade union. This is very important in situations where an employee does not agree with trade unions having a certain political orientation.

The question to what extent the state should protect rights relating to trade unions activities turned out to be rather complex both for the Commission and the Court. In the cases *Schmidt and Dahlstrom* and *National Union of Belgian Police* the Court deemed the state does not bear special responsibilities towards trade unions members and that it should not provide them with a special treatment. But, both the Commission and the Court found that the state should undertake certain measures with the purpose of making the right to form and to join trade unions effective. In this sense, the state may not prevent trade unions from "their right to lay down their own internal rules, to administer their own pursuits and to set up or join trade union federations" (*Cheall v. United Kingdom*). Trade union decision in this sphere must not be subject to any interference by the state. The only exception from this may be only cases listed in paragraph 2 of Article 11. Actually, protection provided for by this article is primarily directed at the interference by the state. Besides, the right to join a certain trade union, can not be used regardless of rules set up by that very trade union. Trade unions can freely decide on admission and locking out members from their organization in accordance with their rules. All this pursuits belong to private activities for which the state, in principle, can not bear responsibility under Convention's provisions.

On the other hand, the Commission has come to a standpoint that the state must protect the individual from the abuse of a dominant position by a particular trade union. For instance, in the case of locking out members contrary to trade union rules, or in case when those rules are irrational and arbitrary, or when such an expulsion can cause extremely negative consequences, such as firing from work. However, the Commission did not deem that there was an abuse of the dominant position of the trade union, when it undertook certain activities within the framework of its mandate, even when such activities affected private life of its members. So, in the case *Johansson v. Sweden* the Commission did not find violation of rights protected by Article 11 of the Convention by the trade union which had concluded a contract with an insurance company on collective family insurance, imposing in that way a compulsory collective insurance upon its members.

The question of violating the right to form and join trade unions in regard to particular categories of employees has been examined in the case *Council of Civil Service Unions v. United Kingdom*. Petitioners complained that civil servants employed by Head Quarters for Communications of the Government of the United Kingdom were prevented from setting up and joining a trade union, despite the fact that a similar trade union had existed and worked for more than four decades before. Because employees in the civil service were in question, the Commission examined legality of the measures undertaken by the state imposing the ban, and found that those measures were based on the domestic law and were liable to control by domestic courts.

*b) **Right not to become a trade union member***

The negative aspect of the right to form and to join trade unions, i.e. the question of the right of an individual not to be bound by an obligation to join trade unions is quite ambiguous. The case *Young, James and Webster v. United Kingdom* refers to the imposition of a contract of membership in British Railway Trade Unions, which was in compliance with existing statutory provisions (the only exception being for those who owing to their religious conviction could not accept membership in trade unions). Employees having refused compulsory trade union membership on the basis of non-religious grounds, were fired from work. The standpoint of the court in this case is that the negative aspect of the freedom of association is not completely out of Article 11 of the Convention, but it does not imply that any compulsory joining a particular

trade union to be compatible with the intentions of this provision. "Interpreting Article 11 to be allowing every compulsory joining a particular trade union might jeopardize the substance of freedom it guarantees". The Court has underlined that the threat to fire those having been employed before the entry into force of the compulsory joining trade unions, represents most serious form of compulsion calling into question the substance of freedom guaranteed by Article 11. Both the Commission and the Court make difference between cases of imposition of trade union membership of those hired (pre-entry closed shop) and those already employed (post-entry closed shop). Both the Commission and the Court have found that in the first case it was a question of tacit acceptance of trade union membership, therefore such imposition of compulsory trade union membership does not violate provisions of Article 11 of the Convention (*ibid).*

But however it must be emphasized that such a restrictive attitude in regard to compulsory trade union membership remains to be questionable. In the case *Fredriksen v. Danmark*, petitioners were sacked from work as a consequence of their refusal to abandone one trade union for the sake of another one, because they were moved from one to another post. The national court deemed that it was a question of unjust firing, but petitioners being dissatisfied by the restitution awarded, submitted a petition to the European Commission, asserting that they were victims to the violation of Article 11 of the European Convention. But the Commission has found that the restitution awarded posed an appropriate compensation and thus they can no longer deem themselves as victims in the sense of Convention's provisions.

*c) **Right to strike***

The right to strike does not represent a subject to direct interest by Article 11 of the European Convention. But however, in interpretation of this provision the Convention's organs accept this right as a very important element and means of accomplishment of the freedom of association. In settling the case *Schmidt and Dahlstrom* the Commission has invoked to Article 6 of the European Social Charter, by which the right to collective action has been unequivocally protected. But, in spite of its starting point that the Convention obliges member states to enable trade unions to protect the interests of their members by way of trade union action, the Court has found that Article 11 allows member states to choose methods and means of protection of the interests of trade union members: "*The*

right to strike poses undoubtedly one of the most significant means of protection of interests of trade unions members, but it is not the only means. The right to strike, due to the fact that has not been explicitly mentioned by Article 11, should be subject to regulation by national legislation, in the sense of imposing restriction to a certain extent". (ibid). Yet, through the suggestion the restrictions of this right to be regulated by national legislation, the Court has implicitly recognized this very right within the framework of Article 11.

*d) **Consultations and collective negotiations***

The right of trade unions to be consulted by employers and to be a party to the collective negotiations is not closely linked to the freedom of association. Despite the formulation "protection of his interests" implies the right of trade unions to be consulted (heard), member states have the right to select means necessary for the fulfillment of that goal (*National Union of Belgian Police* judgment).

In a number of cases, trade unions have complained before the Convention organs that respective state had refused to consult them and to reach collective compacts with them, due to their insufficient representativity. They deemed that such conduct by the state was depriving trade unions members of the right to form and to join trade unions and such an action by the state posed a discriminatory one in regard to more numerous trade unions. Both the Court and the Commission have concluded that it is up to the state to assess what trade union is most representative one, in the sense their number and influence, and to choose who it is going to negotiate with, and that it is not inconsistent with the right to form and to join trade unions guaranteed by Article 11 of the Convention (*Haye and Smeulders v. Netherlands*).

Consultations and negotiations are only two out of more means the state can employ in order to protect rights arising from Article 11 of the Convention. The Court and the Commission have found that *"so long as trade unions are able to protect the interests of their members, to advertise and recruit new members in the struggle of protecting those interests, conditions envisaged by Article 11 are being fulfilled" (Union v. federal Republic of Germany).*

*e) **Other forms of trade union activities***

Invoking to rights guaranteed by Article 11 of the Convention a trade union member can not force the trade union he belongs to run interference on his behalf. In the case *X. v. United Kingdom* the petitioner blamed his trade union for refusing to represent him in his dispute with the employer. The Commission has found that such right to compulsory action by the trade union is not contained in the guarantees from Article 11 of the Convention.

The question whether or not it is a violation of Article 11 of the Convention when one trade union reaches a contract with another association, causing compulsory transfer of its own members to the latter one, was deliberated on in the case *Lilja v. Sweden*. In question was a trade union reaching a contract with a political party and enabling its members, by way of a statement in writing to exclude themselves from membership in that party. The petitioner deemed that neither the trade union nor the party were not legally authorized to undertake such acts on his behalf, that's why he did not undertake any action, i.e. did not submit a statement in writing in order to exclude himself from the political party membership. The Commission has found that the petition was not admissible and referred the petitioner to use comprehensively domestic legal remedies.

3. The right to form and to join trade unions according to the legislation of the Republic of Macedonia

Constitutional guaranties of the freedom of association and setting up trade unions are contained in Article 20 of the Constitution of the Republic of Macedonia. This provision guarantees freedom of association as a wider concept comprising the right to form and to join trade unions: *"Citizens are guaranteed freedom of association to exercise and protect their political, economic, social, cultural and other rights and conviction. Citizens may freely establish associations of citizens and political parties, join them or resign from them. Programmes and activities of political parties and other associations of citizens may not be directed at the violent destruction of the constitutional order of the Republic, or at encouragement or incitement of military aggression or ethnic, racial and religious hatred or intolerance. Military or paramilitary associations*

which do not belong to the Armed forces of the Republic of Macedonia are prohibited.

It is obvious that the right to form and to join trade unions has been treated as an aspect of the freedom of association with the purpose of accomplishing and protection of economic and social interests of citizens. Restrictions of the right to association rendered by the mentioned constitutional provision seem to be within the framework of reasons "necessary in a democratic society".

Article 37 of the Constitution of the Republic of Macedonia much more precisely regulates the right to form and join trade unions: *"In order to exercise their economic and social rights, citizens have the right to establish trade unions. Trade unions can constitute confederations and become members of international trade union organizations. The law may restrict the conditions for the exercise of the right to trade union organization in the armed forces, police and administrative bodies.*

The constitutional provision mentioned has been inspired by, among the rest, ILO Convention No. 87, dealing with trade union organization. Article 2 of this Convention stipulates a possibility trade unions to be organized in higher forms of organization - federations and confederations, as well as to join respective international associations. As for trade union organization in police and armed forces, Article 9 of this Convention leaves this issue to be regulated by national legislation in each member country, and depending on such restriction, the provisions of this Convention shall be applied in those countries.

