

# Journalism in the Public Interest: Definitions and Interpretations in Journalism Ethics and Law

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## SUMMARY

*The literature on journalism ethics and law contains no generally shared definition of what constitutes the public interest. The goal of this article is to establish the positions on the public interest taken by three courts – that is, the European Court of Human Rights, the Constitutional Court of the Republic of Slovenia, and the Constitutional Court of the Republic of Croatia – in order to discern whether case law has provided more specific guidelines for understanding what journalism in the public interest actually means. Based on our analysis, we propose a broad definition whereby information in the public interest refers to data so objectively important to society that the public's right to be informed about such data outweighs a human right or freedom, or a private or public interest, which would otherwise demand that the data not be disclosed to the public. Information in the public interest can be part of political, economic, social, religious, or any other contexts. The essence of the public interest is that it concerns an important matter; the importance of which can only be evaluated on a case-by-case basis, taking into account all of the circumstances of a particular case.*

Key words: Journalism, Public interest, European Court of Human Rights, Constitutional court, Journalism ethics

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## Introduction

There is no generally shared definition of what constitutes the public interest, despite it being “the most important question in journalism today” (Harding, 2012) and “commonly presumed to be fundamental to the practice of journalism” (Morton & Aroney, 2016: 20). Muller (2014: 53) described it as one of the four key recurring concepts in ethical decision-making for journalism, alongside free speech, the avoidance-of-harm principle, and censorship. This highlights the need for exploring the idea of public interest in journalism in more detail.

Despite lacking a clear definition, the term ‘in the public interest’ is well established among both professionals and scholars in journalism ethics and law. According to Franklin et al. (2005: 211), this term is used in both legal and media contexts of ethics, communications policies, and social responsibility. It denotes “specific criteria by which the usual legal rights of an individual or organisation, e.g. to defend their reputation, or protect confidential matters, privacy or copyright, are justifiably overridden by the need for information to be published to benefit society, e.g. to help it understand events or scrutinize people in the public eye” (ibid.). The academic literature mostly deals with the public interest in relation to privacy rights (e.g. Morrison & Svennevig, 2007; Whittle & Cooper, 2009; Rusbridger, 2014; Wragg, 2015; Burns Coleman & Eastgate Dann, 2016). However, this issue is also relevant in cases involving other rights, such as personal dignity or source confidentiality, which can collide with freedom of expression. In order to avoid unjustifiable violations, limits must be determined by considering the public interest.

Since identifying public interests and acting accordingly is a very significant part of journalists’ work, some authors (e.g. Davies, 2009) have argued the need for a more precise definition. According to Harding (2012), for example, such a definition “must provide an overarching rationale as well as being of practical use”. Cathcart (2011) stated that, although no definition can bring “absolute clarity for all journalists in all circumstances”, we can develop “a workable one in most circumstances”. In this article, we will discuss the possibilities for creating such a definition. Our goal is to examine whether definitions from the literature on journalism ethics and law could benefit from public interest interpretations established in case law. The position of three select courts on the issue of public interest in judgements related to freedom of expression will be compared to definitions from the literature in order to discern whether case law has provided more specific guidelines for understanding what journalism in the public interest actually means.

## Literature Review

The roots of the public interest concept can be traced through social contract theories, particularly through the work of Hobbes, Rousseau, Dewey, and Lippmann (for

a detailed review, see Stoker & Stoker, 2012). In political philosophy, public interest has been used over the centuries “to denote some type of commonality or common characteristic between and among citizens” (King et al., 2010: 957). For example, Lippmann (1955) believed that living adults share the same public interest, which is both mixed with and at odds with their private interests. Accordingly, “the public interest may be presumed to be what men would choose if they saw clearly, thought rationally, acted disinterestedly and benevolently” (Lippmann, 1955: 44). When defining the public interest, one needs to consider the semantic dimensions of *publicness* in relation to the public-private dichotomy, as described by Splichal (1999: 17–20). Public can refer to what is visible or accessible to everyone, or at least to many. *Public*, in the sense of referring to matters of general or national (state) importance or interest, has to do with common or general interests that should be satisfied by public actions. In this sense, *public* refers to the sphere of institutionalised political power, a sovereign state, contrary to the economy and personal relations, which are outside of state control and belong to the private sphere. The third meaning of *public* derives from Dewey’s conceptualisation, in which the difference between private and public is not the same as the difference between the individual and social or socially useful. It is instead based on the consequences of an individual’s action for individuals who are not directly involved in a transaction. If the consequences of human actions are confined to the individuals directly participating in them, the transactions are considered private; if indirect consequences are recognised and somehow regulated, the transactions are public in nature.

In the literature, the public interest seems to be discussed most often by emphasising the need for distinguishing the public interest from what interests the public. According to the former *Guardian* readers’ editor, Chris Elliott (2012), the public interest is by no means synonymous with whatever interests the public. Harding (2012) stressed that the public interest “does not mean just satisfying the curiosity of the public”. Muller (2014: 62) claimed that the public interest “is not the same as public curiosity, nor is it assessed by whether a story increases newspaper circulations or generates high levels of online clicks”. Davies (2009) pointed out the need “to draw a distinction between ‘public curiosity’ and ‘social or civic importance’”. Hill and Lashmar (2014: 129) wrote that the public interest “is not the same as what interests the public”. Although both terms—public interest and the interest of the public—include the word ‘interest’, their meanings are distinct from one another: “In one we give our attention to something because it has the potential to do us good or harm; in the other we are merely curious” (Cathcart, 2011).

