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Europe in Law Association

DEFAMATION AND INSULT

THE COMPLIANCE OF THE JUDICIAL ACTS OF RA COURTS WITH THE FREEDOM OF EXPRESSION STANDARDS SET BY INTERNATIONAL LAW, INCLUDING THE EUROPEAN CONVENTION OF HUMAN RIGHTS AND THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

E U R O P E I N L A W A S S O C I A T I O N

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Y E R E V A N 2 0 1 2

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Authors:

Vahe Grigoryan, Legal Counsel

Lousineh Hakobyan, Legal Counsel

Siranoush Iskandaryan, Legal Counsel

Genya Petrosyan, Legal Counsel

Tigran Yegoryan, Legal Counsel

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INTRODUCTION

This report aims to find out the extent to which the judicial acts adopted by Armenian courts apply the fundamental principles and standards in the area of the right to freedom of expression prescribed by international law, including the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the ECHR) and the case law of the European Court of Human Rights (hereinafter: the ECtHR). The research is based on the judicial acts of the RA general jurisdiction courts, the RA Civil Court of Appeal, the RA Cassation Court and the RA Constitutional Court. Rather than examining all the judicial acts, the report focused on those that were related to such key issues in the area of the right to freedom of expression as the key role of free speech, journalists and the mass media in a democratic society, the issue of public interest, the necessity by politicians and public figures to display greater tolerance to critical speech, the problem of differentiating between factual statements and value judgments, etc.

The report has demonstrated that although in 2010 and the first half of 2011 the courts did not always apply the ECtHR case law in a knowledgable manner or at all, starting from the second half of 2011 they registered some progress in the area of application of the ECtHR case law. In this regard, mention should particularly be made of the judgment in the civil case of Tigran Arzakantsyan v. "Yerkir Editorial Office" Ltd., in which the Court applied correctly and professionally almost all of the important ECtHR principles of relevance to that case. The progress is even more striking in view of the fact that the same court sitting in the same formation had not made any reference whatsoever to any of the ECtHR principles in an earlier case of the Mayor of Ijevan and Ijevan Mayor's Administration v. the NGO Investigative Journalists.

Starting from the second half of 2011 the majority of courts invoked such a landmark case in the history of the right to freedom of expression as the ECtHR judgment in Handyside v. the United Kingdom. In the course of the last year and a half the courts have applied the case of Lingens v Austria, which prescribes the need for politicians to be more tolerant to critical expression. The judgments empasizing the "public watchdog" function of the press in a democratic society and many other important principles become increasingly important to courts.

Nevertheless, it must be noted that the progress is not sufficient, and there is still need for improvement and for perceiving and applying these principles correctly. The overwhelming majority of courts do not yet understand fully a number of important principles prescribed by the ECtHR case law. A significant number of judicial acts adopted by Armenian courts do not invoke the ECtHR case law correctly. Many of these invocations are not relevant to the factual circumstances of the examined case and some are merely invoked for the sake of ensuring impressive volumes to judicial acts and to manifest knowledge of European law. References to some judgments are completely wrong. For example, in the vast majority of judgments passed in favour of plaintiffs who are politicians or public figures the Court in its reasoning invokes a paragraph from the case of Pfeifer v Austria, according to which "When

the reputation of a person is damaged his/her right to privacy is violated if no fair balance is secured between the "competing" interests taking account of the presumption of innocence and good conduct on the part of the person." For the first time the reference to this case was made in the submissions of the plaintiff in the case of Rouben Hayrapetyan, Levon Sargsyan and Samvel Alexanyan v. "Dareskizb" Ltd, and the court subsequently used it in its reasoning without checking whether the ECtHR indeed had expressed this idea in its judgment. This wording is now widely circulated in those judicial acts in which courts upheld the right to privacy versus the right to freedom of expression, and no single judge has ever attempted to verify whether or not the ECtHR had ever expressed this position.

The courts do not yet apply the three-wing test stemming from Article 43 of the RA Constitution and Article 10 ECHR, which requires them to assess in each case coming before them if the interference with the right to freedom of expression:

1. Is "prescribed by law": in conformity with the standards set out in the case of Silver v the United Kingdom, the court has to assess if the restriction of the right to freedom of expression has been prescribed by law, if that law is "adequatley accessible to everyone and formulated with sufficient precision to enable the citizen to regulate his conduct: s/he must be able – if need be with appropriate advice to foresee, to a degree that is reasonble in the circumstances, the consequenes which a given action may entail" (para 87-88).

2. Pursues a "legitimate aim": according to the judgment in the case of Cumpana and Mazare v Romania, in defamation cases the legitimate aim is the protection of the reputation of a person. The Court has noted that the human right to the protection of reputation is a right guaranteed under Article 8 of the Convention as an element of the right to respect for privacy.

3. Is "necessary in a democratic society": when assessing this element of the test the Court has to determine whether the interference is "necessary in a democratic society," taking account of the fact that "necessary" means more than "useful," "reasonable" or "desirable," it has to stem from a "pressing social need," be proportional with the legitimate aim pursued … while the "necessity for restriction must be convincingly established" (Barthold v. Germany, Application No 8734/79, para 55).

Mention among the shorcomings must be made of the fact that until now there is no uniform professional terminology, the ECtHR cases are frequently applied in different, often, incorrect translations. In particular, in the majority of domestic judicial acts a formulation from a landmark ECtHR case – Handyside v. the United Kingdom, 1976 – is translated as follows: "Freedom of expression ... is applicable not only to "information and ideas" that are favourably received or regarded as inoffensive but also to those that insult, shock or disturb..." It should be noted that the words used by the ECtHR are "offend, shock or disturb" – not "insult" but "offend," the difference being in the extent or degree of damage.

The authors are hopeful that the report will be of interest to journalists, legal counsel and judges, as well as anyone interested in the right to freedom of expression. We believe that it will enable the reader to form a profound understanding of the key issues in the field and improve their knowledge and perception of the fundamental right to freedom of expression.

ROUBEN HAYRAPETYAN, SAMVEL ALEKSANYAN AND LEVON SARGSYAN V "DARESKISB" LTD, THE PUBLISHER OF "HAYKAKAN ZHAMANAK" DAILY

The Facts of the Case

On 07.02.2011, the Court of General Jurisdiction of Kentron and Nork-Marash Administrative Districts of Yerevan (hereinafter: the Court), having examined the civil suit brought by Rouben Hayrapetyan, Samvel Aleksanyan and Levon Sargsyan (hereinafter: the Plaintiffs) against "Dareskizb" Ltd. (hereinafter: the Defendant), seeking protection of their honour and dignity, decided to grant the complaint in part. The Court obligated the Defendant to retract the misinformation damaging the Plaintiffs" honour and dignity published in the article entitled "Seven out of Eight are in the List" and the retraction be published in the same "Haykakan Zhamanak" daily with the wording and the form determined by the Court.

The Court decided to exact 2.044.000 AMD from "Dareskizb" Ltd. in favor of each of the Plaintiffs, of which 2.000.000 as damages award, and 44.000 as compensation for the prepaid court fee. The claim was rejected in its part on the costs of judicial representation.