Paragraph 2 of Article 37 of the Constitution of the Republic of Macedonia stipulates restrictions of the right to trade union organization referring only to police, armed forces and administrative bodies, which is entirely consistent with the last sentence of paragraph 2 of Article 11 of the European Convention, as well as with Article 9 of the ILO Convention No. 87.

Article 38 of the Constitution of the Republic of Macedonia *"guarantees the right to strike. Conditions for accomplishing the right to strike can be restricted by law in the armed forces, police and administrative bodies".*

Though the Convention does not explicitly mention and guarantee the right to strike, nor it defines any restrictions of this right, restriction stipulated by the provision mentioned are not inconsistent with the

Convention, having in mind that according to interpretations set out by Convention organs the strike is deemed as one of most important means for efficient accomplishment of the right to form and to join trade unions.

The Law on Labor relationships ("Official Gazette of the Republic of Macedonia" No. 80/93 and 14/95) further elaborates constitutional provision referring to the right to strike. Chapter IV, titled "Trade Unions and Employers" regulates: trade union organization, conditions under which the legitimacy of a trade union organization is recognize, employer's duties towards trade unions and protection of trade union representatives.

Article 76 of the Law stipulates: *"For the purpose of accomplishment of their economic and social right deriving from work and determine by law and collective compacts, workers have the right to form and join trade unions"*. This provision is very much similar to the one from the Constitution, but it has been adapted to the forms of trade union organization in companies. Aspect number 1 of this right is *"workers' freedom of self-organization and participation in the work of those organizations without prior approval by anybody"* (paragraph 3 of Article 76). This freedom has been secured by provision which prescribe that *"trade unions can not be dissolved nor their activities prevented in administrative way, if they have been formed and conduct their activities in accordance with the law and others regulations. Trade union activities and activities of their representatives may not be restricted by employer's acts, provided they are in accordance with the law and collective compacts"* (Article 78 paragraphs 1 and 2).

While aspect number one of the freedom of trade union organization tackles the problem of protection of this freedom from outside pressure and interference, the second aspect of the trade union organization focuses on protection of individuals from monopolist position of trade unions. According to Article 76 paragraph 2 of the Law, *"workers freely join trade unions or become their members"*. Pursuant the Law, trade union membership is not an obligation for workers nor it poses a condition for the accomplishment of any of their rights deriving from work. Thus the situation in which a trade union can be blamed for monopolization of its position from the point of view of imposing compulsory membership can be fully avoided.

The Law on Labor Relation insists on some conditions under which the legitimacy of trade union organizations may be recognized. Those conditions are linked to some organizational features of trade unions: *"Trade unions of employees and trade unions of employers pass their own*

statutes or rules and work programmes, carry out free election of their representatives and arrange the way of management and performance of their activities" (Article 77). Such an interest by the legislator to trade union organization has been inspired by the desire the trade union to be constituted into a democratic organization and with the aim of avoiding its malpractice in practice. It has been also inspired by the ILO Convention No. 87, which has the same intention towards the democratic character of trade unions.

The Law on Labor Relationships provides for a general obligation of the employers towards trade unions. According to Article 82, *"the employer is obliged to provide conditions for trade union activities in relation to protection of worker's rights from work"*. This general legal provision has been elaborated in detail by respective collective compacts.

With the aim of establishing realistic preconditions for trade union functioning, the Law on Labor Relationships also stipulates special protection of trade union representative. According Article 83, *"Trade union representative enjoy special protection and can not be deemed liable nor put in a less favourable position, including loss of his job, due to his trade union membership and activities"*.

The analysis of the provisions of Macedonian legislation concerning freedom of association and right to form and to join trade unions offers sufficient basis for drawing conclusions that this matter is regulated at three levels: The first, the constitutional one, which is the most general, meets the same level of standards required by Article 11 of the European Convention in relation both to the guarantees of these freedoms and rights and to their restrictions. Rights guaranteed at the second and the third levels, by their operationalization by law and by collective compacts are also within the framework of the standards both of mentioned provision of the Convention and practice of Convention organs.

RIGHT TO AN EFFECTIVE REMEDY (ARTICLE 13 OF THE CONVENTION)

Article 13 of the European Convention on Human Rights has a general significance and refers to all other rights and freedoms guaranteed by the Convention. Its function is to create an obligation for member states to secure to the individuals effective legal means for the protection of their rights and freedoms in proceedings before domestic authorities, both for elimination of the violation and ensuring compensation if any.

The provision of Article 13 does not constitute by itself a new legal remedy for the protection of rights and freedoms guaranteed by the Convention, but imposes an obligation for member states to provide them in domestic legislation.

Although the applicants often deny that national legislation does not ensure appropriate legal remedies (*in abstracto*), the question on legal remedies should be examined *in concreto*, i.e. whether or not there exist legal remedies and if they are effective in that particular case. But, some common principles relevant for the interpretation of Article 13 of the European Convention established in the practice of the European Court make such an obligation of member states significantly relative. Thus, it is considered that even although no single legal remedy can meet requirements from mentioned provision, the set of legal remedies provided for by domestic legislation is deemed to be able to do it. Further, "effective legal remedy" means efficiency within the framework of the specificities of different procedures, having in mind limited possibilities for submitting requests incurred by them.

Although Article 13 has a function to supplement the substantial rights and freedoms guaranteed by other provisions of the Convention, in order to determine a violation of Article 13 it is not necessary to determine at the same time a violation of any other provisions of the Convention. It is quite sufficient that national legal order does not secure appropriate legal remedy for the protection of respective right or freedom, i.e. in a particular case the applicant has been denied his right to use the remedy stipulated,

regardless the fact whether or not his right or freedom has truly been restricted. This principle was established in 1978 in *Klass case*, but since then in practice there has not been any other case in which a violation of Article 13 has been determined without determining at the same time a violation of any other provision of the Convention.

In its older judgments the European Court has drawn the conclusion that authorities Article 13 refers to do not entail necessarily judicial authorities in the strictest sense of the word at all instances, but at least in one of them. In its later judgments, the Court, at first sight slightly, but substantially, cedes from such an interpretation at the detriment of judicial protection of human rights and freedoms.

Article 13 of the Convention implies: first, existence in domestic legislation of legal means for the protection of human rights and freedoms guaranteed by the Convention, regardless of the fact whether or not they are incorporated in domestic legislation; and second, these legal means to be efficient ones. "Efficiency" does not mean a certainty of the success of the claimant, because the success is a factual question depending on the fact whether or not respective right or freedom has been violated, as well as on other circumstances in a particular case (*Swedish Engine Drivers case*). The success is to be decided on by a competent body. Having in mind the contents of articles 5 and 6 of the Convention, which Article 13 is connected mostly with, at least in one instance this body must be the court itself, and its decision must be on merits.

Provisions of the Convention guaranteeing basic procedural rights of an individual faced with state apparatus of compulsion, such as in cases of deprivation of his liberty, in cases of criminal trial against him etc., pose *leges specialis* in relation to the general requirement for effective remedy contained in Article 13 of the Convention. These provisions determine in detail which requirements must be met by a particular proceedings as a precondition this proceedings to be considered as an "effective remedy" before domestic authorities. They include not only the judicial character of proceedings (independent and impartial tribunal established by law), but also other precisely defined procedural requirements, such as public hearing, trial in reasonable time, presumption of innocence, right to defence, etc. Also, they include some "material" rights, such as the right to liberty and security of a person, which obliges state bodies to respect a series of guarantees within the framework of respective procedures. All these procedural and material requirements can be considered as a closer

determination of the meaning of the guarantee of the right to an effective remedy.

When violation of rights and freedoms guaranteed by the Convention, and not of rights and freedoms in general, is in question, in that case submitting a request for protection pursuant Article 13 is possible only. Further, an additional condition for this should be a well founded suspicion that such a violation has been committed, and not only a mere statement by the applicant without any relevant evidence (*Powell and Rayner v. United Kingdom*).

The legislation of the Republic of Macedonia stipulates a number of legal means for the protection of right and liberties guaranteed by the Constitution and further elaborated by laws, i.e. rights and freedoms taken over from the European Convention. First, within the framework of Section 3 of Chapter II - Basic Rights and Liberties of the Individual and Citizen - the general constitutional basis for the establishment of the system of legal means for the protection of rights and freedoms before domestic authorities has been created. According to Article 50 paragraph 1of the Constitution "*Every citizen may invoke the protection of freedoms and rights determined by the Constitution before regular courts, as well as before the Constitutional Court of the Republic of Macedonia, through a procedure based on the principles of priority and urgency*".

The Constitutional Court of Macedonia has been existing since 1963, mainly trough the classical function of exerting abstract control over the constitutionality of laws and other enactments. One of the most significant novelty introduced by the Constitution of the Republic of Macedonia of 1991 was the direct protection of human rights by the Constitutional Court when violated by individual legal acts passed by public authorities. This kind of protection was introduced as a logical superstructure over the newly established constitutional concept of human rights as a basic value of the constitutional order.