If we summarised the definitions from different scholars and professionals, their common element would be equating the public interest with information that has relevance for the public. According to Hill and Lashmar (2014: 129), the public in-

terest is “important information that should be available to the public to help them make informed decisions in a democratic society”. Similarly, Wilson (1996: 32) stated that the public interest “refers to serious matters in which the public have or ought to have a legitimate interest”. Morrison and Svennevig (2007: 63) even proposed a new concept—‘social importance’—as a test of public interest, which would allow journalists to avoid confusion regarding the difference between what the public is interested in and what is in the public’s interest.

Muller (2014: 64) comprehensively listed indicators of public interest, namely: the existence of crime or serious corruption or impropriety in public life; the existence of a threat to public health or safety; the existence of a fraud or scam that is likely to mislead or rob the public; exposure of hypocrisy or double standards in public life; and betrayal of public trust in something in which the public has a substantial commercial or emotional investment. To summarise, the public interest concerns “matters that affect public health, safety, or financial security; the capacity of citizens to participate in civic life; or the conduct of affairs in which the public have invested trust” (Muller, 2014: 65). Moosavian (2014: 244–248) classified the public interest as that which contributes to democratic debate, prevents the public from being misled, or reveals crimes or serious misdeeds. These are merely examples of typical themes, which are usually by virtue of their content so important to the public that journalists have a wide margin of freedom of expression when reporting on them.

Several authors have attempted to define the public interest as an argument in cases of privacy invasion. Burns Coleman and Eastgate Dann (2016: 67), for example, argued that invasions of privacy should serve the public interest, which is not “the interest of an individual, or a particular group, but an interest that all citizens share, such as their interest in justice, safety, health or good governance”. Gillespie (2016) wrote that public interest journalism encompasses correcting a significant wrong, bringing to light information that affects public well-being and safety, or seeking greater accountability and transparency in public life. Whittle and Cooper (2009: 97–98) defined the following characteristics of public interest: citizens in a democratic state have an interest in having access to information about the workings of the state’s institutions, as well as private companies and voluntary organisations that require the public’s trust; when an individual holds such an office, it is in the public interest that his/her public actions be open for inspection, analysis, and investigation by the news media; such an individual is to be judged for his/her public and not private acts; and if links are shown to exist between public and private, then the latter is a legitimate area of inquiry.

The idea of journalists serving the public interest is “closely linked to ideas of the social responsibility of news media” (Rodny-Gumede, 2015: 112), and is therefore of central importance for ethical journalism. The fundamental principle of journal-

ism ethics is journalists' moral commitment to maximally relevant truth-telling in the public interest and for the public good, according to Jacquette (2012: 214). Since the primary purpose of journalism ethics codes is "safeguarding the autonomy of the profession and serving the public interest" (Baydar, 2008: 21), it can be assumed that a clearer definition of the public interest can be found within them. Journalism codes of conduct generally recognise that in some circumstances, "there must be public interest exceptions to ethical norms of news-gathering and of what should be published" (Franklin et al., 2005: 211). A review of several randomly selected codes or guidelines revealed that some explicitly refer to the public interest, but without explaining its meaning. For example, this was the case in codes from Finland (Council for Mass Media, 2014), the Netherlands (*Raad voor de Journalistiek*, 2015), Sweden (Pressens Samarbetsnämnd, 2001), Denmark (The Press Council, 2013), Germany (German Press Council, 2015), Slovenia (DNS & SNS, 2010), and Croatia (HND, 2009). Conversely, some media organisations (e.g. BBC, The Guardian) and professional organisations (e.g. IPSO from the UK, The Press Council of South Africa, The Press Council in Bosnia and Herzegovina, The Austrian Press Council, New Zealand Press Council) adopted codes that at least somewhat thoroughly define how the public interest is to be understood.

A rather detailed definition has been created by the British Independent Press Standards Organisation (IPSO, 2016), stating that the public interest includes, but is not confined to: detecting or exposing crime, the threat of crime, or serious impropriety; protecting public health or safety; protecting the public from being misled by an action or statement of an individual or organisation; disclosing a person or organisation's failure or likely failure to comply with any obligation to which they are subject; disclosing a miscarriage of justice; raising or contributing to a matter of public debate, including serious cases of impropriety, unethical conduct, or incompetence concerning the public; and disclosing concealment, or likely concealment, of any of the above. A very similar definition has been presented by the BBC Editorial Guidelines, which states that the public interest includes, but is not confined to: exposing or detecting crime; exposing significantly anti-social behaviour; exposing corruption or injustice; disclosing significant incompetence or negligence; protecting people's health and safety; preventing people from being misled by some statement or action of an individual or organisation; and disclosing information that assists people in better comprehending or making decisions on matters of public importance.