The Content of the Publication

An article entitled "Seven out of Eight are in the List" was published in "Haykakan Zhamanak" daily. It was accompanied by 8 photographs, those of the Plaintiffs" among them, and worded as follows:

> "According to the information that we possess, in the course of the preliminary investigation of a number of criminal cases, in particular, narco-trafficking, trafficking and money laundering, the Russian Federation (RF) National Security Service, the Prosecutor's Office and other law enforcement bodies have found out that certain Armenian officials are also related to these crimes.
>
> The RF law enforcement have found out that Russian criminal groupings have close links with different RA officials, so they have compiled a list of some 32 Armenian officials that are in this or that way related to different crimes or have links with Russian criminal groupings. According to the information that we possess, the representatives of the RF Prosecutor's Office have spoken about this list with Smbat Karakhanyan, President of the Armenian National Club "Unity". The leadership of the RA Prosecutor General's Office have informally shared this list with Aghvan Hovsepyan, RA Prosecutor General and Gorik Hakobyan, Chief of the National Security Service. The Russians have raised the issue of subjecting the persons in the list to liability. However, the above Armenian officials have replied to their Russian

> colleagues that they did not have the power to solve this problem. According to our information, the names in the first 7 rows of the list made by the Russian law enforcers include those of Sashik Sargsyan, MP and the President's brother; Rouben Hayrapetyan (Nemets Rubo) and Levon Sargsyan (Flourmill Lyovik), MPs; Gagik Khachatryan, Chief of the RA State Revenues Committee; Samvel Aleksanyan (Lfik Samo), MP; Hovik Abrahamyan, Speaker of the Parliament and Gagik Tsaroukyan, Head of the Parliamentary Faction "Prosperous Armenia". According to the information that we possess, the RF law enforcement have not included Serzh Sargsyan's name since they excluded from the very beginning that it would be possible to raise the issue of subjecting him to liability.

On 26 October 2010, the aforementioned Members of the Parliament sent a letter to "Dareskizb" Ltd., informing the company that the information in the publication was not true and damaged their honour and dignity. Invoking Article 8 of the RA Law on Mass Communication, the Plaintiffs demanded that a retraction be published. The text of the retraction, which stated that "the information presented in the article is not true and was published without any verification whether it was true" was enclosed with the letter. In his reply to this letter dated 1 November 2011, Mr Nickol Pashinyan, Editor-in-Chief of the newspaper "Haykakan Zhamanak" refused to publish a retraction, arguing that its text was unclear about the factual inaccuracies to be retracted, which had to be stated according to Article 8 of the Armenian Law on Mass Communication. In addition to this, he informed the Plaintiffs that the information mentioned in the publication had been confirmed by Mr Smbat Karakhanyan, President of the National Club "Unity" who had been given the disputed information by the Russian Procurator's representatives.

The Reasoning of the General Jurisdiction Court

The Court noted that Article 1087.1 of the RA Civil Code prescribes that the disseminated information can be regarded as defamation if a/ the disseminated facts damage a person's honour, dignity and professional reputation; b/ the facts are not true; c/ they are presented publicly. The article published by the Defendant contained such expressions as "narco-trafficking, trafficking and money laundering." These are crimes prescribed by the RA Criminal Code, and the fact of the relation of any person, especially of an MP with them is reproachable by the public, dishonorable and damaging.

The Court indicated that the Defendant did not present to the Court any evidence, which would substantiate that those facts were true. Moreover, not having an obligation to prove the contrary, the Plaintiffs provided the Court with a letter from the RF Prosecutor's Office, which stated that there were no materials in the RF Prosecutor's Office corroborating the participation of the people indicated in the article in the commission of crimes in the territory of the RF.

Taking into account the fact of failure to meet the burden of proof, as well as the letter of the RF Prosecutor's office, the Court found that the facts disseminated by the Defendant were not true.

According to Paragraph 11 of Article 1087.1, when determining the damages award the Court takes account of the peculiarities of the case, including the means and scope of dissemination of defamation, as well as the Defendant's proprietary situation.

The Court reasoned that the Plaintiffs in this case were Members of the National Assembly of the Republic of Armenia, and as representatives of the legislative branch of power of the Republic of Armenia had a certain perceivable standing in the society, which obliged them to have an impeccable conduct and an exemplary behaviour; in contrast, the information disseminated by the defendant in the article regarding the fact of possible relation of these people to the above crimes, imparted different information on the reader endangering the objective manifestation of the public attitude to the Plaintiffs as members of the legislature. The assessment given by the public to the Plaintiffs was of a considerable practical importance, since any negative assessment diminished the Plaintiffs" reputation as individuals and as members of the RA National Assembly and created obstacles for them in taking full part in societal and economic relations. Considering the aforementioned, the position the Plaintiffs occupied in public life as representatives of the legislative branch of power, as well as the fact that the defamatory statements had been disseminated by a daily newspaper with a circulation of 7480 copies reaching large masses of the public, the Court determined the damages in the amount of 2000 multiplied by the minimum salary (1000 Armenian drams) for each Plaintiff.

Although according to Article 48 of the RA Civil Procedure Code, each party has to prove the facts they allege, the Defendant did not provide any evidence relating to his proprietary status, which could serve as a basis for decreasing the damages award.

The Court also referred to a number of ECtHR cases. In particular, Article 10 "protects journalists" rights to divulge information on issues of general interest provided they act in good faith and on an accurate factual basis and provide "reliable and precise" information in accordance with the ethics of journalism" (Bladet Tromso and Stensaas v. Norway, 20/05/1999, Application No 21980/93, para 65, Prager and Oberschilk v. Austria, 26/04/1995, Application No 15974/90, 37). Article 10 ECHR guarantees the right to freedom of expression. However, this right is not absolute and is subject to restrictions. Article 10 ECHR also protects the rights and reputation of others. The ECtHR stated in its judgments

> "No doubt Article 10 para. 2 (art. 10-2) enables the reputation of others - that is to say, of all individuals - to be protected, and this protection extends to politicians too, even when they are not acting in their private capacity".
>
> "When the reputation of an individual is infringed his right to private life is violated "if a fair balance is not struck between the competing interests taking into account presumption of innocence and good behavior." (Pfeifer v. Austria, Application No 12556/03, ¢ 35, ECHR 2007-XII).

The last principle was not cited correctly though. In view of the aforementioned, the General Jurisdiction Court determined the damages in the amount of 2000 multiplied by the minimum salary (1000 AMD) for each Plaintiff.

This judgment was subsequently appealed to the Appeal Court, which upheld the judgment of the first instance Court by reiterating its reasoning. The Cassation Court returned the Defendant's cassation complaint.

Legal Analysis of the Judicial act in the Light of Article 10 of the European Convention on Human Rights and Other International Standards on Freedom of Expression

The first instance Court did not discuss properly several key issues stemming from the European Convention on Human Rights, which would have a direct impact on the instant case. Those were the issues of public interest, the status of the parties, the distinction between the statement of facts and value judgments, as well as the proportionality of the damages award.

The Issue of Public interest

The Court has consistently distinguished between cases in which there exists a right of the public to be informed and those in which the publication merely serves to satisfy the curiosity of a certain readership (Standard Verlags GmbH v. Austria, 04/06/2009, Application No 34702/07, para 32). In the case of Tønsbergs Blad AS v. Norway (01/03/2007, Application No 510/04, para 87) the ECHR stressed:

> "...where a public figure may have failed to obey laws, even privately and outside of his official duties, the acts may be of public concern and thus protected under Article 10."

In the case of Karhuvaara v. Finland (16/11/2004 Application No 53678/00, para 45) the ECtHR stated:

> "...even though the matter may not be of great public concern, if it involves the lives of politicians and may influence voting, then it may still fall under the essential right in a democratic society to be informed."

> "Whilst the press must not overstep the bounds set, inter alia, in the "interests of national security" or for "maintaining the authority of the judiciary", it is nevertheless incumbent on it to impart information and ideas on matters of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog" (Observer and Guardian v the UK, 26/11/91, Application No 13585/88, para 59 (b)).

The impugned article concerned eight politicians, including the Plaintiffs, three members of Parliament - Rouben Hayrapetyan, Levon Sargsyan and Samvel Alexanyan. The article, in particular, discussed their relationship to different crimes committed in the territory of the RF and links with Russian criminal groupings. No doubt, there was a public interest in a publication relating to such relations and links.