According to Article 110 of the Constitution, the Constitutional Court of the Republic of Macedonia "*protects the freedoms and rights of the individual and citizen relating to the freedom of communication, conscience, thought and public expression of thought, political association and activity, as well as prohibition of discrimination among citizens on the ground of sex, race, religion or national, social or political affiliation*".

The Law on the Judiciary, in a number of provisions of its general principles, has emphasized the protection of human rights and freedoms before courts. Thus, according to Article 6, "*Courts protect freedoms and rights of the individual and citizen unless according to the Constitution it is in the competence of the Constitutional Court of the Republic of Macedonia. Citizens and other legal subjects are entitled to judicial protection of the legality of individual acts of state administration, as well as of other institutions carrying out public mandates*". According to Article 7 "*Everyone has the right to equal access to courts for the purpose of having his rights and lawful interests protected. Everyone has the right to lawful, impartial and fair trial within reasonable time. No one can be denied the access to courts due to the lack of material means.*"

The practical exercising of these competencies both of the Constitutional Court and of ordinary courts in the protection of human rights has come across serious problems since the very beginning of their introducing. The first reason is of normative nature. Namely, according to Article 110 of the Constitution, not all rights and liberties guaranteed by the Constitution are subject.to the protection by the Constitutional Court, as it is the situation in other countries where constitutional court protection of human rights is functioning, but only some of them, explicitly mentioned by this article, such as: freedom of communication, conscience, thought and public expression of thought, political association and activities, as well as the prohibition of discrimination among citizens on the ground of sex, race, religion or national, social or political affiliation.

Such an approach of narrow competence of the Constitutional Court was inspired by the idea to provide more strengthened protection to those human rights and freedoms which are more noteworthy, more sensitive and more vulnerable than other rights and freedoms in democracy in society in transition and the protection of which is more complicated in the proceedings before ordinary courts. The aim was also to seclude more clearly the competence of ordinary courts in the field of protection of human rights, on one hand, and the competence of the Constitutional Court in that field, on the other, and to facilitate the access of citizens to the protection of those rights and freedoms.

The practice has shown very soon that such a debalanced approach to the particular sorts of human rights couldn't offer the results expected. The Constitutional Court has had significant troubles in building its own methodological approach in determining the constitutional dimension of those rights and freedoms and to distinguish the breach of constitutionality in that field, as its very competence, from the breach of legality of

individual legal acts passed by public authorities in that field, as the very competence of ordinary courts. The legal situation has been furthermore complicated, because there hadn't been any legislation which would have more precisely marked off the respective competencies. Thus, the major result of that vague legal situation was the extremely cautious, or more over, tremulous attitude both of Constitutional Court and ordinary courts towards their competence of protection of human rights.

This question, which is being considered substantial for protection of human rights in the Republic of Macedonia, has been discussed on many occasions by different fora. The main suggestions are that the Constitutional provisions providing this kind of protection must be altered in direction that the direct protection of human rights by the Constitutional Court should embrace each right and freedom guaranteed by the Constitution, given that the proceeding before ordinary courts deciding on legality of individual acts pertaining those rights and freedoms, is validly completed. In that way this particular institution for protection of human rights would be approximated to the European standards in that matter, both on normative and on practical levels.

The new Constitution of the Republic of Macedonia contains three different means for providing legitimate, proper and opportune work of the administration and other public services: first, the work of the administration is based on the principles of expertise and competence (Article 58 paragraph 2 of the Constitution); second, by guaranteeing the right to appeal against legal acts issued in the first instance proceedings by an administrative body, organization or other institution carrying out public mandates (Article 15); and third, by guaranteeing judicial control over the legality of individual acts of state administration, as well as of other institution carrying out public powers (Article 50 paragraph 2).

Nevertheless, although the Constitution provides for normative level of control over the administration and services and a system of protection of fundamental human rights through ordinary and constitutional judiciary, the Constitution provides for an additional institution for protection these values - the Public Attorney. According to Article 77 of the Constitution, the Public Attorney protects the constitutional and legal rights of citizens when violated by bodies of state administration and by other bodies and organizations with public powers. The Constitution provides for that the competence, the mode of work and the conditions for election and dismissal of the Public Attorney shall be regulated by law. In this sense, Article 7 of the Constitutional Law on Enforcing the Constitution contains

the obligation the law on Public Attorney to be passed not later than six months after adoption of the Constitution.

The Public Attorney represents a constitutional institution, because the basic provisions concerning its position and its tasks have been laid down in the Constitution. The Constitution does not determine precisely the position of the Public Attorney, nor his competence, but having in mind its definition as an organ for protection of the constitutional and legal rights of citizens when violated by bodies of state administration and by other bodies and organizations with public powers, as well as the fact that the Parliament is to elect him (Article 77), it is evident that the Public Attorney has been designed as additional means both in order to facilitate the process of functioning of other institutions for protection of human rights and for providing parliamentary control over the work of state administration.

The Public Attorney has been designed as an organ which is to observe, note, point out and intervene in those individual cases where various non-legal and non-institutional factors obstruct the proper functioning of the established mechanisms and means for protection of human rights. Its further function is to generalize those occurrences and to suggest general legal and political measures directed at the promotion of the state of respect and protection of human rights.

The Law on Public Attorney ("Official Gazette of the Republic of Macedonia" No. 7/97) envisages the Public Attorney as a single official, i.e. does not introduce more different kinds of Ombudsmen with different tasks in different areas of the legal system, as it is the situation in some other countries (articles 2 and 3). The Public Attorney shall be elected by the Parliament for a period of eight years, with the option to be re-elected. He shall be elected among persons who hold a degree in law, with experience in legal affairs more than nine years and with high and common recognized qualifications in the field of protection of human rights. After being elected, the Public Attorney proposes his deputies, who are to be elected by the Parliament too. The Law imposes the principle of incompatibility of the function of the Public Attorney with other public functions, professions or affiliation to a political party (articles 4-8).

The tasks of the Public Attorney, as well as the list of administrative and other bodies and organizations which can be subject to its supervision, are not precisely defined by the Law. But, from his general function to provide protection of constitutional and legal rights of citizens through dealing with complaints from the general public against authorities and

public officials, it is evident that all kinds of authorities, including the Government itself, the municipal bodies and the courts, i.e. all kinds of administrative and other bodies with a long-standing obligation to act pursuant the law, can be subject to supervision by the Public Attorney, regardless of the fact that they are accountable for their work to some higher instance.

According to the Law, not only the legality, but also objectivity and impartiality of the decision making bodies can be subject to the supervision of the Public Attorney. In that sense, the scope of social life where the Public Attorney is entitled to intervene is not limited. The only limitation is in the case where a judicial proceedings is underway. The courts are not exempt from the supervision of the Public Attorney. Due to independence of courts, the supervision by the Public Attorney does not concern how the court is to judge in an individual case, but he might intervene if the court does not obey the procedural regulations, for example in cases where the court protracts the proceedings unreasonably (articles 10 and 11).

The addressing the Public Attorney is deprived of any formality. There is not any mediator between the Public Attorney and citizens. Everyone can submit a complaint to him directly. The active legitimacy for addressing the Public Attorney does not include necessarily any personal legal interest. The proceedings before the Public Attorney can be initiated both by the citizens having suffered from the breach of their own rights, and by citizens having noted a breach of some other's rights or some general issues connected with the state of respect and protection of human rights, because *actio popularis* seems to be the most convenient to the general features and tasks of the institution of an Ombudsman. There is no absolute time limit for submitting complaints. The Public Attorney may act on his own initiative too (articles 12-14).

In the course of the investigation, the Public Attorney is entitled to request all necessary explanations and additional information, to have an access to all files concerning the case, regardless their confidentiality, to interview all sort of public officials, to require expert opinions etc. (articles 19 and 20).

According to articles 21-23, when the inquiry is finished, the Public Attorney concludes the case with a written decision, which is communicated to the complainant. The Public Attorney has no formal powers to annul or to alter the illegal acts of the state administration or of other bodies with public powers which have breached the rights of

citizens. But his position and his particular authorizations enable him to initiate proceedings before other organs supplied with formal legal or political powers. Further more, his close communication with the public enables him to impose himself as an objective, impartial, moral, competent and autonomous authority with a great influence over the formal decision making bodies in the legal and political system. The preventive mission of the Public Attorney is very important too, because all kinds of state authorities are fully aware that their work can be subject to the scrutiny of the Public Attorney. Besides, according to Article 24, the Public Attorney is obliged to submit to the Parliament an extensive annual report with observations made in connection with his supervision. This report constitutes the basis for a debate in the Parliament, in order to draw compulsory conclusions on the necessity of undertaking general legal or political measures for the promotion and protection of human rights.

Besides criminal and legal protection of the right to life (Article 2 of the European Convention), prohibition of torture (Article 3), prohibition of slavery and forced labor (Article 4), right to liberty and security of a person (Article 5), right to respect for private and family life, home and correspondence (Article 8), etc. they are also protected through the institute of "compensation of tangible and intangible damage" defined by the Law on Contractual Obligation.