Some codes drafted shorter definitions. For example, the Press Council in Bosnia and Herzegovina (2011) defined the public interest "as the procedure and/or information which has the intention of helping the public create personal opinions and decisions about issues and events, including the efforts to detect criminal and/or civil offenses, and to prevent the seduction of the public by certain statements or actions of individuals or organizations". The Austrian Press Council (Der

Österreichische Presserat, 2013) referred to “situations of investigating serious crime, protecting public health or safety, or preventing the public from being misled”. Some professional organisations preferred more general definitions. The Press Council of South Africa (2016), for example, described the public interest as “information of legitimate interest or importance to citizens” (The Press Council of South Africa, 2016). The New Zealand Press Council also gave a definition that left room for different interpretations, defining the public interest “as involving a matter capable of affecting the people at large so that they might be legitimately interested in, or concerned about, what is going on, or what may happen to them or to others”.

## Methodology

Reviewing journalism ethics and law literature, as well as several journalism ethics codes, revealed that, despite its relevance for journalism, there is no strict universal definition of the term ‘public interest’. However, we expect that case law has more specifically defined the public interest as the circumstances determining the limits of freedom of expression. Therefore, our goal is to establish the position on the public interest issue taken by three select courts, that is, the European Court of Human Rights (ECtHR), the Constitutional Court of the Republic of Slovenia (CCRS), and the Constitutional Court of the Republic of Croatia (CCRC).

The ECtHR’s judgements were chosen because the ECtHR is “an international constitutional court with the power of *in concreto* judicial review and with the *de facto erga omnes* effect of its judgements” (Zupančič, 2006: 170). According to Ribičič (2010: 116), the European Convention on Human Rights is not only what has been written in it, but also what the ECtHR has read in it and added to it in any of its decisions on the convention’s merits. In this way, the European Convention on Human Rights is a “living instrument” (Wedam Lukić, 2010: 1039) that continuously develops through the case-law of the ECtHR; accordingly, national courts must apply the ECtHR’s case-law when interpreting the contents of particular conventional rights. The judgments of constitutional courts are nationally relevant because one of their functions is “the function of the substitute ‘Constitution-maker’”, which means that in specific cases, these courts “even supplement constitutional provisions” (Mavčič, 2009: 34). The Constitution “is changing” with almost every decision of the Constitutional court, which provides its interpretation of the Constitution when dealing with complex constitutional issues (Ribičič, 2010: 35).

We will address three research questions:

RQ 1: How is the public interest interpreted in the case law of the ECtHR?

RQ 2: How is the public interest interpreted in the case law of the CCRS?

RQ 3: How is the public interest interpreted in the case law of the CCRC?

We will use the qualitative method of document analysis to answer these questions (e.g. Bowen, 2009). What that means is we will analyse relevant judgements of the three courts dealing with cases concerning freedom of expression, as well as legal acts that serve as the basis for the courts' decisions. Judgments of the ECtHR refer to Article 10 of the European Convention on Human Rights, judgements of the CCRS to Article 39 of the Constitution of the Republic of Slovenia, and judgements of the CCRC to Articles 38(1) and 38(2) of the Constitution of the Republic of Croatia. Due to space limitations, only a few case studies will be presented in the following chapter.

## **Results and Discussion: Matters in the Public Interest**

### **Case Law of the European Court of Human Rights**

The notion of a public interest in the context of the right to freedom of expression is not explicitly defined in the European Convention on Human Rights. However, the ECtHR has repeatedly stated in its judgments that freedom of expression is one of the most important human rights. According to the ECtHR, this human right constitutes one of “the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every man”.<sup>3</sup> Despite this principled position, according to which freedom of expression is paramount in the hierarchy of human rights, its scope in each case depends on many factors and circumstances. The most important circumstance is whether the disputed statement was made in the context of the public interest. Debate on matters related to the public interest must be free and should only be limited in exceptional cases.<sup>4</sup> In the context of such topics, the participants in these discussions may express their ideas in particularly sharp and provocative terms.<sup>5</sup>

This context necessitates distinguishing between a matter in the public interest and a matter of the public interest. The necessity of distinguishing between these two matters was raised by the ECtHR in *Von Hannover v. Germany*.<sup>6</sup> It addressed an application by Caroline von Hannover (the applicant), who lost the litigation in the German courts against the media, which had published photos of her private life. German courts took the position that the applicant was an absolute public person whose privacy stopped at her front door.<sup>7</sup> According to the German courts, since the controversial photos were taken in public places, the media's publication of these photos did not intolerably affect the applicant's right to privacy. Based on this, publishing the photos in question legitimately exercises the public's right to be informed. However, the ECtHR upheld the complaint by Caroline von Hannover and condemned Germany for breaching the applicant's peaceful private and family life.

The ECtHR held that the German courts wrongly assessed that the publication of the applicant's photos was in the public interest due to her status. Namely, there should be a distinction between facts that are objectively and broadly relevant to society and those with the sole purpose of satisfying the curiosity of a particular readership. Media coverage of the first—i.e. facts in the public interest—must be as unrestricted as possible. However, reporting on intimate events in the lives of famous persons, which serves only to profit the media, is afforded a much narrower protection of freedom of expression. In this case, the ECtHR thus defined the criteria for the distinction between matters that lie within the public interest and matters that merely serve to entertain the masses. The objective element is decisive. For defining matters in the public interest, it is not important whether this matter interests the public; what is essential is that it is objectively and broadly important to society.