Nevertheless, the General Jurisdiction Court failed to engage in any legal analysis of the public interest aspect of the instant case, while this could have had a serious impact on the resolution of the case and the damages award.

The Personality and the Status of the Plaintiff

Another important issue central to the ECHR jurisprudence in defamation cases is the status of the parties. Although the General Jurisdiction Court did analyze the status of

one of the parties, the Plaintiffs, its reasoning was entirely contrary to the principles established by the ECHR in its case law on Article 10, which are:

> "The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance. No doubt Article 10 para. 2 (art. 10-2) enables the reputation of others - that is to say, of all individuals - to be protected, and this protection extends to politicians too, even when they are not acting in their private capacity; but in such cases the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues (Lingens v. Austria, 08/07/1986, Application No 9815/82, para 41-42, Feldek v. Slovakia, 12/07/2001, Application No 29032/95, para 74, Krone Verlag GmbH & Co. KG v. Austria, 11/12/2003, Application No 27306/07, para 53)."

The same principle is also recognized in the CoE Parliamentary Assembly Resolution 1636(2008) on Indicators for Media in Democracy, stating that state officials shall not be protected against criticism and insult at a higher level than ordinary people, for instance through penal laws that carry a higher penalty.

However, contrary to the mentioned key principle, the General Jurisdiction Court stressed the importance of protecting the reputation of the 3 Plaintiff-MPs due to their very status of politicians and it was also one of the grounds substantiating the maximum damages award determined by the Court.

It is worth mentioning that this interpretation of the Court was invoked by the applicant in the Constitutional Court contesting constitutionality of Article 1087.1 of the RA Civil Code. The RA Constitutional Court in its Decision N 997 dated 15.11.2011 made a reference to that issue in the following manner:

> "Taking into consideration that in cases of politicians and public figures, publications pertaining to issues of public interest are given utmost protection, while defining the damages award, this status of an applicant cannot be interpreted to the detriment of the defendant."

The Personality and the Status of the Defendant

The Defendant in the instant case was a print media. The case law of the ECtHR implies that the status of the Defendant is another important issue for consideration in defamation proceedings. According to the ECtHR case law:

> "…freedom of the press is accorded special protection recalling that a fundamental function of the press is to impart information on matters of public interest (Sunday Times v. UK, 26/04/1979, Application No 6538/74, 50 (b)).
>
> "Journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation" (Bladet Tromsø and Stensaas v. Norway, 20/05/1999, Application No 21980/93, para 59, Dichand and Others v. Austria, 26/02/2002, Application No 29271/95, para 41, Prager and Oberschlick v. Austria, 26/04/1995, Application No 15974/90, para 38).

However, no legal analysis was done in the judicial act on the status of "Haykakan Zhamanak" daily as a print media outlet. On the contrary, this circumstance was interpreted in a way that was unfavourable to the newspaper.

Statements of Fact and Value Judgments

The General Jurisdiction Court did not carry out a special analysis for qualifying and distinguishing between the statements of fact and value judgments of the impugned article.

Although the statements contained in the article mostly had a factual nature, the wording of several expressions made in the publication were subject to consideration since they included rather vague terms such as "relationship" and "links," for example. Nevertheless, even with such terms the statements of the contested publication could be regarded as defamatory statements of fact.

The main principle established by the ECtHR regarding the obligation of the media to verify the presented statements of facts is the following:

> "Protection of the right of journalists to impart information on issues of general interest requires that they should act in good faith and on an accurate factual basis and provide "reliable and precise" information in accordance with the ethics of journalism (Bladet Tromsø and Stensaas v. Norway, 20/05/1999, Application No 21980/93, para 65, Prager and Oberschlick v. Austria, 26/04/1995, Application No 15974/90, para 37)."

> "Under the terms of paragraph 2 of Article 10 of the Convention, freedom of expression carries with it "duties and responsibilities", which also apply to the media even with respect to matters of serious public concern. These "duties and responsibilities" are significant when there is a question of attacking the reputation of a named individual and infringing the "rights of others". The more serious the allegation is, the more solid the factual basis should be (Europapress Holding D.O.O. v. Croatia, 22/10/2009, Application No 25333/06, para 66).

In the instant case the matter relates to the statements about the Plaintiffs" links with criminal acts or relationships with Russian criminal groupings, which by their nature require a more solid factual basis.

At the same time, the ECtHR has established that under special grounds the media may be dispensed from their ordinary obligation to verify factual statements that are defamatory of private individuals. Whether such grounds exist depends in particular on the nature and degree of the defamation in question and the extent to which the media can reasonably regard their sources as reliable with respect to the allegations (Pedersen and Baadsgaard v. Denmark, 17/12/2004, Application No 49017/99, para 78, Bladet Tromsø and Stensaas v. Norway, 20/05/1999, Application No 21980/93, para 66, McVICAR v. the United Kingdom, 07/05/2002, Application No 46311/99, para 84).

The analysis of the present case shows that the Defendant had disclosed their source of information even before the Plaintiffs filed a lawsuit with the Court by a letter of response to the Plaintiff's request for retraction. After the publication of the article it published an interview with the person providing that information who explicitly accepted that and also

gave some additional details on the topic. Later on, "Haykakan Zhamanak" daily published another article entitled "Correction" with the same content, which directly referred to its source of information, and the previous article was justifieded by an unintentional publication of the unedited version.

Thus, right from the beginning the Defendants disclosed their source of information to the Plaintiffs, which should have had an important bearing on the case. Other issues for consideration should have been whether the journalist could reasonably check the contested facts, accessibility of the information on the impugned statements, reliability of the sources of information. Particular attention had to be given to the content of the letter from RF Prosecutor's office where "non participation in committing of the mentioned crimes" was asserted, while the contested publication spoke about links and relations.

However, the Defendant did not essentially have a procedural opportunity to present all the necessary materials and evidence substantiating its position to the Court, and that circumstance alone could qualify as a violation of Article 10 ECHR.

Proportionality of the Interference

The RA Civil Code (Article 1087.1) provides for a maximum amount of damages for defamation in the amount of 2000 multiplied by the minimum salary, and for insult of 1000 multiplied by the minimum salary. According to the same law, when defining the award of damages account must be taken of the peculiarities of the case, including the means and scope of dissemination of defamation, and the Defendant's proprietary status.

Nevertheless, the General Jurisdiction Court applied the maximum amount of damages provided by the law without taking into consideration these facts, nor the requirements of Article 10 ECHR.

The reasoning of the first-instance Court, later endorsed by the Court of Appeal reads as follows:

> "The Plaintiffs …in this case are Members of the National Assembly of the Republic of Armenia, and as representatives of the legislative branch of power of the Republic of Armenia have a certain perceivable standing in the society, which obliges them to have an impeccable conduct and an exemplary behavior. By contrast, the information disseminated by the Defendant in the article regarding the fact of possible relations of these people to the above crimes, imparts other information to the reader endangering the objective manifestation of the public attitude to the Plaintiffs as members of the legislature. The assessment given by the public to the Plaintiffs has an important practical meaning, since any negative assessment diminishes their reputation as individuals and as members of the RA National Assembly and creates obstacles for them in taking full part in societal and economic relations. Considering the aforementioned, the first-instance Court when defining the size of damages award has taken into account both the legal provisions relating to damages award, the position the Plaintiffs occupy in public life as representatives of the legislative branch of power, as well as the fact that the defamatory statements were disseminated by a daily newspaper with 7480 circulation becoming accessible to wide circles of the society."

This reasoning implies that the status of the Plaintiffs has served as a ground for defining the maximum damages award, which directly contradicts the ECtHR standards.