Articles 193-197 of the Law contain provision on compensation of tangible damage in case of death, bodily injury and health impairment. Article 198 provides for compensation of tangible damage in case of degradation of honour and defamation. The Law makes compensation of intangible damage in a civil procedure possible regardless of the compensation of tangible damage. According articles 200 and 300 of the Law compensation of intangible damage can be adjudicated for a sustained bodily pains, mental pains due to reduction of life activity, disfigurement and mutilation, degradation of honour and dignity, death of a close person, as well as fright. Besides, the court can order the judgment to be published in the media at the expence of the mischief-doer or to force him to withdraw his statement the injury has been inflicted by.

The procedure before state administration and other institutions carrying out public mandates has been regulated by Federal Law on General Administrative Procedure ("Official Gazette of SFRY" No. 47/86)

applied as a republican one according Article 5 of the Constitutional Law on Enforcement of the Constitution of the Republic of Macedonia. This Law elaborates in detail the constitutional guarantee of the right of appeal against individual acts issued in the first instance proceedings by a court, administrative body, organizations or other institutions carrying out public mandates, in its part relating to the state administration. Thus, this Law provides for a number of legal means, such as, appeal, renewal of proceedings, annulment or abrogation of rulings, judicial review of administrative acts etc. Other laws regulating particular administrative proceedings, such as in the fields of customs, taxation, social insurance etc., also envisage such legal means.

Article 50 paragraph 2 of the Constitution specifically guarantees judicial protection of individual acts issued by state administration and other institutions carrying out public mandates. This protection is being conducted mainly through judicial review of legality of administrative acts. Federal Law on Judicial Review of Administrative Acts ("Official Gazette of SFRY" No. 4/77 and 36/77) applied as a republican one, among the rest, regulates the question which administrative acts can be subject to the judicial review. According Article 9 paragraph 1 count 3 of the Law, judicial review does not include individual acts issued by the Assembly of the Republic of Macedonia and the President of the Republic. Count 2 of that very paragraph employs other laws to exclude other individual acts issued by other bodies from a judicial review.

The cited provisions were passed long before the adoption of the new Constitution of the Republic of Macedonia of 1991. They were designed under a quite different constitutional regime, within the framework of which the very constitution (Article 216 paragraph 2 of the Constitution of SFRY and Article 267 of the Constitution of SRM of 1974) contained a general constitutional basis which employed the law to exclude the judicial review in particular administrative fields. But the new Constitution of the Republic of Macedonia of 1991 does not contain such a basis. On the contrary, Article 50 paragraph 2 guarantees judicial protection of the legality of absolutely all individual acts, regardless of the fact which organ they have been issued by.

The above mentioned shows that the legislation of the Republic of Macedonia does not ensure overall judicial control upon legality of individual acts in the sense of general guarantees provided for by Article 13 and particular guarantees of Article 6 of the European Convention. But, it must be noted that this plight is only a temporary one, and it is likely to

be resolved through the harmonization of inherited federal laws with the new Constitution of the Republic of Macedonia, within the framework of current legislative reform in the field of state administration.

The Law on Labour Relationships ("Official Gazette of the Republic of Macedonia" No. 80/93, 3/94 and 14/95) envisages a number of legal means for the protection of rights deriving from work. Article 115 and 122 of the Law regulate cases of cessation of work by firing, and Articles 123 and 124 determine means for legal protection of workers against firing. Article 116 defines conditions under which a fine can be delivered to workers and articles 134 and 135 determine legal means for the protection in proceedings before the employer, inspection and competent court, as well as the right of trade unions to compulsory interference and representation of the interests of workers in proceedings before the employer and courts. These legal means have been further elaborated by general and particular collective compacts.

RIGHT TO PEACEFUL ENJOYMENT OF ONE'S POSSESSIONS (ARTICLE 1 OF THE FIRST PROTOCOL)

The right to ownership of property has not been originally guaranteed by the European Convention on Human Rights. For the first time it was regulated in 1952, by Article 1 of the First Protocol to the Convention. Actually, Article 1 of the First Protocol guarantees several property rights: first, the right of every natural or legal person to peaceful enjoyment of his possession; second, right not to be deprived of one's possession, i.e. freedom of depriving from possession; and third, the right to be subject only to lawful deprivation of possession, i.e. right the conditions under which the deprivation of possession in public interest is possible to be precisely determined by law and to be in consistence with general principles of international law.

The rights mentioned are being followed by respective powers of member states to prescribe in their national legislation certain restrictions to rights mentioned and to control the use of those rights with the purpose of ensuring general interests or to secure payment of taxes or other contributions or penalties.

Formulations used in Article 1 of the First Protocol are characterized by extremely emphasized extensivity, designed with the purpose of covering a diversity of situations. That's why, they are being specified by the European Commission and Court, and their practice is the most relevant source for the interpretation of the meaning of provisions mentioned.

1. The right of natural or legal person to peaceful enjoyment of his possession

The right to ownership of property in the legislation of the Republic of Macedonia is subject to constitutional protection. It is a question of a general and brief provision from Article 30 paragraph 1 of the Constitution, which reads: *"The right to ownership of property and the right to inheritance are guaranteed."* At first sight, this provision sounds

rather general and directly inapplicable and it requires further legal elaboration. The first conclusion that can be drawn is that it offers a guarantee of the right to ownership of property to everyone, regardless of his or her legal linkage to the Republic of Macedonia, i.e. both for the nationals of the Republic of Macedonia and for foreigners too, which is entirely consistent with the formulation used in Article 1 of the Convention, which obliges member states to ensure the rights of all in their respective territories. Otherwise, the Constitution uses the term "property" with the purpose of covering both movable and non-movable (rights *in rem*) and right to intangible things (rights *in personam*).

In order to draw a conclusion on the extent of the guarantee contained in Article 30 paragraph 1 of the Constitution, its isolated interpretation is sufficient, but it must be interpreted in relation to the meaning of Article 8 paragraph 1 count 6 of the Constitution. The latter provision mentions *"legal protection of property"* as one of the fundamental values of the constitutional order of the Republic of Macedonia. It must be also interpreted in relation to articles 50 to 58 of the Constitutions covering general guarantees and institutions for the protections of fundamental rights and freedoms. These general guarantees ensure that public authorities has only such power in exercising of individual's right to ownership of property only to an extent which is necessary in securing general interests and the remaining is a sphere of free disposition of individuals.

The right to ownership of property is specially protected against actions by administrative bodies. Article 50 of the Constitution guarantees the right of citizen to invoke to the protection of their rights and freedoms determined by the constitution before courts and the Constitutional Court in a procedure based on principles of priority and urgency. Judicial control over the legality of individual acts by administrative bodies and other institutions conducting public powers is also guaranteed. Citizens are also entitled to be informed of their rights and fundamental freedoms and to contribute actively, on their own or together with others, to the improvement and protection of these rights and freedoms.

Listed general constitutional guarantees, as well as the inclusion of the protection of property in the fundamental constitutional values, offer foundation for drawing a conclusion that it is a question of wider range of guarantees than the right to property itself as an institution of the private law.

Guaranteeing the right to ownership to property has two mutually connected aspects: first, guaranteeing the ownership as a social and legal institute and second, guaranteeing of all civil or at least all property rights belonging to individuals within of framework of the first aspect. In this sense there is a close relationship between the guarantee of ownership of property and other personal rights and freedoms. This connection is to secure each legal personality to have space for free action in the field of legal relationship connected with ownership. In other it is question not only of the sphere of private life of a citizen, but also of his business activities, because the right to ownership of property is supplemented by the freedom of enterprenourship, i.e. the former being a precondition for the latter one.

From the previously set out it turns out that the interpretation of constitutional provisions concerning right to ownership of property is identical with the one deriving from Article 1 of the First Protocol, as well as the interpretation given by European Court in cases referring to this provision of the Convention. Namely, in the case *Muller v. Austria*, by the concept of "protection of ownership of property, the Court understands a wide range of private rights. In the group of rights among persons, the Court includes rights among private individuals on the basis of a contract, further, rights arising on the basis of lawful and legal-public relationships, which also can be an integral part of the property. The last ones have to meet two conditions: first, those relationships must have monetary value; and second, their bearer to be the only owner. Intangible property includes rights deriving from doing certain business activities, licence rights, patent rights and other rights deriving from intellectual and industrial property, as rights having two main characteristics specific for ownership: exclusivity and transferability.

2. Deprivations of property, the right to compensation and control of the use of property

The guarantee of ownership of property does not mean that it is an absolute one, but that the encroachment by authorities upon property must not be arbitrary one only, i.e. it must be lawful and to run up to certain defined boundary only. This boundaries are not abstract ones, and do not refer only to abstract right to ownership of property, but affect each individual personal right upon a tangible or intangible things. But it must be emphasized that the mentioned guaranties does not mean protection against encroachment which is legally permissible, i.e. that the

encroachment public authorities exercise for the accomplishment and satisfaction of general interests.