Moreover, many different cases that are objectively important to society can be found in ECtHR case law; typically, these are matters with political content. According to the ECtHR, free political debate and free elections are the cornerstones of any democratic system.<sup>8</sup> Therefore, there is a wide margin for freedom of expression in the context of a political debate, which means that the parties can express themselves in such a debate in a particularly sharp and provocative manner.

An example of restrictions on freedom of expression in the context of political debate was considered by the ECtHR in the case *Lombardo v. Malta*.<sup>9</sup> City councillors in a Maltese town, in connection with the construction of a local road, published a newspaper article accusing the city council of ignoring public opinion on the issue. Maltese courts found the assertions by the councillors to be offensive, and thus an abuse of freedom of expression; therefore, they convicted the councillors of defamation. The ECtHR declared the application admissible and convicted Malta for violating freedom of expression. In its judgment, *inter alia*, the ECtHR stated that the applicants' statements were given within the context of an open political debate on a matter in the public interest, and that such a debate should especially be unrestricted. Therefore, by convicting the applicants, the Maltese courts excessively restricted their right to freedom of expression.

The ECtHR further emphasised the necessity of unrestricted freedom of expression in the context of political debate in the cases of *Oberschlick v. Austria*<sup>10</sup> and *Oberschlick v. Austria (2)*.<sup>11</sup> In the first case, journalist Gerhard Oberschlick published in the newspaper *Forum* a criminal complaint that he had filed against an Austrian politician. The politician was advocating reducing family allowances for women immigrants in Austria and simultaneously for increasing those received by Austrian women. Austrian courts considered the criminal complaint's publication to be an abuse of freedom of expression and condemned Oberschlick for defamation. In the courts' view, Oberschlick wrongly associated the politician's statement with Nazi

ideas, while at the same time expressing contempt for the politician in his article. The ECtHR heard the journalist's appeal and in its judgment, *inter alia*, stated that it is necessary to criticise the politician's conduct; therefore, in the context of political debate, sharp and provocative statements are permissible. Freedom of expression in the context of political debate may only be restricted in exceptional cases.

The court even went a step further in protecting freedom of expression in the context of political debate in the case of *Oberschlick v. Austria (2)*. This dealt with a case in which the then governor of Carinthia, Jörg Haider, at a ceremony, *inter alia*, stated that we had to thank both Nazi and Allied soldiers, since both fought for our freedom. Journalist Oberschlick commented on Haider's appearance in an article in which, *inter alia*, he labelled Haider as an idiot. Because of these words, he was sentenced by Austrian courts; however, the ECtHR allowed his appeal. One of the decisive reasons for the ECtHR's position, which held that Oberschlick's words were within the permissible limits of freedom of expression, was that the criticism of Haider had been expressed in the context of a political debate.

A typical example of a matter in the public interest is misuse of power on the part of public officials. In the case of *Thorgeirson v. Iceland*,<sup>12</sup> writer Thorgeirson published two articles criticising alleged violent conduct by the Reykjavík police. Police officers were described with sharp expressions, such as "beasts in uniform". At the police union's insistence, the public prosecutor instituted criminal proceedings against Thorgeirson for defamation. The evidence showed that Thorgeirson simply invented a part of the allegations in the article, which he wrote primarily on the basis of unsubstantiated rumours, so Icelandic courts found him to be guilty. However, the ECtHR allowed Thorgeirson's appeal. The main reason for the ECtHR's decision was that Thorgeirson wrote on a matter in the public interest—i.e. the alleged abuse of police powers. According to the ECtHR, in the context of such a debate, the journalist may also report on the basis of rumours and without sufficient basis in fact.

In the case of *Giniewski v. France*,<sup>13</sup> writer Giniewski published an article blaming Catholic Church doctrines for anti-Semitism in society. Because of these words, he was sentenced by French courts for defamation of members of the Christian community. However, the ECtHR condemned France for infringing on the writer's freedom of expression, stating that in the context of a subject as important as the search for the cause of the Holocaust, the greatest tragedy of modern times, sharp and even offensive expressions should be allowed.

Let us conclude the review of the ECtHR case law in relation to matters in the public interest with the case of *Editions Plon v France*.<sup>14</sup> The ECtHR ruled on a case in which former French President Mitterrand's physician published a book describing the last days before the death of his patient. The French authorities banned the sale

of the book, since it was alleged to interfere with respecting the president's relatives. However, the ECtHR held that such a restriction on freedom of expression was too strict. The main reason for the ECtHR's position was that the subject of a head of state's illness and the question of whether he was able to carry out his work while ill was a matter of public interest.<sup>15</sup>

On the basis of the presented cases, one can conclude that any matter can be considered to be in the public interest as long as it is objectively important to the public. This can be a debate on the construction of a road, which is important for a local population, or a debate on a reactionary politician's ideas, for whom the public voted in an election. It can also be a debate on the misuse of power on the part of public officials, an investigation of the causes of the Holocaust, or about the illness of the president of the country. The public has the right to be informed about all of these facts, and it is essential that everyone be enabled to express their opinions. Discussing matters in the public interest should only very rarely be restricted due to its great importance for a free and democratic society.