The ECHR has developed a body of case law that provides for the requirement of proportionality in the use of fines payable in respect of damages and establishes that a disproportionately large damages award constitutes a violation of Article 10 of the Convention. The Committee of Ministers also stated this in its Declaration on Freedom of Political Debate in the Media dated 12 February 2004.

In the case of Romanenko and others v. Russia the European Court stressed that the domestic courts did not analyze what part of the applicants" income adjudicated amounts represented and whether an excessive burden would thereby be imposed on them. In the applicants" submission, undisputed by the Government, the sanction was equivalent to their income for four months and was thus obviously a severe penalty. In conclusion, the Court found that the Russian authorities did not adjudicate the defamation claims in compliance with the Convention standards. Accordingly, the interference complained of was not "necessary in a democratic society" within the meaning of Article 10 § 2 of the Convention.

In the case of Tolstoy Miloslavsky v. the United Kingdom the Court, having regard to the size of the award in the applicant's case in conjunction with the lack of adequate and effective safeguards at the relevant time against a disproportionately large award, found that there had been a violation of the applicant's rights under Article 10.

Another important issue which was not discussed by the general jurisdiction Court was the "chilling effect" the damages award in the amount of 2.000.000 AMD could have had on the freedom of press in Armenia contrary to the principles established by the ECtHR, which, as a rule, considers the "chilling effect" that would result from restrictions on the exercise of freedom of expression by members of the press.

> The fear of sanction has a "chilling effect" on the exercise of freedom of expression (Wille v. Liechtenstein, 28/10/1999, Application No 28396/95, para 50). This effect, which works to the detriment of the society as a whole is likewise a factor, which goes to the proportionality of, and thus the justification for, the sanctions imposed on the applicants, who were undeniably entitled to bring to the attention of the public the matter at issue (Lombardo and others v. Malta, 24/04/2007, Application No 7333/06, para 61).

The damages awarded by the general jurisdiction Court in the amount of 2000 multiplied by the minimum salary (1000 AMD) for each Plaintiff are evidently contrary to the principle of proportionality of interference prescribed by the ECtHR.

BELA KOCHARYAN AND SEDRAK KOCHARYAN V. "SKIZB MEDIA KENTRON" LTD., THE FOUNDER AND PUBLISHER OF "ZHAMANAK" DAILY

The Facts of the Case

On 06.06.2011, the Court of General Jurisdiction of Kentron and Nork-Marash Administrative Districts of Yerevan examined the civil suit brought by Bela Levon Kocharyan and Sedrak Robert Kocharyan (hereinafter: the Plaintiffs) against "Skizb Media Kentron" Ltd. (hereinafter: the Defendant), the founder and publisher of "Zhamanak" daily, claiming that their honor and dignity had been damaged and demanding that the Defendant be obligated to retract the disseminated misinformation and to pay damages to the Plaintiffs in the amount of 6.000.000 AMD. The Court granted the claim for partial award of damages in the amount of 3.000.000 AMD for defamation and insult.

The articles published in several issues of "Zhamanak" daily contained, in particular, the following information:

The article entitled "The Blood from the Kocharyans, the Thrill from Tsarukyan, and the Anti-shock from Lfik" contained the following expressions:

> "…Even Bella Kocharyan, the wife of the RA second President Robert Kocharyan, is far behind him in the market of pharmaceuticals …"
>
> "… It is noteworthy that the name of the pharmaceutical network "911" belonging to the Kocharyans was not included in the list."
>
> "… "Comstar" Ltd. and "Liqvor" CJSC occupy one third of the market of blood preparations and plasma substitutes in the Armenian market of pharmaceuticals. Fifty five percent of the market belongs to the former, and forty percent to the latter. According to our sources, these companies are sponsored by the Kocharyans."
>
> "… "Farmatex" Ltd. also has a dominant position in the Armenian market of pharmaceuticals. …The owner of the company is an Englishman, who is backed by the Kocharyans."

The article entitled "The Diamond Rob" contained the following expressions:

> "… Thus, as reported by our authoritative sources, recently the Kocharyans have made another economic acquisition. According to our information, Sedrak Kocharyan, Robert Kocharyan's elder son, has obtained a diamond mine in India, having arranged the deal as an investment. The contract of

> mine acquisition was concluded through "Converse Bank". It is worth mentioning that according to some information, Kocharyans also have diamond mines in Namibia."

The article entitled "Volvo+Spayka=Sedrak Kocharyan" contained the following expressions:

> "…in Armenia, the giant truck manufacturing Swedish company "Volvo Trucks" has entrusted its official representation to the company "SPAYKA". ..... The point is that this company is officially owned by a person with a name and surname David Ghazaryan, but in reality Kocharyans, in particular, Sedrak Kocharyan, Robert Kocharyan's son stands behind it."

On 11.10.2010 (posted on 13.10.2010) the representative-to-be of B. Kocharyan and S. Kocharyan (who did not have an authorization at the time of sending the request for retraction) informed the Defendant by a letter of the inaccuracies in the aforementioned articles and requested that they be retracted. In the course of judicial examination the Defendant accepted the Plaintiffs" request for retraction. The retraction submitted by the Defendant was published in the same newspaper.

According to the letter signed by the head of the State Registry of Legal Entities at the RA Ministry of Justice dated 08.11.2010, "Farmatex" Ltd. was not registered in the State Register. Bela and Sedrak Kocharyans were not in the list of the registered owners of "Liqvor" CJSC, "Tagak Farm" CJSC, "Comstar" Ltd., "Farmatec" CJSC, "Spayka" Ltd. According to the letter from "Converse Bank" CJSC dated 12.11.2010, no transfer or other bank transactions had been made from Sedrak Kocharyan's bank accounts to India and Namibia.

The Legal Analysis of the Judicial Acts in the Light of Article 10 of the European Convention on Human Rights and Other International Standards on Freedom of Expression

The first instance Court did not consider several key issues stemming from the European Convention on Human Rights that would have had a direct impact on the instant case and interpreted some others in a way that led to erroneous conclusions. These were the issues of public interest, the status of the parties, the distinction between facts and value judgments, and the proportionality of the damages award.

Facts v. Value Judgments

In the section on legal analysis of the concepts of defamation and insult the Court offers the following interpretation:

> "...The definition given by the legislature to the concepts of defamation and insult and the facts corroborating the existence of defamation and insult imply that unlike defamation, insult does not yet have a damaging nature. Instead it has such a purpose, whereas defamation already has a damaging nature. To be qualified as defamation, the disseminated factual statements must already have a defamatory nature (the fact of damaging). Thereby, the action in case of defamation is completed when it damages, while in the case of insult it pursues such a purpose. As a result of an insult its objective can be achieved by damaging through disseminating untrue information, in such a case one deals already with defamation. In the light of the mentioned legal position the Court emphasizes

that an insult of a private individual having continuous nature can transform into defamation only after a certain period of time since continuous nature of insulting expressions aimed at damaging a person results in factual damage to his honor and dignity by publishing factual false information, which occurs when the purpose is achieved. Therefore, in such a case we can speak of defamation."

Through this kind of interpretation the Court evidently made a wrong distinction between facts and value judgments. Both the RA Civil Code and Article 10 ECHR case law directly imply that the difference between a statement of fact and a value judgment, insult and defamation is not in the continuous nature of the respective action, or the time of the accomplishment of the action but first of all in the distinction of opinion and facts, while the Court deemed defamation as the next phase of insult when the damaging purpose of insult is practically achieved.

The ECtHR has consistently stressed the need for a distinction between statements of fact and value judgments.

"…the existence of facts can be demonstrated, whereas the truth of value judgments is not susceptible of proof. As regards value-judgments this requirement is impossible to fulfill and it infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10 of the Convention (Lingens v. Austria, 08/07/1986, Application No 9815/82, para 46).