Article 1 of the First Protocol permits to exercise control over the use of property with the purpose of accomplishing general interests. There are different terms of general interests (common, public, collective or other), but its substance is the same: individuals - subjects to civil and legal rights, do not live on their own, but in a state as an organized community. They enjoy their rights and freedoms within the framework of established social and legal order. They have an autonomous sphere of free action in order to seek for their own way of arranging their lives pursuant their personal convictions and aspirations, to get into relations with others, and according to their own will to accomplish their own material and moral interests. A very significant part of those interests is their property as an economic foundation for the accomplishment of their freedom. But such freedom is not and it can not be unlimited. Individuals are members of the society, and in the society there may be interests which are over the individuals ones. The individual is obliged to contribute to the common benefit, even in situations when it is not in his own private interest. Just in this sense, the Article 30 paragraph 2 of the Constitution of the Republic of Macedonia determines that *"Ownership of property creates rights and duties and should serve the well-being of both of individual and the community"*.

There are significant problems in determining legal boundaries of collective interest, i.e. in determining when and how much individual interests have to retreat before "higher" interests and under what conditions the individual as a bearer of the right to ownership of property has to endure a decrease of the scope of his freedom in favour of the common benefit. Paragraphs 3 and 4 of Article 30 of the Constitution of the Republic of Macedonia endeavours to resolve this problems by prescribing that: *"No person may be deprived of his or her property or of the rights deriving from it, except in cases concerning the public interest determined by law. If property is expropriated or restricted, rightful compensation not lower than its market value is guaranteed"*. Such provisions bears some dilemma: first, what do property and rights deriving from property mean; second, what does public interest determined by law imply; and third, is there any difference between expropriation and restrictions of property rights and what is it like.

The constitutional provisions guaranteeing the right to ownership of property should have been the general legal basis for a different type of property relations under the new Constitution of the Republic of

Macedonia from 1991. But however, new laws in this field have not been passed yet, and the relations mentioned run on the basis of inherited federal laws concerning ownership of property. The static art of these relations are regulated by the Federal Law on Fundamental Legal-Ownership Relations from 1981, and their dynamic part by the Federal Law on Contractual Relations from 1978. A number of other old both federal and republican laws concerning particular subject to ownership, such as farming land, housing lots, dwellings, forests, water, fish stock, cultural monuments etc., went on being valid, in spite of the fact of their being inconsistent with the new Constitution. But at the same time, a large of new laws have been passed, such as: the Law on Expropriation, the Law on Industrial Property, the Law on Fishing , the Law on Selling of Apartments in Social Ownership, the Law on Transformation of Socially Owned Companies and others. However the lack of passing a law regulating fundamental ownership relations is evident. The constitutional guarantee of ownership of property, by some scholars is being seen as a constitutional basis for passing a law on denationalization, as a historic precondition for the creating of democratic relations and for the invigouring of the legal guarantee of the ownership of property in practice. In some other scholars' opinion, in a situation when once the property was nationalized on the basis of laws valid at the time, there does not exist any legal obligation deriving from the constitutional guarantee of the right to ownership of property, but denationalization may be only an act of good will and a result of political decision.

The question of compatibility of the legislation of the Republic of Macedonia with relevant provisions of the First Protocol of the European Convention can be considered at several levels: first, at the constitutional level, all elements from Article 1 of the First Protocol are present, i.e. the right to ownership is guaranteed and the general interest determined by law can only be the basis for seizure or restriction of property; second, it is obvious that operationalization of this constitutional provisions by laws comes late, not only in relation to the political need of their passing, but also in relation to the legal obligation for their passing deriving from respective provisions from the Constitutional Law on the Enforcement of the Constitution of the Republic of Macedonia; and third, legal protection of the right to ownership of property at all levels of legal regulations takes into account the connection between this right and other fundamental rights and freedoms of citizens, such as freedom of market and

enterpreneurship, which gives to the right to ownership of property a more complex dimension.

RIGHT TO EDUCATION
(ARTICLE 2 OF THE FIRST PROTOCOL)

1. The right to education

Guaranties in Article 2 of the First Protocol to the European Convention stress the importance of education as a foundation for entire accomplishment of the potentials of a human being, satisfaction of his own aspirations, development of social and cultural values and advancement of economic well-being in the community. This Article stipulates that: *"No person shall be denied the right to education. In the exercise of any function which it assumes in relation to education and to teaching, the state shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions".*

The formulation of this Article causes a dilemma in relation to obligations by the state in the field of education. It is a question whether or not the provisions of this article provide for and obligation for the state to guarantee that everyone shall acquire education up to a certain age, or it simply means that the state must not prevent acquisition of education. In other words it is a question whether this provision provides for a negative or a positive obligation for the state in the field of education.

Article 44 or the Constitution of the Republic of Macedonia guarantees that *"Everyone has the right to education. Education is accessible to everyone under equal conditions. Primary education is compulsory and free".* Elaborating this constitutional provision, Article 3 of the Law on Primary Education ("Official Gazette of the Republic of Macedonia" No. 44/95) emphasized the positive side of obligation for the state in primary education, by which it resolves above mentioned dilemma in connection with interpretation of Article 2 of the First Protocol. Article 3 of the Law stipulates that primary education is compulsory for all children from 7 to 15 years of age. In order to make this provision effective, it must be balanced with the duty of public authorities to ensure schools of public character. Article 10 of the Law on Secondary Education ("Official Gazette of the Republic of Macedonia No. 44/95) creates similar

duties for public authorities. Besides, for the children with physical and mental obstacles in their development, depending on sort and extent of obstacles, there is a duty for public authorities to organize specialized elementary schools or special classes in elementary schools.

Out of the character of these obligations its turns out that the failure of authorities to meet these requirements means violation of the right of children to education and parents' obligation to secure their children to benefit from education. Because of this, in the Republic of Macedonia the right to education of children has been combined with parents' obligation to secure their children education trough compulsory enrollment with primary schools and their responsibility for their punctual attendance of school (article 46 of the Law on Primary Education).

2. The language of education

In view of the language in which education shall be conducted, the European Court and Commission are relentless. In the well known Belgian language dispute, where French speaking parents wanted their children to be educated in French, the European Court has determined that Article 2 of the First Protocol guarantees only an equal access to already established general and official system of education: *"The Convention does not provide specific duties in view of the type of measures and methods in which they shall be conducted. In this sense, the first sentence of Article 2 does not specify the language in which education shall be conducted in order to meet the right to education".*

By bringing Article 2 in connection with Article 14 of the Convention, the Court has concluded that Article 14 is not effective upon the right of child or his parents to be educated in a language they shall choose. *"Anyway, the right to education would be meaningless if it did not include the right to education in the language or languages in official use in the country".*

Solutions in the Law on Primary Education (Article 8 paragraph 1) and in the Law on Secondary Education (Article 4 paragraph 1) in view of the language education is being carried out follow Article 7 of the Constitution of the Republic of Macedonia. According to this provision, *"Macedonian and its Cyrillic alphabet is the official language in the Republic of Macedonia".* But it can be noted that both laws go much further in view of the language in which children, especially those

belonging to national minorities, shall be educated. Thus, Article 8 paragraphs 2 and 3 of the Law on Primary Education stipulates that *"Training and education for pupils belonging to national minorities shall be conducted in the language and alphabet spoken by the respective national minority, in a way determined by law. Those pupils are obliged to compulsory study of Macedonian as well".* Article 4 paragraph 2 and 3 of the Law on Secondary Education contains identical solutions.

3. Respect for religious and philosophical convictions of the parents

The second sentence of Article 2 of the First Protocol causes a dilemma in connection with parent's right to provide their children education in conformity with their own religious or philosophical convictions. Apparently can not bind itself within the framework of its own system of education to meet every request for education fitting religious or philosophical convictions of children and their parents. Such a right of parents of their children naturally must be limited if effective education and certain standard of education for all is to be accomplished. In the cases *Mr. and Mrs. G. Kartnel* and *Mr. and Mrs. T. Hardt* petitioners, belonging to Evangelist and Lutheran Church in Sweden, complained that parents of children belonging to that church were prevented from providing their children education in line with their religious convictions, because the children had been obliged to attend religious teaching in public schools run by the Swedish Church, as a state one. Reasons why Swedish authorities refused to grant Evangelist and Lutheran Church licence to practice religious teaching in public schools lay in the need school children to acquire a general, comprehensive and practical knowledge in the field of religion, which does not imply any particular religion. Originally, petitioners complained only on violation of Article 2 of the first Protocol, but however the Commission has examined the case *ex oficio* from the aspect of the prohibition of discrimination from Article 14 of the Convention. After the Commission had found the petition admissible, the Swedish authorities ordered children of parents belonging to the Evangelist and Lutheran church to be exempted form compulsory religious teaching.

In regard to this question the Macedonian legislation is rather coherent: religious teaching is not permitted in primary and secondary schools (Article 13 paragraph 2 of the Law on Primary Education and Article 7 paragraph 2 of the Law on Secondary Education). The

accomplishing parents' right to provide their children education in conformity with their religious or philosophical convictions in the Republic of Macedonia is possible through the establishment of schools for religious teaching by various religious communities out of the system of public education (Article 19 paragraph 3 of the Constitution), as well as by establishing private institutions of education at all levels of education except the primary one (Article 45 of the Constitution). Such solutions are within the framework of requirements from the second sentence of Article 2 of the First Protocol. However, having in mind that the system of the Republic of Macedonia prohibits any kind of political and religious activities within public schools, religious teaching inclusive, it is advisable to consider the possibility of reservation or declaration on the interpretation of that provision from Article 2 of the first Protocol to the European Convention.