### **Case Law of the Constitutional Court of the Republic of Slovenia**

Public interest is not defined in the Constitution of the Republic of Slovenia (see *Ustava Republike Slovenije*). However, it is mentioned in the Slovenian legislation, i.e. the Public Information Access Act (see *Zakon o dostopu do informacij javnega značaja*). Article 6(1) of the Act specifies the information to which an applicant does not have access, and Article 6(2) defines the so-called 'public interest test'. On the basis of the latter, access to the requested information may be permitted, even if the information falls within the definition provided in Article 6(1), if the public interest in the disclosure of such information prevails over the public interest or the interest of other persons by restricting access to said information.<sup>16</sup>

Although the CCRS case law is much more modest than the ECtHR's case law on this topic, CCRS's decisions demonstrate that it understands matters in the public interest very similarly to the ECtHR. Let us present some examples confirming this.

In the case of Up-2940/07,<sup>17</sup> the police announced at a press conference that some police officers were suspected of committed several offenses. The police gave journalists only the initials of the suspected police officers' names. However, the daily *Delo* published an article revealing the identity of a suspected police officer. The police officer filed an action against the newspaper's publisher, and he was successful in the ordinary courts. According to the regular court's opinions, the newspaper should not have disclosed the identity of a person against whom criminal proceedings had not yet even been initiated, let alone convicted. However, the CCRS ruled in favour of the daily because the subject of public officials' abuse of powers is a

matter of public interest, the framework of which should allow for a wide margin of freedom of expression.

Another matter in the public interest is the subject of influential business lobbies. In the case of Up-570/09,<sup>18</sup> the daily *Večer* published an article stating that a known Carinthian entrepreneur (who was identified by his full name in the article) was suspected of money laundering, which he had allegedly committed in collaboration with some bank officials. The entrepreneur brought an action against the newspaper for wrongful interference with his right to privacy. The regular court upheld his claim, but the CCRS sided with the newspaper. In the decision upholding the constitutional complaint, the CCRS held that the public had a right to be informed about influential economic networks involving entrepreneurs and banks.

In the case of Up-139/02,<sup>19</sup> the CCRS decided that a controversial fundraising from a legal perspective for members' mutual support is a matter in the public interest with respect to what critical media coverage is permissible. According to the CCRS, even in the event of a pointed and provocative media report, unlawfulness is excluded if it is a criticism carried out in the public interest or if it is in the legitimate interest of the public to be informed about a particular action or event.

In the case of Up-1128/12,<sup>20</sup> the CCRS dealt with a case in which a regular court had sentenced a former member of Parliament for insulting the public prosecutor by saying that "he would not entrust him to take care after three sheep, because he would be afraid that the two of them would be lost and that he did not know how this man finished law school, but as it appears the law school nowadays could be finished by anyone, who could then get a job at a court or an office of the prosecutor and is then cemented to death there and nobody could move him, even if he does such stupid things". The CCRS repealed the convictions, *inter alia*, because the words of the Parliament member were spoken in the context of a discussion on a matter in the public interest—i.e. criticising the work of public prosecutors. The CCRS emphasised that the public has the right to be informed in detail about the work of public prosecutors, and the latter must endure critical and unpleasant words on their account.

There is only one case in CCRS case law that conflicted with the standards set out in the ECtHR case law when defining the concept of public interest in informing the public. The case of Up-1391/07<sup>21</sup> dealt with a situation in which a Parliament member, Srečko Prijatelj, had been criticised by a journalist working for *Mladina* magazine. In his speech before Parliament, Prijatelj made fun of homosexuals, which was the subject of a severe critique by *Mladina's* journalist. Among other things, the journalist called him "a cerebral bankrupt". Prijatelj brought an action against *Mladina* for defamation; he was successful before the ordinary courts, and even the CCRS ruled in his favour. *Mladina* instituted proceedings before the ECtHR, which,

for the first and only time so far, found Slovenia to be in breach of freedom of expression.<sup>22</sup> The ECtHR held that Slovenian courts excessively restricted the right to freedom of expression because they disregarded fact that the journalist's words had been written in the context of a political debate, i.e. to criticise the wrongful conduct of the representative of authority.<sup>23</sup>

From the above cases, it is evident that the CCRS usually understands matters in the public interest similarly to the ECtHR, namely, as matters that are objectively important for the public and within which a wide margin of freedom of expression is permitted. The CCRS's misunderstanding of a matter in the public interest in the *Mladina* case led to the first conviction of Slovenia by the ECtHR for violation of freedom of expression.

### **Case Law of the Constitutional Court of the Republic of Croatia**

Public interest is not defined in the Constitution of the Republic of Croatia (see Ustav Republike Hrvatske). The right of access to information is regulated by Croatian law. Thus, Article 16 of the Croatian Right to Access to Information Act (see Zakon o pravu na pristup informacijama) defines the "proportionality and public interest test", on the basis of which the authorities must assess whether the applicant is allowed to be familiar with specific information to which the public is not otherwise entitled. For this purpose, and in line with this provision, it is necessary to weigh the conflicting interests: on the one hand, public interest in the disclosure of information, and on the other hand, the interest of other persons in ensuring that such information is not disclosed.