In view of the importance of the distinction between insult and defamation in each and every case, rather than building its reasoning on the time of the accomplishment of the infringement, the Court should have built it upon the distinction between facts and value judgments and the required extent of proof stemming from this distinction.

"Where a statement amounts to a value judgment, the proportionality of an interference may depend on whether there exists a sufficient factual basis for the impugned statement, since even a value judgment without any factual basis to support it may be excessive" (Dichand and Others v. Austria, 26/02/2002, Application No 29271/95, para 41).

The Court arrived at the following conclusion:

"The Court notes that according to Paragraph 2 of Article 1087.1 of the Civil Code only the expression in the headline "The Blood from the Kocharyans..." should be qualified as insult in the light of the above interpretation, as it is an expression attributed to the Plaintiffs" family without any subjective differentiation, i.e. regardless of the public nature that it has, it is not a fact, moreover, its compliance to the reality is not important as a precondition for defamation. This means that the Court should consider the relevant expression under the definition of "insult".

The word "blood" by its literal wording and interpretation does not contain elements of insult and is used in this meaning in compliance with the reality by its full meaning, whereas according to the headline of the published article, the word "blood" in the expression attributed to the Kocharyans loses its literal interpretation, as through the article the reader is led to negative impressions, i.e. people to whom the blood is attributed can be perceived negatively through evaluation in different negative ways (for example as a person who has committed a crime). Therefore, by disseminating this expression the Defendant aimed to damage the honour and dignity of the Plaintiffs, i.e. to diminish

them in the objective opinion of the public. The right to retract and receive a damages award belongs to each member of this family.

The Court underlines that the expression contained in the mentioned title could be discussed and accepted at a different level, that is, it could be perceived as a non-offensive expression by its literal interpretation only if it were possible to determine its non-negative meaning from such a title, while the phrase used by the Defendant cannot be perceived by its common sense simply, as similar phrases are usually used to evoke negative impressions and emotions, and it cannot call up positive features of respect and reputation towards the Plaintiff among the readers and wide circles of the public, but quite the opposite: it creates a negative impression and opinion about the persons to whom the title is attributed, while even in the article there are no clarifications about its non-negative meaning. On the contrary, the attempt was to make the negative meaning of the word "blood" more expressive and emphasized in the actual reality, in the author's opinion, through confirming it by the corresponding information, which has been expressed by the Defendant by using the phrase contained in the headline and aimed at a negative purpose as an evaluation corroborated by certain facts."

This interpretation evidently implies that the Court examined the expression "Blood from Kocharyans" in the headline of the article detached from the context and content of the article. Whilst reading the article as a whole it becomes clear that this phrase has to do with the Kocharyans" links with the market of blood preparations and plasma substitutes. It is supported by the following extract:

"… "Comstar" Ltd. and "Liqvor" CJSC occupy one third of the market of blood preparations and plasma substitutes in the Armenian market of pharmaceuticals. Fifty five percent of the market belongs to the former, and forty percent to the latter. According to our sources, these companies are sponsored by the Kocharyans."

The ECtHR case law demonstrates that to assess a statement the Court looks at the entire content and context of the article (Perna v. Italy/ 06/05/2003, Application No 48898/99, para 45, Marônek v. Slovakia, 19/04/2001, Application No 32686/96, para 53), the meaning of no phrase is revealed apart from the context of the article.

Meanwhile, this judgment of the Court clearly states that the expression "Blood from Kocharyans" could be perceived as inoffensive by its ordinary interpretation if only it were possible to determine its non-negative meaning from such a title, whereas the phrase used by the Defendant cannot in any way be understood by its common sense, as similar phrases are usually used to evoke negative impression and emotions, and it cannot arouse positive qualities of respect and good reputation towards the Plaintiffs among the readers, wide circles of the public, but quite the opposite: it creates a negative impression and opinion about the persons to whom the title is attributed, and this especially so when in the article there are no clarifications about the non-negative meaning of the title.

So, the Court first analyzed the impugned expression merely within the scope of the headline of the article and secondly, disregarded the content of the article, which, in fact, explained the phrase used in the headline.

The fact of non-compliance of the information qualified as defamation by the Court with the reality was confirmed by several official documents, which refute the Plaintiffs" ownership of or participation in the mentioned companies. It is noteworthy that most of the statements in the article relate not to

the participation or other official links of the Plaintiffs with the listed companies but sponsoring or backing those companies, which is not susceptible of proof by the documents in the case file.

In this context, when assessing the nature of the contested information, proving its compliance with the reality and the extent of damage by them, the Court had to differentiate them from other statements susceptible of proof by the provided evidence and to take into account the principles deriving from the ECtHR case law.

"The safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism (Bladet Tromsø and Stensaas, 20/05/1999, Application No 21980/93, para 65, Prager and Oberschlick v. Austria, 26/04/1995, Application No 15974/90, para 37)."

Under the terms of Paragraph 2 of Article 10 the exercise of this freedom carries with it "duties and responsibilities", which also apply to the press. These "duties and responsibilities" are liable to assume significance when, as in the present case, there is question of attacking the reputation of private individuals and undermining the "rights of others".

According to another important principle established by the ECtHR, the more serious the allegation is, the more solid the factual basis should be (Europapress Holding D.O.O. v. Croatia, 22/10/2009, Application No 25333/06, para 66). This principle was stressed in the context of allegations of criminal nature. Special grounds are required before the media can be dispensed from their ordinary obligation to verify factual statements that are defamatory of private individuals. Whether such grounds exist depends in particular on the nature and degree of the defamation in question and the extent to which the media can reasonably regard their sources as reliable (Pedersen and Baadsgaard v. Denmark, 17/12/2004, Application 49017/99, para 78, Bladet Tromsǿ v. Norway, 20/05/1999, Application No 21980/93, para 66).

A journalist also has a right not to disclose his source of information except in very limited cases. Without such protection, sources may be deterred from assisting the press in informing public on matters of public interest. As a result, the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected (Goodwin v. UK, 27/03/1996, Application No 28957/95, para 35). This principle has also been reflected in Recommendation R (2000) 7 of the CoE Committee of Ministers on the Right of Journalists Not to Disclose their Sources of Information.

In the light of the aforementioned principles the Court should have at least discussed the reasonable possibility of proving the impugned factual allegations taking into account the "supporting" concepts used in the articles, the status of the Plaintiffs, the sources of information and the damaging nature and extent of the factual allegations.

It is at least evident that some of the impugned statements cannot be corroborated or refuted by the official documents found in the case file. At the same time, several factual allegations made in the publications and qualified as defamation by the Court, can be corroborated by the official documentation.

> The crucial part of the analysis of the Court should have focused on the nature and extent of damage caused by the impugned statements. The first instance Court regarded all of the examined statements as seriously damaging to the honor, dignity and professional reputation of the Plaintiffs.

The Personality and Status of the Plaintiffs

The Court's conclusion was based on the Plaintiffs" status. Unlike others, the latter enjoy more attention and respect in the society, and the damage caused to their good reputation through publishing and disseminating the misinformation is difficult to recover. The following was emphasized in the judgment.

> "By their nature, the factual allegations in question are statements diminishing the Plaintiffs" honor and dignity since due to them the public opinion of the Plaintiffs as the family members of the RA second President is changed in a negative moral way by reason of the fact that being the former RA President, his family too follows his role and reputation in the society, which stems from his status and which is reflected in the neutrality of their relations with business and entrepreneurship..."