RIGHT TO FREE ELECTIONS (ARTICLE 3 OF THE FIRST PROTOCOL)

1. Nature of the right to free elections

Article 3 of the First Protocol to the European Convention has determined an obligation for member states *"to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislator".*

This guarantee form the Convention emphasizes the connection between effective political democracy and human rights, i.e. it stresses the democratic society as a precondition and as a logical and political environment in accomplishing and protecting human rights. Unlike others, the formulation of this provision does not create only a negative obligation for member states to restrain from preventing citizens to enjoy rights and freedoms guaranteed. It creates a positive obligation for a certain action by the state, and that action is the way of accomplishing the substance of the guarantee itself.

This formulation long made Convention organs interpret it that it is not a question of an individual's right, but of a positive obligation of member states to structure their respective political systems on the basis of political representation and periodical election of political representatives. In other words, Article 3 of the First Protocol was deemed as not offering protection of individuals rights in case of non-fulfillment of this obligation by the state. However, beginning with the case *Mathieu Mohin and Clerfayt v. Belgium*, the European Court has strengthened its standpoint that this provision guarantees individual rights appropriate to be protected by Convention organs.

The right to free election directly builds up the freedom of expression and freedom of association. These freedoms, together with the institutional system of conducting elections secured by the constitutional and political system of each member state, constitute preconditions for the accomplishment of the right to free elections.

The guarantee for free elections poses a very wide provision in view of determining the obligation of the state in providing conditions for accomplishment of this right. Their specific shape depends on the character of the constitutional and political system of each member state separately. The minimum of standards of such system are the following: a) Existence in the constitution provisions providing for a legislative body made of elected representatives; b) General right to vote; c) Periodical repetition of elections of representatives in the legislative body at reasonable intervals; d) Free choice of voters, i.e. absence of political or any other kind of pressure over the choice of voters; e) Secrecy of ballot; f) Permissibility of political parities or other kinds of associations for the purpose of political action, including the right of political parties to put up their candidates in the elections; g) Application of rules listed not only for the election of central legislative body, but also for the election of local and regional bodies of representatives. (*The Greek* case; *Mathieu Mohin and Clerfayt v. Belgium*).

Despite the mentioned determination of minimum standards, the formulation of Article 3 of the First Protocol still remains wide enough. Apart from the general obligation of providing institutional infrastructure, it does not contain in itself any suggestion about a particular electoral system or voting system. In this sense, every member state can freely prescribe its own electoral system and its own electoral technique. The control organs of the Convention even do not examine if a particular member state has prescribed any kind of restriction of the active electoral right (for instance for foreigners who have permanent place of residence on its territory and for prisoners) and of the passive one (for instance for the police and the military, as well as in view of the age of candidates etc.). The only requirement being those restrictions not to be arbitrary and to violate the freedom of expression (*Appl. No. 9267/81*). Convention organs also do not examine whether or not a particular electoral system (for example, the majority or the proportional) secure factually equal value of the formally equal right to vote of each citizen (*Appl. No.9728/66*), nor whether or not in the domestic legislation provision sanctioning abuse of individual's right to vote have been prescribed.

It is quite understandable if we take in consideration that the establishment of an electoral system is very sensitive question, which is not only a matter of legal regulation, but also a matter of political arrangements, and which is relevant not only from the standpoint of human rights, but also from the standpoint of functioning of its political system, in conformity with its own national interests and strategy.

According to its normative basis, the electoral system of the Republic of Macedonia is undoubtedly a democratic one, because the citizens occupies a central position in it. Pursuant Article 2 of the Constitution of the Republic of Macedonia, *"Sovereignty in the Republic of Macedonia derives from citizens and belongs to the citizens. Citizens of the republic of Macedonia exercise their authority through democratically elected representatives, through referendum and through other forms of direct expression"*. This principle is further elaborated through determining political pluralism and free, direct and democratic elections as fundamental values of the constitutional order of the Republic of Macedonia (Article 8 paragraph 1 count 5). This principles of the democratic structure have been embodied in a series of other, more concrete constitutional provisions. According to Article 22, *"Every citizen on reaching 18 years of age acquires the right to vote. The right to vote is equal, universal and direct, and it exercised at free elections by secret ballot. Person deprived of the right to practise their profession by a court verdict do not have the right to vote.* The only restriction of the right to vote refers to the persons deprived of the right to practise their profession due to their mental disorder, which is justifiable with the fact that they can not express their own will. The restriction does not refer to persons sentenced for committing a criminal offence, as it is the situation in many other countries.

2. Right to vote and to be elected

The set of political freedoms and rights, at most general level are guaranteed by the constitutional provision declaring *"freedom of association in order to exercise and protect political, economic, social cultural and other rights and convictions. Citizens may freely establish associations of citizens and political parties, join them and resign from them. The programmes and activities of political parties and other associations of citizens may not be directed at the violent destruction of the constitutional order of the Republic, or at encouragement or incitement to military aggression or ethnic, racial or religious hatred or intolerance"* (Article 20 paragraphs 1, 2 and 3 of the Constitution).

As a fundamental right, the freedom of association is being exercised directly on the basis of the Constitution. In such circumstances, the only scope of the law dealing with relations in the field of political association and activities is to regulate procedural and organizational aspects of those relationships. In this sense, the Law on Political Parties

("Official Gazette of the Republic of Macedonia" No. 41/94) regulates only the issues connected with the procedure of establishing political parties, their registration and procedure for their cessation. According to Article 17 paragraphs 1 and 2 of the Law, a political party ceases when a competent court rules that its activities are directed at the violation of values determined by Article 20 paragraph 3 of the Constitution. It can also cease if the Constitutional Court passes a decision according to which the programme of the political party is not in conformity with the Constitution.

The election of representatives for the Assembly of the Republic of Macedonia has its general foundation in the Constitution, but the entire electoral procedure has been regulated by law, which is to be adopted by a two-thirds majority vote of the total number of representatives in the Assembly. According to Article 62 paragraphs 1,2 and 3 of the Constitution of the Republic of Macedonia, *"The Assembly of the Republic of Macedonia is composed of 120 to 140 representatives. The representatives are elected at general, direct and free elections and by secret ballot. The representatives represents the citizens and makes decisions in the assembly in accordance with his or her personal convictions"*. Pursuant Article 63 of the Constitution, the representatives for the Assembly are elected for a term of four years.

Article 2 of the Law on Election of Representatives provides for that *"Citizens elect representatives for the Assembly of the Republic of Macedonia by direct and secret ballot. Every citizen on reaching 18 years of age has the right to elect and to be elected as a representative in assemblies"*. Article 3 of the Law guarantees freedom and secrecy of vote: *"Nobody can deem citizen liable because of his voting, nor to force him to tell who he has voted for, nor why he has not voted"*.

Two kinds of nominators of candidates for representatives are provided for by the Law. According Article 20, registered political party having more than 1.500 members or a group of 100 citizens may nominate candidate for representative.

According to the Law, for a representative is elected the one who has won majority of votes by voters having voted in a constituency, given the entire number of votes is not less than one third of the entire number of voters in that constituency according to the electoral list of citizens. Having in mind that the abstinence of voting in Macedonian legislation is not sanctioned, the mentioned majority is a sufficient basis for confidence of relatively large number of voters. The number of votes needed is much

lower in the second round of voting, which is to be conducted if in the first round no candidate has won the necessary number of votes. In the second round as elected for a representative shall be deemed the candidate who has won most of the votes by voters having voted.

The Law regulates in detail the electoral technique, as a very important aspect of accomplishing the right to vote. Among them, the Law pays a special attention to the way of voting, control over its proper and lawful conducting, kinds and competence of electoral authorities, the way of vote counting and fixing electoral results, the procedure of submitting complaints, control over lists of voters etc.

The secrecy of vote is secured by electoral committees, the members of which must be present at the polling stations all the time of the voting. Very important point is that representatives of political parties having nominated candidates take part in the work of electoral committees, and they have the right to intervene on the spot with electoral committees on the irregularities in voting.

Pursuant articles 70 to 72 of the Law, the competent electoral committees decide in first instance on complaints against irregularities in voting. Competent municipal courts decide on appeals against ruling passed by electoral committees, and the Supreme Court of the Republic of Macedonia decides on appeals against ruling by the State Electoral Committee. Besides, within the framework of administrative dispute, courts are bearers of the protection of regularity and legality of entire electoral procedure.

Article 115 of the Constitution, as well as articles 24, 25 and 26 of the Law on Local Self-government ("Official Gazette of the Republic of Macedonia" No. 52/95), guarantee political representation and electability of organs in the local self-government units deciding on local community issues. The procedure and conditions for election of councils, as representative organs in the local community, as well for the election of mayors, have been regulated by the Law on Local Elections ("Official Gazette No. 46/96). These conditions and procedure rest upon the same electoral principles and are exercised by the same electoral technique as for the elections of representatives in the Assembly of the Republic of Macedonia. The only difference being that the election of representatives for the Assembly of the Republic of Macedonia is carried out by the majority model, and for the local councils by the proportional one.