Our analysis of the CCRC case law was limited by the relatively small number of available judgements. Namely, on the CCRC's website, we found eight decisions by the CCRC relating to Articles 38(1) and 38(2) of the Constitution of the Republic of Croatia,<sup>24</sup> and in all of them, the CCRC dismissed constitutional complaints and upheld the judgments of the ordinary courts, convicting the applicants of abusing the right to freedom of expression. This suggests that the CCRC has a narrower scope of freedom of expression than the CCRS and the ECtHR, or that in the case law we analysed, it did not deal with any case in which it should have ruled according to the standards set out in the ECtHR case law in favour of the holder of freedom of expression. Which of these possibilities is correct cannot be determined based only on the analysis of the cited decisions of the CCRC. Critically analysing the CCRC decisions could only be feasible if we had at our disposal the texts of the constitutional complaints, which were brought in some cases and which allowed us to infer how the constitutional complainants argued their claims that the ordinary courts had wrongfully limited their right to freedom of expression. The constitu-

tional complainants' statements are only briefly summarised in the CCRC decisions. Based on the material available, we focused mainly on the question of whether the CCRC takes ECtHR case law into account in its decisions, according to which matters in the public interest are subject to a wide margin of freedom of expression.

After reviewing the decisions, we found that in none of these cases did the CCRC establish that the constitutional complainant's statement fell within the context of the debate on matters in the public interest, which would justify a wide margin of freedom of expression. Only in one case<sup>25</sup> did the CCRC state that the constitutional complainant exceeded the permissible margin of freedom of expression, despite the 'importance' of the information to the public, because he wrote about a politician's life. From this decision, it cannot be discerned why the word 'importance' was used in quotation marks or whether the CCRC thus wanted to claim that reporting on a politician's life is in fact not important to the public.

In no other decision did the CCRC mention whether controversial expression of the constitutional complainant fell within the context of the debate in the public interest, which is surprising given the fact that in some cases considered by the CCRC, those matters were undoubtedly relevant to the public.

Thus, in the case of U-III-237/2012, the CCRC dismissed a complainant who drew attention in a newspaper article to alleged corrupt conduct of a state prosecutor's office in Zadar, which is certainly a matter in the public interest. From the CCRC decision, it follows that the constitutional complainant could have been relieved of his responsibility if he submitted a final conviction of the prosecutors he wrote about. Let us in this context recall the judgment in *Thorgeirson v. Iceland* mentioned above, in which the ECtHR stated that journalists reporting on abuses of government representatives could use sharp and even offensive words, and their findings may even be based solely on assumptions and hearsay. Therefore, the CCRC in the present case put on the constitutional complainant a significantly harsher burden of proving the veracity of his allegations, as the Icelandic courts should have imposed on Thorgeirson, according to the ECtHR. Although, as mentioned above, we cannot accurately and comprehensively learn about the facts in that case solely on the basis of the CCRC decision, the above statements seem to demonstrate that the CCRC in the case described assessed freedom of expression more restrictively than the ECtHR in its case law.

As stated in the description of CCRS case law, a case of insulting a state prosecutor was also dealt with by the CCRS.<sup>26</sup> One of the reasons for the CCRS's decision, under which offensive words directed at the state prosecutor are within a permissible margin of freedom of expression, is that the Parliament member discussed a matter that was important for the public. However, the CCRC in its decision did not consider the question of whether the disputed statements by the constitutional com-

plainant had been given in the context of a matter in the public interest and, if this were the case, whether and how the above fact influences defining the margins of freedom of expression of the constitutional complainant. In its decision, the CCRC referred to the judgment of the ECtHR *De Haes and Gijssels v. Belgium*<sup>27</sup> (the decision, clearly in error, states that it is the case *Haas and Gijssels v. Belgium*), but the facts of the ECtHR judgment and those of the case considered by the CCRC are substantially different. The case of *De Haes and Gijssels v. Belgium* dealt with an insult to judges, and the case adjudicated by the CCRC dealt with an insult to prosecutors. According to the settled ECtHR case law, judges should enjoy significantly greater protection against unjustified attacks on their reputation, as is the case for civil servants.<sup>28</sup> In criticising prosecutors, there should therefore be a wider margin of freedom of expression, as with the critique of court, and that is why the case *De Haes and Gijssels v. Belgium* does not speak in favour of finding that the CCRC's decision was consistent with ECtHR case law.

A matter in the public interest could have been involved in the case of U-III-7479/2014. In this case, in the proceedings before ordinary courts, the constitutional complainant had been sentenced for insulting the Croatian Composers' Association. He published an advertisement accusing the plaintiff of 'robbing' the public, who was, according to the Copyright Act, entitled to a percentage of the price of auditory media. The CCRC dismissed the constitutional complaint and stated in its decision that it fully agreed with the ordinary courts. Additionally, in this decision, the CCRC did not consider the question of whether the disputed advertisement was a matter in the public interest. Given that the constitutional complainant criticised a privilege established by law of a legal person who was allowed to earn income at the expense of taxpayers, in our opinion, the facts in this case were a matter of intense public interest to be informed. However, the CCRC did not even mention the existence (or lack thereof) of public interest in this case.

With regard to the CCRC case law, the case of U-III-3946/2011 should also be mentioned. Here, the CCRC considered a case in which the constitutional complainant was convicted before the ordinary court for insulting the head of a municipality. In an article published in a newspaper in connection with the sale of land and the construction of golf courses, the head of municipality was accused of a conflict of interest. For this article, the constitutional complainant was acquitted before the ordinary court. However, he was sentenced for stating at a panel discussion that the head of the municipality was a "true cockroach". The CCRC fully agreed with the ordinary courts that, independent of the context in which the controversial statement was made, it constituted an abuse of freedom of expression.