The interpretation and logic of the Court does not stem from the ECtHR standards. According to the principles established in the case of Lingens v. Austria (08/07/1986, Application No 9815/82, para 42):

> "The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance. No doubt Article 10 para. 2 (art. 10-2) enables the reputation of others - that is to say, of all individuals - to be protected, and this protection extends to politicians too, even when they are not acting in their private capacity; but in such cases the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues."

The ECtHR has consistently stressed that when private individuals enter the arena of public debate they lay themselves open to public scrutiny and must consequently display a greater degree of tolerance to criticism (Bodrožić v. Serbia, 23/06/2009, Application No 38435/05, para 34). Whereas the first instance Court has placed the fact of more attention and respect towards the Plaintiffs in opposition to the limits of acceptable criticism, thus interpreting the concept in a way, which contradicts the international standards. The Court did not make a distinction between the wife of the second RA President, who has been engaged in wide-scale public activities and S. Kocharyan, who was an entrepreneur. The first lady of the Republic, as a person directly in the focus of public attention, should be equated in her position and status with the status of a public figure along with its consequences under the freedom of expression regulations.

The second plaintiff who is the elder son of the second RA President, being a well-known entrepreneur at the time of the publication of the articles, was again in the center of public attention. Therefore, the public had a right to receive information on his proprietary and entrepreneurial status. As the fact of S. Kocharyan being the RA second President's

son by its importance prevailed over his status of an entrepreneur in terms of public attention and information requirements, in the instant case he must have been equated in his position and status with that of a public figure with all its consequences.

The requirement and perception of neutral behavior in the field of entrepreneurship by the family members of the RA second President, including after the termination of his office is, in fact, the Court's subjective approach and does not stem from any requirement of either national or international documents. Moreover, information on business activities of the RA second President's two sons (including the Plaintiff) has been posted on R. Kocharyan's inofficial website, and therefore, was not deemed as a violation of the principle of neutrality or non-participation in business activities. Another principle, which is also important in the instant case, assigns importance to the fact of how the impugned statement affected the professional life of the subject of criticism (Grinberg v Russia, 21/07/2005, Application No 23472/03, para 33).

In the light of the aforementioned, the analysis of the nature and extent of damage caused by the impugned statements should have been central to the first instance Court in the light of the ECtHR case law, especially in determining the damages award. The Plaintiffs" public position and the public attention to them have been interpreted in a way contrary to the international standards.

The Personality and Status of the Defendant

Likewise, the courts overlooked the status of the Defendant. In particular, the circumstance that the Defendant was a print media outlet was not given a proper assessment by the courts. Meanwhile, even in the early ECtHR judgments on Article 10 (Sunday Times v. UK, 26/04/1979, Application No 6538/74, para 50 (b)), the Court emphasized.

> "It is incumbent on the press to impart information and ideas on matters of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog"."

The status of the Defendant is particularly important in the instant case in the light of a principle established by the ECtHR in the case of Prager and Oberschlick v. Austria (26/04/1995, Application No 15974/84, para 38), according to which, "journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation".

Again, as in case of the Plaintiffs" status, not only did the courts fail to take into account the status of the Defendant as a media outlet, but they used it in the opposite meaning, making reference to the means of dissemination of information, i.e. the press. Therefore, as with the Plaintiffs, interpretations on the Defendant's status were used by the Court contrary to the requirements and objectives of Article 10 ECHR.

The Issue of Public Interest

Referring to the legal position of the ECtHR on the issue of public interest, the first instance Court arrived at the conclusion that in the instant case the insulting and defamatory expressions contained in the publications were in no way ideas or information discussed

in politics, neither were they ideas related to other spheres of public interest. Moreover, by disseminating the impugned statements the media outlet did not pursue the aim of engaging in any political debate, and the published information was not meant to discuss an issue of public concern.

The close study of defamation case law under Article 10 shows that the Court has applied the public interest principle freely, finding the presence of a public interest very easily and, in some cases, upholding the public's right to be informed even in the absence of a matter of general interest (S. Smet, "Freedom of Expression and the Right to Reputation: Human Rights in Conflict", (Karhuvaara v. Finland, 16/11/2004, Application No 53678/00, para 45, Tønsbergs Blad AS v. Norway, 01/03/2007, Application No 510/04, para 87)). The Court in some cases connected the possible effect of the spouse's potential conviction to citizen's voting intentions, and thus found that some degree of public interest was involved (Karhuvaara v. Finland, 16/11/2004, Application No 53678/00, para 45). The ECtHR also observed that there is no warrant in its case-law for distinguishing between political discussion and discussion of other matters of public concern (Thorgeir Thorgeirson v. Iceland, 25/06/1992, Application No 13778/88, para 64).

According both to the norms of international law (ECHR, article 10) and national law (RA Civil Code, article 1087.1, paragraph 5) responsibility for publication of damaging statements could be mitigated also in cases when publication of such information in a particular situation and by its content was conditioned by an overriding public interest and the person publicly disseminating that information proves that s/he has undertaken reasonable efforts to find out whether they were truthful and valid. When publications on the proprietary status of high-ranking officials in Armenia do not conform with the recognized principles of accountability and transparency, overlooking the fact of public distrust of the independence of the judiciary, the prejudiced nature of the judicial acts, this defense by the Defendant could be deemed as a valid defense. How could the journalist in the absence of information make verifications of the information of public importance when the state itself does not support and create environment for fulfilling that function?

Proportionality of the Interference

The first instance Court awarded maximum damages for insult and defamation in the amount of 3.000.000 AMD, substantiating it by the following:

> "Taking into account the maximum damages award foreseen by the legislator for defamation and insult, the Court notes that in defining the size of the damages award, regard must be had to the peculiarities of the case relating to the Plaintiffs' status. Unlike others, the latter receive more attention and are more respected in the society, so the damage caused to their good reputation through publishing and disseminating the misinformation is difficult to recover, therefore, the damages award should be comparable to the severity of the actual damage. Besides, in determining the amount of damages award, the Court assigns particular importance to the fact that the Defendant did not make any attempt of an out of court settlement of the case, moreover, the published article "The Kocharyans" Heart Wants a Retraction" strengthened the public interest in the publication...."

The reasoning of the Court shows that the Plaintiffs" status, the fact of receiving much public attention served as a ground for granting the maximum damages award provided by the law, which directly contradicts the standards established by the ECHR.

For the sake of satisfying the requirement of proportionality of the interference the Court did not take into account on the one part the status of the parties and on the other part the relationship of the damages award to the income of the Defendant. In fact, these circumstances were not even put forward before the Court and neither during the preliminary hearings nor the judicial process the Court did make any reference to them. In the meantime, attempting to justify the award of maximum damages provided by the law, it referred to an ECtHR case (Petrina v. Romania, 14/10/2008, Application No 78060/01), the factual circumstances and the legal positions of which were not applicable to this case. The only similarity in the two cases was the approximate mathematical similarity of the damages awards.

In the case of Steel and Morris v UK the ECtHR emphasized that the sums awarded in defamation cases, although relatively moderate by contemporary standards were very substantial when compared to the modest incomes and resources of the applicants. Hence, in awarding damages one thing that had to be taken into account was not the sizes of awards granted in other states, but the injury suffered by the Plaintiff through the publication, the income of the Defendant and the impact of the award on the activities of the latter.

The judgment of the first-instance Court was approved by the Court of Appeals, and the filed cassation appeal was returned.

So, the restriction of the Defendant's freedom of expression could not be deemed as "necessary in a democratic society" giving rise to the violation of Article 27 of the RA Constitution and Article 10 ECHR.

TIGRAN ARZAKANSTYAN V.