3. Protection of electoral rights

Legal order of the Republic of Macedonia provides a fairly wide range of mechanisms of protection of electoral rights: protection accomplished through the intervention by criminal law, protection accomplished by direct action of organs supposed to take care of lawful and rightful conduct of elections (electoral committees at all levels), protection exercised by courts, as well as protection within representative bodies themselves through the institute of verification of mandates.

Criminal and legal protection of electoral rights is accomplished when these rights are being threatened or violated by committing criminal offences, as heavies forms of punitive behaviour for the offenders of which there have been stipulated penalties and other criminal sanctions. The Criminal Code of Macedonia has provided for 8 criminal offences against electoral rights, listed in Chapter XVI titled "Criminal offences against elections and voting". They are as follows: prevention of elections and voting; violation of the right to vote; violation of freedom of voters' commitment; abuse of the right to vote; bribery at election and voting; violation of secrecy of ballot; destruction of electoral instruments; and electoral fraud.

Section III of the Law on Elections for Representatives in the Assembly of the 17XRepublic of Macedonia, titled "Punitive provisions", provides for minor offence liability for registered political parties and other organizations, as well as for persons in charge within them, in cases where they do not adhere to rules of conduct determined their mutual agreement on the protection of dignity, repute and integrity of candidate personality. They shall also be punished if they carry out promotion of candidates or propaganda within 48 hours prior the day of elections. For a minor offence shall also be punished a natural person if he or she holds a person responsible for voting or forces him to say who he did or did not vote for, and if he makes mess, noice or disorder at the polling station.

It can be noted that the above mentioned constitutional and legal basis of the electoral system and the electoral technique in the Republic of Macedonia is sufficiently developed in order to meet requirements arising from Article 3 of the First Protocol to the European Convention and elaborated in the practice of the European Court and Commission, and

especially the following: freedom of political association and activity; political representation as the basis of legislative power and local self-government; electability of political representatives; reasonable intervals between two consecutive elections; universal and equal right to vote; electoral technique securing free, direct and secret ballot; judicial supervision of the regularity of elections; and developed institutional system of criminal protection of electoral rights.

PROHIBITION OF INPRISONMENT FOR DEBT (ARTICLE 1 OF THE PROTOCOL No. 4)

Article 1 of the Protocol 4 to the European Convention provides for an additional restraint of authorities for deprivation of one's liberty "*merely on the ground of inability to fulfill a contractual obligation*". Just because of that this provision is closely linked to Article 5 paragraph 1 count b) of the Convention, which refers to the possibility of deprivation of liberty "*for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law*".

Prohibition provided for in the above mentioned article is not of an absolute, but only of a relative nature. In other words, the European Convention does not prohibit deprivation of one' liberty on the ground of inability for fulfillment a contractual obligation in cases where the person in question is financially able to fulfill it, but he uses fraud or acts in bad faith with the aim of avoiding the fulfillment of his obligation. The Convention prohibits only such deprivation of liberty of financially unable debtor.

Unlike provision from Article 1 of the Protocol No. 4 to the European Convention, Macedonian legislation does not contain a so explicitly formulation prohibition. However, the fact that deprivation of liberty has not been mentioned in the list of measures for the fulfillment of contractual obligation, in an indirect way implies that such a deprivation of liberty is prohibited. That's why, this is an absolute prohibition and it does not allow any deprivation of liberty of a debtor, even in case when he is financially able to fulfill his contractual obligation, but by fraud and illwill avoids doing it.

Articles 1, articles from 16 to 21 and Article 27 of the Federal Law on Executive Procedure ("Official Gazette of SFRY No. 20/78, 6/82, 74/87, 57/89 and 27/90), which, according to the Constitutional Law on the Enforcement of the Constitution, has been taken over as a republican law, defines means and methods of execution in cases where contractual

obligations have been determined by an effective judicial judgment. Means of execution of monetary claims can be only: forceful sale of movables, forceful sale of non-movables; transfer of monetary claims, conversion of money into other types of property and transfer of money held by the a clearing house.

For the execution of non-monetary claims there have been a series of means, such as: delivery of movables (articles 212-218); sale of non-movables (articles219-222); duty for doing, not doing or endurance (articles 223-228); taking back to work of an employee (articles 229-233); entry of property rights in a public register (articles 234-237); partition of articles (articles 238-242); and posting of mortgage claims upon movables and non-movables (Article 251).

Each means of execution has been adapted to the nature of obligation to be fulfilled by the debtor, but in no case the deprivation of liberty of the debtor has not been prescribed as a means of execution of his contractual obligation. This leads to the conclusion that Legislation of the Republic of Macedonia is in line with Article 1 of the Protocol No. 4 to the European Convention.

RESTRICTIONS OF POLITICAL ACTIVITY OF ALIENS, PROHIBITION OF COLLECTIVE EXPULSION AND PROCEDURAL SAFEGUARDS RELATING TO EXPULSION OF ALIENS (ARTICLE 16 OF THE CONVENTION, ARTICLES 3 AND 4 OF PROTOCOL No. 4 AND ARTICLE 1 OF PROTOCOL No. 7)

Provisions of the European Convention guarantee certain rights and freedoms to everyone within the jurisdiction of the state in question, regardless of the fact whether or not the person is a national of that state. Of course, the previously cited is valid as long as those provisions are being interpreted isolated from Article 16 of the Convention. Namely, this provision contains restrictions on rights and freedoms covered by the Convention in relation to persons non being nationals of the respective state. But however, restrictions of the rights of aliens are of a limited scope, and they can only relate to political activity of aliens. More precisely, Article 16 restrains the exercise of rights guaranteed by articles 10, 11 and 14 of the Convention, as substantial ones for political activity, and not all rights and freedoms guaranteed by the Convention in general. In every other field and for any other purposes, aliens enjoy and exercise all other rights and freedoms guaranteed by the Convention under equal conditions with persons - nationals of the respective state.

Considering that articles 10 and 11 themselves contain certain restrictions pertaining to all persons, regardless of their legal and political linkage with the state in question, and "in the interest of national security or public safety" or "for the prevention of disorder and crime", it is apparent that goals of restrictions contained in Article 16 are of a quite different nature and they protect other interests - probably connected with the protection of good relations among states. Just in this sense, the prohibition of protests staged by aliens directed at the existing regime in another state, does not pose a violation of Article 10 of the European Convention. The state in question can also restrain previously mentioned rights of aliens even in a case when they do not pose a threat to its relations with other countries, but relate only to the state they reside in.

Legislation of the Republic of Macedonia does not contain an explicit provision contradicting such solutions. On the contrary, Article 29 paragraph of the Constitution of the Republic of Macedonia guarantees foreign subjects to enjoy freedoms and rights covered by the Constitution, under conditions regulated by law and international agreements. The existing Law on Movement and Residence of Foreign Subjects in the Republic of Macedonia ("Official Gazette of the Republic of Macedonia No.36/92) does not regulate the question of political activity of aliens, which means that it must be additionally regulated by a separate law.

Article 2 paragraph 1 of Protocol No. 4 to the European Convention guarantees the right to liberty of movement and freedom of choosing their residence to aliens lawfully staying within the territory of a state.

Provisions incorporated in the Law on Movement and Residence of Foreign Subjects in the Republic of Macedonia also guarantee this right and freedom and further elaborate them, and restrictions they provide for are identical to the ones stipulated by paragraphs 3 and 4 of article 2 of Protocol No. 4 to the Convention.

Paragraph 2 of Article 2 of Protocol No. 4 guarantees both nationals and aliens the right to leave any country, including their own. Relevant provisions of Law on Movement and Residence of Foreign Subjects in the Republic of Macedonia guarantee this right too. As for the enjoyment of this right by Macedonian nationals, it has been explicitly guaranteed by Article 27 paragraph 2 of the Constitution of the Republic of Macedonia. Restrictions on this right provided by paragraph 3 of the same article are also in line with those envisaged by the Convention.

Article 3 of Protocol No. 4 to the European Convention guarantees the right of nationals not to be expelled from the territory of the state which he is a national and the right to enter the territory of that state.

This right has also been guaranteed by Article 27 paragraph 2 of the Constitution of the Republic of Macedonia. Moreover, paragraph 2 of Article 4 of the Constitution absolutely prohibits, under no condition, neither individually nor collectively, nationals of the Republic of Macedonia to be deprived of citizenship nor to be expelled or extradited to another state.

Article 4 of Protocol No. 4 contains a prohibition on collective expulsion of aliens.

Neither the Constitution of the Republic of Macedonia nor Law on Movement and Residence of Foreign Subjects in the Republic of Macedonia contain an explicit provision prohibiting collective expulsion of aliens. But from the formulation of Article 34 of the Law, which reads "*A foreign subject can be expelled from the territory of the Republic of Macedonia if, for having committed a criminal offence, a criminal sanction - expulsion from the territory of the Republic of Macedonia, has been brought against him*", a conclusion can be drawn that only individual, and not collective expulsion is possible.