In this respect, it should be noted that the question of the possible abuse of a higher municipal official is a matter in the public interest, which justifies the participants in

the debate having a wider margin of freedom of expression for statements that “offend, shaken or disturb the State or any part of society”.<sup>29</sup> In the context of matters in the public interest, the ECtHR allowed offensive statements like “idiot”<sup>30</sup> “fascist”,<sup>31</sup> and “cerebral bankrupt”.<sup>32</sup> As evident from the CCRS case law presented above, the same applies to the case law of that court.<sup>33</sup> Slovenia’s only conviction before the ECtHR occurred because the CCRS was in conflict with the standards described in ECtHR case law due to the objectively offensive term “cerebral bankrupt” being taken out of the context of a matter in the public interest.<sup>34</sup>

## Conclusion

Generally, scholars and professionals in journalism and law understand the public interest similarly. Reviewing various definitions indicated that (part of) journalism ethics literature and professional codes in particular have attempted to implement more extensive definitions, in some cases even by enumerating circumstances that are supposed to count as evidence of the public interest. While some attempted to be all-inclusive (e.g. Muller, 2014), others recognised that the public interest was not confined to what was explicitly cited (e.g. IPSO, 2016). Conversely, the legislature and legal theory are not inclined to embrace a single definition for all of the circumstances that may create a situation in the public interest. The described powerlessness in the definition of the public interest is understandable. Different information and topics that are so important to the public that they can be labelled information or matters within the public interest cannot be enumerated or firmly defined. Public interest is an open circuit of themes that can fall within a “social, economic, cultural or even commercial or religious” context (Harris et al., 2009: 457).

The same conclusion can be drawn from analysing case law of the ECtHR and the CCRS, while the available CCRC case law deviates from the criteria set out in the ECtHR case law and, with the exception of the *Mladina* case, also differs from the positions of the CCRS. As already stated in this article, our analysis of CCRC case law is not thorough, as we had only its decisions at our disposal, not the constitutional complaints themselves. Therefore, we could not determine whether the constitutional complainants referred to the public interest, in the context of which they made their contested statements. However, even based on the analysed decisions, it can be concluded that the CCRC does not consider the public interest within which the statements were made as an important factor in defining the margins of freedom of expression as it applies to ECtHR case law, even though it is obligated to follow standards set by ECtHR case law due to Croatia’s ratification of the European Convention on Human Rights.

We believe that it is unreasonable to expect scholars, professionals, and legislators to rigorously define public interest in order to direct journalists’ decisions, as such a

definition could never suit every circumstance unless it was very vague. Our research confirmed that the existing definitions and interpretations offer sufficient guidance and provide solid ground for journalists' decision-making when considering the public interest in particular situations. The general spirit of these definitions closely relates to the idea of news media's democratic responsibilities, which include: "informing people on factual matters relevant to their civic duties; explaining and clarifying those facts by putting them in context; providing a check against abuses of power by probing behind the curtains of government, commerce, and other public enterprise; and providing a venue for discussion and debate" (Scheuer, 2008: 27). We propose a definition that is in line with such an understanding, but at the same time avoids the danger of excluding possible circumstances that can contribute to the public interest:

*Information in the public interest refers to data so objectively important to society that the public's right to be informed about such data outweighs a human right or freedom, or a private or public interest, which would otherwise demand that the data not be disclosed to the public. Information in the public interest can be part of the political, economic, social, religious, or any other contexts.*

This definition's understanding of the public interest can be linked to Dewey's (1927/1988) conceptualisation of the public in the sense of considering consequences of a particular action affecting persons beyond those involved (see Splichal, 1999: 20). When deciding whether reporting on a particular action is in the public interest, a journalist should reflect on the possible consequences of that action for those who are not directly involved. If the journalist finds that the consequences extend beyond those directly concerned, that they, as Dewey (1927/1988: 244) would say, "affect the welfare of many others", then the action is in the public interest. It should be pointed out here that the distinction between private and public is not the same as the one between individual and social; many private acts are social because "their consequences contribute to the welfare of the community or affect its status and prospects" (ibid.).

Going beyond a broad definition, such as the one written above, and searching for agreement on a very detailed one would be senseless and even counterproductive, since the variety of circumstances determining the public interest can never be predicted in advance nor written down as a comprehensive definition covering all possible situations. The essence of the public interest is that it concerns an important matter, and the matter's importance can only be evaluated on a case-by-case basis, taking into account all of the circumstances of a particular case.