"YERKIR EDITORIAL OFFICE" LTD

On 13 January 2011, in the issue No 3/2326 of Yerkir daily an article was published about Tigran Arzakantsyan (hereinafter: the Plaintiff) in the framework of the series of articles entitled 131 Faces and Masks. Tigran Arzakantsyan sent a retraction text to Yerkir Editorial Office Ltd. (hereinafter: the Defendenant) and demanded that it be published in Yekir daily as his reply to the above article. The daily did not publish the text in question. Instead, it published its comments on the text. On 11 February 2011, Tigran Arzakantsyan applied to the Court against the company demanding that the latter be obligated to retract the information damaging his honour and dignity, pay damages in the amount of 3.000.000 AMD, as well as reimburse the court fees in the amount of 568.000 AMD. The Plaintiff, in particular, regarded the expression «that son of a bitch» allegedly said about him by Hrant Bagratyan, as well as the expressions «styliag,» «speaks in his Qyavar dialect in a more comprehensible way» as insults. In addition to this, the Plaintiff considered the expressions «... transports beautiful girls by plane ...», «is famous as a permanent customer of casinos,» «is used to being beaten,» «was beaten,» «every time he is beaten...,» «in the course of the previous session only once did he appear in the lobbies of the National Assembly» to be defamatory arguing that:

> «such words, expressions and sentences uttered about anyone, even more so about a Member of the National Assembly elected by the people are insulting, reprehensible, objectionable and damaging.»

As to the amount of the non-pecuniary damage, the Plaintiff indicated:

> «… this amount was assessed objectively taking account of the position of the Plaintiff as a representative of the legislative branch of power as well as the fact that the insuting and defamatory statements were disseminated by a daily newspaper of 2000 copies thereby becoming accessible to broad layers of the society (both in hardcopy and via the Internet).»

Having examined the circumstances of the case and the evidence before it, the Court concluded that Tigran Arzakantsyan's claim against Yerkir Editorial Office Ltd. must be granted in part. Accordingly, the Court found that the expression «that son of a bitch» allegedly made by Hrant Bagratyan was one made with a view to damaging a person's dignity and was perceived by the public as an insult. For this reason the Court decided to grant the Plaintiff's claim in part and to exact from the Defendant 288.000 AMD in favour of the Plaintiff, of which 200.000 AMD for non-

pecuniary damage, 80.000 AMD as lawyer's reasonable fee and 8000 AMD as compensation for the prepaid court fee.

The Legal Analysis of the Judicial Act in the Light of Article 10 of the European Convention on Human Rights and Other International Freedom of Expression Standards

The judgment of the Court, with the exception of two key points, is awell-grounded and a correctly analized judicial act which reflects almost all of the key principles set by the ECtHR case law that were of relevance to this case. They included, in particular, the importance of freedom of expression, whether the subject of the publication was of public interest, the person and the status of the Plaintiff, the status of the Defendant and its role in a democratic society, the standards of responsible journalism, and the need to differentiate between facts and value judgments.

The Importance of Freedom of Expression

The Court was right to emphasize the importance of freedom of expression in a democratic society by invoking the ECtHR case of Handyside v the United Kingdom (Application No 5493/72, para 49), which for the first time laid down the following important principle:

> "Subject to paragraph 2 of Article 10 … is applicable not only to «information» or «ideas» that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no «democratic society». This means, amongst other things, that every «formality», «condition», «restriction» or «penalty» imposed in this sphere must be proportionate to the legitimate aim pursued."

The Plaintiff's Person and Status

The Court also applied correctly another principle stipulated in the landmark ECtHR case of Lingens v. Austria (Application No 9815/82, para 41-42), according to which:

> "…The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance. No doubt Article 10 para. 2 (art. 10-2) enables the reputation of others - that is to say, of all individuals - to be protected, and this protection extends to politicians too, even when they are not acting in their private capacity; but in such cases the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues."

The Defendant's Status and the Role of the Press in a Democratic Society

The Court applied correctly the ECtHR case law relating to the role, functions, rights and responsibility of the press, stressing, in particular, that:

> "Whilst the press must not overstep the bounds set, inter alia, for the "protection of the reputation of others", it is nevertheless incumbent on it to impart information and ideas on political issues just as

> on those in other areas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them" (Lingens v Austria, para 41).

Invoking several other cases, including Prager and Oberschlick v. Austria, De Haes and Gijsels v Belgium, Chemodurova v Russia, the Court applied correcty another ECtHR principle according to which:

> "…journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation…and in that sense Article 10 (art. 10) protects not only the substance of the ideas and information expressed but also the form in which they are conveyed."

The Court also applied correctly the ECtHR case of Shabanov and Tren v. Russia, (Application No 5433/02, para 40) concerning responsible journalism, stressing that:

> "Article 10 of the Convention protects journalists" right to divulge information on issues of general interest provided that they are acting in good faith and on an accurate factual basis and provide "reliable and precise" information in accordance with the ethics of journalism."

Factual Statements v. Value Judgments

The Court was also correct to apply the ECtHR requirement of the need for a distinction between facts and value judgments, noting, in particular, that:

> "In the Court's view, a careful distinction needs to be made between facts and value-judgments. The existence of facts can be demonstrated, whereas the truth of value-judgments is not susceptible of proof. … As regards value-judgments this requirement is impossible of fulfilment and it infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10 (art. 10) of the Convention. … even where a statement amounts to a value judgment, the proportionality of an interference may depend on whether there exists a sufficient factual basis for the impugned statement, since even a value judgment without any factual basis to support it may be excessive."

As a result of its analysis, the Court found that the expression "speaks in his Qyavar dialect in a more comprehensible way" is a value judgment and, as such, it is not susceptible of proof. In addition to this, the Court noted that it was not without a factual basis, which was the fact that the Plaintiff markedly spoke Gavar dialect with a number of media. The Court found that the expression "stylyag" was also a value judgment noting that by it the mass media outlet conveyed its viewpoint regarding the Plaintiff's dressing style. Furthermore, the Court stressed that the way of living of the people's elected representatives was a matter of public interest and in this sense it was allowed to resort to exaggeration when expressing opinions about it.

The Court, however, regarded that the expression "son of a bitch" addressed to the Plaintiff was an insult, reasoning that it was an expression made for the sole purpose of damaging a person's dignity and in its usual daily meaning it is percieved as an insult by the public. The Court also referred to the Explanatory Dictionary of Modern Armenian by Ed. Aghayan, according to which "son of a bitch" is a swear word and means "a rogue, scoundrel, rascal, as well as a kid." The Court was right to find that:

> "The mass media outlet would not have been held responsible for such an expression had it proved that it had been made by another person and that the journalist had merely invoked that expression having distanced himself/herself from it."

At the same time, the Court took account of the fact that the Plaintiff had submitted a written statement by Hrant Bagratyan, in which the latter refuted the fact of making such a statement. Accordingly, by stating that it is governed by the principle of proportionality and takes account of the Defendant's proprietary situation, the Court found that the Defendant must pay damages in the amount of 200.000 AMD for insulting the Plainitff, which would restore his violated right. Nevertheless, we believe that the damages award of 200.000 AMD is not in line with the principle of proportionality and is not commensurate with the seriousness of damage to the Plaintiff. In fact, it may have a "chilling effect" on the free press (Wille v. Liechtenstein, Application No 28396/95, para 50).

As to the expressions deemed defamatory by the Plaintiff, the Court, having examined them in the light of the above ECtHR principles, including the requirement of greater tolerance to critical speech by politicians, found that the claim in this part had to be dismissed. Nevertheless, we believe that the Court assessed wrongly whether or not the expressions "... transports beautiful girls by plane ...", "is famous as a permanent customer of casinos,""is used to being beaten,""was beaten," "every time he is beaten...," "in the course of the previous session only once did he appear in the lobbies of the National Assembly" were defamatory. The Court found that they were not defamatory, reasoning that:

> "regardless of whether they are true or not, they are not by their nature defamatory since they do not have the last elements (essential property) of defamatory statements. They are not damaging to the Plainitff's honour, dignity or professional reputation."