RIGHT OF APPEAL IN CRIMINAL MATTERS (ARTICLE 2 OF PROTOCOL No. 7)

Article 2 of Protocol No. 7 guarantees the right to "*everyone convicted of a criminal offence to have his conviction or sentence reviewed by a higher tribunal*". Having in mind that this Protocol has recently become effective and the jurisprudence of the European Commission and Court relating to it has not been available, the compatibility of domestic legislation with the Protocol has been assessed only on the basis of existing Explanatory report and respective comments.

Article 15 of the Constitution of the Republic of Macedonia guarantees "*the right to appeal against individual legal acts issued in a first instance proceedings by a court, administrative body, organization or other institutions carrying out public mandates*".

The appeal against the verdict issued by a court at first instance has been provided for by Chapter XXIII of the Draft Code on Criminal Procedure, as the most significant remedy referring both to the factual and legal questions. Namely, the authorized persons (parties, defending council, lawful representatives both to the convict and the suffering person and other by law determined persons) may submit an appeal against verdict delivered by the court at first instance in a period of 15 days from the day of receipt of the verdict. In case of summary proceedings this period is 8 days.

The verdict may be contested on the following grounds: first, because of essential violation of the provisions of criminal procedure; second, because of violation of provisions of the criminal code; third, because of the state of the facts was erroneously or incompletely established; and fourth, because of the decision as to the sentence, security measures, confiscation of property gain, costs of criminal proceedings and claims under property law, and because of a decision to publish the verdict in the press or over radio or television.

The court at second instance passes a decision in a session of the panel or on the basis of a hearing. The court in the second instance may reject the appeal as being late or inadmissible, or it may refuse the appeal because it is unfounded and confirms the verdict of the court in the first instance, or it may vacate that verdict and return the case to the court in the first instance for retrial and a new verdict, or it may revise the verdict of the court in the first instance.

The appeal against the verdict of the court in second instance is possible only in cases explicitly determined by law. Parties and persons whose rights have been violated in criminal procedure may submit an appeal against the decision of the investigating judge, as well as against other decision of the court in the first instance, save in cases where such an appeal is explicitly prohibited by law.

Chapter XXIV of the Draft Code of Criminal Procedure provides for four extraordinary legal remedies against the final verdict: first, reopening of criminal proceedings; second, extraordinary mitigation of the punishment; third, request for protection of legality; and fourth, request for extraordinary review of final verdict.

It must be mentioned that an appeal against verdict or ruling passed by the court in the first instance in proceedings on minor offences is also possible. In such a proceedings there exist extraordinary remedies too, such as request for reopening of the proceedings of minor offences and request for protection of legality (Article 75 of the Draft Bill on Minor Offences).

COMPENSATION FOR WRONGFUL CONVICTION (ARTICLE 3 OF THE PROTOCOL NO. 7)

Article 3 of the Protocol No. 7 to the European Convention on Human Rights provides for the right to compensation for wrongful conviction of a person in a criminal procedure.

Articles from 529 to 537 of the Draft Code on Criminal Procedure guarantee and elaborate the same right. The substantial precondition for the accomplishment of the right from Article 3 of the Protocol No. 7 is the existence of a prior conviction by final decision for a criminal offence, i.e. when the case has become *res judicata*. The formulation used in mentioned provisions from the Draft Code on Criminal Procedure is "effectively pronounced criminal sanction", which is entirely in line with the meaning of respective provisions of the European Convention. The term "effectively pronounced criminal sanction", includes punishments, safety measures and juvenile measures.

Apart from real damage (*damnum emergans*) and loss of earnings (*lucrum cesans*), within the framework of compensation requirable by this procedure are comprised: expences of the criminal proceedings the convict has already paid, expences for the defence of the convict and other expences arising from the proceedings. The convict is not entitled to the right to compensation only due to the fact of wrongful conviction, but the existence of damage must be proved, both in kind and amount.

For the existence of wrongful conviction meaningless is the fact what was the reason for such wrongful conviction: whether it was by judge's or other authority's failure, or due to a false statement of a witness or an expert, due to forged papers etc. It is even possible that wrongful conviction has been caused by no one's failure, but merely there appear new facts and circumstances leading to a reversed decision.

It is considered that a person is partly acquitted from accusation in cases when for offences committed in succession has been acquitted only

for some of them and convicted for the rest of them. In such a case the right to compensation refers only to offences for which the offender has been acquitted.

The right to compensation does not exist when on the occasion of a extraordinary legal remedy (for example, reopening of criminal proceedings) the qualification of the offence has been modified, so that the person in question has been convicted for an offence of lighter type than it was by the previous conviction.

A person is not entitled to the right of compensation when at the reopened proceedings he was sentenced less severely than by the previous conviction, or when the punishment has been commuted by way of extraordinary mitigation of his punishment, regardless of the fact whether or not at the time of pronouncement of conviction there existed circumstances influential upon the punishment, but the court was not aware of them.

If the renewal of criminal proceedings was permitted in favor of the accused, and he dies or becomes permanently mentally unfit in the course of renewed proceedings, the renewed proceedings ceases, and the right to compensation passes over his heirs. They inherit the right to compensation only of property damage, only within the framework of already filed claims by their bequeather.

When a person has been convicted on the basis of his false admission of guilt, the right to compensation does not exist if admission has been given voluntarily. The person is entitled to the right to compensation if the admission has been given under threat or force of any kind.

If the claim to compensation has not been recognized or a competent administrative body has not decided on it within three months after its submission, the person having suffered damage may submit a lawsuit before a competent court. If an agreement has been reached between the claimant and the competent administrative body only upon a part of the claim, a lawsuit for the remainder of the claim can be submitted.

The question of compensation for wrongful conviction is being decided upon according to the general principles for compensation from contractual law, as well as from general principles from civil procedure, except specificity arising from criminal procedure.

Right to compensation belongs to a person who has been detained, but a criminal proceedings has not been initiated, or the proceedings has been ceased, or the accused has been acquitted or the accusation has been denied. This right also belongs to a person having served a sentence deprivation of liberty and later, by an extraordinary legal remedy his sentence has been commuted below the sentence already served, or the punishment has been replaced by a punishment other than deprivation of liberty, or has been found guilty, but exempted from punishment. The right to compensation belongs to persons wrongfully deprived of liberty by an unlawful act of a competent body, or detained longer than it was ordered, and finally if detention lasted longer than prison sentence the person has been tried to.

The person who has been unlawfully deprived of liberty has the right to compensation regardless the fact whether detention has been ordered, except in the case when he caused deprivation of liberty by his own misconduct.

If the case connected with wrongful conviction of a person has been shown in mass media and it has caused his defamation, that person has the right the new decision to be announced. After death of the person wrongfully convicted, this right belongs to his or her spouse, his or her children, his or her parents, his or her brothers and sisters.

RIGHT NOT TO BE TRIED OR PUNISHED TWICE (ARTICLE 4 OF PROTOCOL No. 7)

Article 4 of Protocol No. 7 guarantees that "*No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same state for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that state*".

Article 14 paragraph 2 of the Constitution of the Republic of Macedonia also defines the principle of *non bis idem*. It does it very rigidly defining that "*No person may be tried in a court of law for an offence for which he/she has already been tried and for which a legally valid court verdict has already been brought*". With the same meaning is the formulation from Article 5 of the Draft Code on Criminal Procedure.

Such formulations cause certain controversy, particularly: first, is there any prospect for conducting a criminal procedure after previously brought court verdict for a minor offence with the same features as a criminal one?; and second, do the Constitution and international acts permit reopening of the procedure at the detriment of the convict?

Domestic legislation allowed conducting a disciplinary action independently from criminal procedure so far. It seems that it is not a problem at all from the Convention aspect, of course if it is not a question of charges pursuant autonomous interpretation of the term "criminal charges" from Article 6 of the Convention.

But, far more complicated is the relation between criminal procedure and procedure for minor offences. As a rule, for an offence with same features there can not be conducted simultaneously both a criminal and a procedure for minor offences. But, the possibility of conducting a criminal procedure for an offence for which there has already been brought a sanction in a procedure for minor offences, has not been ruled out. Pursuant Article 47 paragraph 2 of the new Criminal Code, "*The*

imprisonment or the fine the convict has served or paid for an minor offence or for fraud or embezzlement in business doing shall be calculated in the sanction brought for a criminal offence the features of which include the ones of the minor offence and the fraud and embezzlement".

The existing Code on Criminal Procedure also allows a reopening of the procedure at the detriment of the convict. The authors of the Draft Code on Criminal Procedure ascertain that those solutions are inconsistent with Article 14 paragraph 7 of the International Covenant on Civil and Political Rights. That's why, Article 395 of the Draft Code permits the procedure to be reopened in favor of the convict only, even in a case when the court verdict by which the accusation has been denied has been brought upon prosecutor's renunciation of accusation, and it has been proved that renunciation has been caused by abuse of office (paragraph 1 count 3). But, this is not possible, because in this case the reopening of the procedure would logically be at the detriment of the convict only.