## ENDNOTES

- <sup>1</sup> ECtHR judgment, *Handyside v. United Kingdom*, application no. 5493/72, 7 December 1976.
- <sup>2</sup> For more on the circumstances under which it is possible to define the scope of freedom of expression in specific cases, see Čeferin, 2013.
- <sup>3</sup> In this regard, see summarised examples below from ECtHR case law.
- <sup>4</sup> ECtHR judgment, *Von Hannover v. Germany*, application no. 59320/00, 24 June 2004.
- <sup>5</sup> The German Federal Supreme Court and Federal Constitutional Court somewhat mitigated those views; however, the applicant for the most part lost the cases against the media. For a more detailed analysis of the judgment, see Teršek, 2005: 97–114.
- <sup>6</sup> See, e.g., ECtHR case *Ceylan v. Turkey*, application no. 23556/94, 8 July 1999.
- <sup>7</sup> ECtHR judgment, *Lombardo v. Malta*, application no. 7333/06, 24 April 2007.
- <sup>8</sup> ECtHR judgment, *Oberschlick v. Austria*.
- <sup>9</sup> ECtHR judgment, *Oberschlick v. Austria (2)*, application no. 20834/92, 1 July 1997.
- <sup>10</sup> ECtHR judgment, *Thorgeirson v. Iceland*, application no. 13778/88, 25 June 1992.
- <sup>11</sup> ECtHR judgment, *Giniewski v. France*, application no. 64016/00, 31 January 2006.
- <sup>12</sup> ECtHR judgment, *Editions Plon v. France*, application no. 58148/00, 18 May 2004.
- <sup>13</sup> In this case, the ECtHR agreed with the French court to the effect that, immediately after the president's death, it was necessary to prohibit the sale of the book with an interim injunction, as at that time Mitterrand's relatives were still very affected by his death. Concurrently, it held that permanently banning the sale of the book represented too-strict interference with freedom of expression.
- <sup>14</sup> Difficulties in defining that term are emphasised by the Slovenian Information Commissioner (see Informacijski pooblaščenec), which published on its website that the concept of public interest is a "legally undefined term, therefore, in each individual case it has to be determined whether circumstances exist which are in the interests of the wider community and not just the individual".
- <sup>15</sup> Decision of the CCRS, Up-2940/07, 5 February 2009.
- <sup>16</sup> Decision of the CCRS, Up-570/09, 2 February 2012.
- <sup>17</sup> Decision of the CCRS, Up-139/02, 11 May 2004.
- <sup>18</sup> Decision of the CCRS, Up-1128/12, 14 May 2015.
- <sup>19</sup> Decision of the CCRS, Up-1391/07, 10 September 2009.
- <sup>20</sup> ECtHR judgment, *Mladina d.d. Ljubljana v. Slovenia*, application no. 20981/10, 17 April 2014.
- <sup>21</sup> Compare with the ECtHR judgment, *Oberschlick v Austria (2)*, supra.
- <sup>22</sup> Decisions are available on the website <http://www.usud.hr/hr/prema-clancima-ustava-republike-hrvatske> (last accessed November 11, 2016). Due to the limited space available, we will not analyse the decisions relating to the prohibition of censorship in Article 38(3) (only one decision was delivered in relation to this provision, and it relates to the definition of a journalist in the Media Act) and the right to information in Article 38(4) of the Constitution. We could not find any constitutional court's decision relating to Article 38(5) of the Constitution, which provides for the right to correction.
- <sup>23</sup> Decision of the CCRC, U-III-2845/2011, 5 May 2016.
- <sup>24</sup> Decision of the CCRS, Up-1128/12, 14 May 2015.
- <sup>25</sup> ECtHR judgment, *De Haes and Gisjels v. Belgium*, application no. 199983/92, 24 February 1997.
- <sup>26</sup> Ibid. See also the ECtHR judgment in the case *Kobenter and Standard Verlags v. Austria*, application no. 60899/00, 2 November 2006.

- <sup>27</sup> ECtHR judgment, *Handyside v. United Kingdom*.  
<sup>28</sup> ECtHR judgment, *Oberschlick v. Austria*.  
<sup>29</sup> ECtHR judgment, *Bodrožić v. Serbia*, application no. 32550/05, 23 June 2009.  
<sup>30</sup> ECtHR judgment, *Mladina d.d. Ljubljana v. Slovenia*.  
<sup>31</sup> See Case Up-1128/12, *supra*.  
<sup>32</sup> Decision of the CCRS, Up-1391/07, 10 September 2009.
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# Novinarstvo u javnom interesu: definicije i interpretacije novinarske etike i prava

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## SAŽETAK

Literatura o novinarskoj etici i pravu ne sadrži općeprihvaćenu definiciju javnog interesa. Cilj je ovog članka ustanoviti stajališta triju sudova o javnom interesu – Europskog suda za ljudska prava, Ustavnog suda Republike Slovenije i Ustavnog suda Republike Hrvatske – da bi se utvrdilo je li sudska praksa pružila konkretnije smjernice za razumijevanje stvarnog značenja novinarstva u javnom interesu. Na temelju naše analize predlažemo široku definiciju u kojoj se informacije od javnog interesa odnose na podatke koji su toliko objektivno važni društvu da pravo javnosti da bude informirano o tim podacima nadilazi ljudsko pravo ili slobodu, ili privatni ili javni interes, koji bi inače zahtijevali da se podatci javno ne objave. Informacije od javnog interesa mogu biti dio političkog, gospodarskog, društvenog, vjerskog ili nekog drugog konteksta. Bit je javnog interesa da se radi o važnom pitanju, čija se važnost može jedino vrednovati na razini pojedinačnog slučaja uzimajući u obzir sve okolnosti određenog slučaja.

Ključne riječi: novinarstvo, javni interes, Europski sud za ljudska prava, Ustavni sud, novinarska etika

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