We believe that these expressions are in fact damaging in view of the fact that the acts of transporting beautiful women by plane, being a permanent customer of casinos, and being used to beatings are nothing but reprehensible phenomena for any reasonable member of the society. However, they are not defamatory not because they are not damaging but because the Defendant had submitted to the Court a number of publications about them whereas the Plainitff had never attempted to demand a retraction from these media. Neither had he retracted this information during the court hearing, something which the Court noted in its judgment:

> "… the dissemination of information by the above information sources through the relevant articles was also public in nature, whereas the Plainitff had never objected to any of them in the past. The fact that the Plaintiff did not object to these facts during the court hearing proves that the disseminated factual statements are essentially true, in which case there can be no word about defamation."

Finally, it should be added that both the Plainitff and the Defendant lodged appeals against the judgment of the first instance Court, which were not granted by the Appeal Court. The Cassation Court also returned the parties" cassation appeals.

TATUL MANASERYAN V. "SKIZB MEDIA KENTRON" LTD., THE FOUNDER AND PUBLISHER OF "ZHAMANAK" DAILY

The Facts of the Case

On 20.09.2011, the Court of General Jurisdiction of Kentron and Nork-Marash Administrative Districts of Yerevan examined the civil complaint brought by Tatul Manaseryan against "Skizb Media Kentron" Ltd., the publisher of "Zhamanak" daily demanding a retraction of defamatory information and a damages award. The Court granted the complaint in part, deciding that the Defendant must be obligated to retract the misinformation damaging the Plaintiff's honour and dignity published in the article entitled "A Criminal Case against the Adviser to the Chairman of the NA?". The claim for partial award of damages was granted in the amount of 510.000 AMD, of which 300.000 AMD as damages award, 200.000 AMD as compensation for the judicial representation, and 10.000 AMD for the pre-paid court fee.

The Content of the Impugned Publications

An article entitled "A Criminal Case against the Adviser to the Chairman of NA?" was published in "Zhamanak" daily. The publication contained the following information:

> "According to our information, criminal proceedings have been initiated against Tatul Manaseryan, Adviser to the NA Chairman, and the case is now investigated by a special investigator in Kentron Investigative Department of the Police. T.M. is suspected of having committed usury. In the framework of different criminal proceedings one of the summoned witnesses blabbed that T. M. had lent him money at interest. They say that this is how the criminal case originated."

The same newspaper published another article entitled "Mr. Manaseryan, Didn't You Lend 40.000$ at Interest?" which is cited below:

> "Concerned and annoyed with the article published yesterday, T. Manaseryan called the editorial staff and demanded a retraction and an apology for publishing false information. As proof, T. Manaseryan mentioned that he had personally inquired about the criminal proceedings on usury initiated against him from Matevosyan, Head of Kentron Investigative Department of the Police who gave a negative response. Manaseryan also told that the Police refuted this information too and suggested that we called the respective official to become assured of the truth of what he was saying. However, we called

> the PR Department of the Police, and they suggested that we called back next day for them to verify it with investigators. We asked Mr. Manaseryan to send the retraction text anyway, but he told he would do that after learning how the Police responded. He refuted the information on giving testimony the day before. Nevertheless, our sources insist that there is an initiated criminal case on usury against another person, who borrowed 40.000$ at 12% interest rate from Tatul Manaseryan. The pre-trial investigation is still underway. We do not publicize other details yet and are going to call the Police today."

On 20.10.2010, T. Manaseryan sent a request for retraction to the publisher of "Zhamanak" daily. There is no evidence in the case file that the request for retraction had been met. According to the motion of the Defendant and the protocol of the court session, Anton Araqelov was indicated as a source to be disclosed.

Taking into account the fact of the failure of the Defendant to meet the burden of proof, as well as the official letter of the Head of the Police Kentron department, according to which no criminal proceedings had been instituted against T. Manaseryan, the Court found that the statements made in the publication entitled "A Criminal Case against the Adviser to the NA Chairman?" were not true. In the light of the aforementioned, the Court found that the contested information had to be retracted. The Court referred to several ECtHR cases, including Pedersen and Baadsgaard v. Denmark (17/12/2004, Application No 49017/99), Bladet Tromsø v. Norway (20/05/1999, Application No 21980/93), Lingens v. Austria, Prager and Oberschlick v. Austria (26/04/1995, Application No 15974/90), McVicar v. the United Kingdom (07/05/2002, Application No 46311/99), Pfeifer v. Austria (15/11/2007, Application No 12556/03).

The analysis of the judgment of the first-instance Court implies that the Court did not consider properly whether and to what extent the impugned publication was a matter of public interest, and neither did it provide the Defendant a procedural opportunity to summon his source of information to the Court. The information provided by the source could have had an important impact on assessing whether the journalist had taken reasonable efforts to verify the contested information, as well as whether her source was reliable.

The Court found correctly that the information contained in the second publication did not have a defamatory nature.

In defining the size of the damages award the Court, in line with Article 1087.1 of the RA Civil Code and the ECtHR case law, took into consideration the Defendant's proprietary status and position (i.e. the status of the print media and the role played by them as such). Based on this reasoning, a damages award in the amount of 300 multiplied by the minimum salary was granted.

The judgment was appealed to the Court of Appeals, which rejected it by its decision. Subsequently, this decision was appealed to the Cassation Court, which rejected the cassation appeal on 27.04.2012.

The Analysis of the Decision of the Cassation Court

Considering the necessity for uniformity in the application of Article 1087.1 of the RA Civil Code by courts, the RA Cassation Court ruled on the interpretation of the provisions regulating relations connected with the mentioned article. The Cassation Court emphasized that for proper implementation of the discretionary powers of courts, ECtHR standards on freedom of expression and its restrictions have to be applied.

Subsequently, the Court interpreted each of the requirements of the three-wing test in the light of the ECtHR case law. Although similar interpretation had already been made by the RA Constitutional Court in its Decision N 997 dated 15.11.2011, the analysis of the Cassation Court aimed at the clarification of the three-wing test, which can have important practical implications for lower-instance courts in defamation cases.

The Cassation Court also interpreted the regulations of Article 1087.1 of the RA Civil Code, of which the following deserve a particular attention.

The Cassation Court interpreted the concept of "insult." Turning to the criteria for qualifying a particular expression as insult, the Cassation Court noted:

> "1. The statement has to damage one's honor, dignity and business reputation in reality, and the burden of proof lies with the plaintiff, 2. The person making the statement has to pursue the aim of damaging a person's honour, dignity and reputation from the very beginning, i.e. s/he should have an intention of diminishing an individual's reputation and degrading him/her."

The RA Civil Code defines "insult" as a publicly made expression aimed at damaging an individual's honour, dignity and reputation. This definition implies that the damaging purpose is the necessary component of the concept, i.e. not only does an individual have to make the respective statement, but s/he also has to make it with the purpose of damaging. At the same time, this definition does not take account of the damaging nature of the expression since it is well possible that an expression may have been made with the purpose of damaging a person, but not be of a damaging nature.

The Cassation Court requires for simultaneous existence of two components (the purpose of damaging and the damaging nature) for qualifying an expression as an insult.

It is worth mentioning that in judicial practice the definition of "insult" in the RA Civil Code has led to such an interpretation and subsequent application of the mentioned provision, according to which the damaging purpose has in fact been equated to the damaging action. As a consequence, the damaging purpose of the statement is often ignored (the Civil Court of Appeal, Bela and Sedrak Kocharyans v. "Skizb Media Kentrom" Ltd., the founder and publisher of "Zhamanak" daily).

The Cassation Court also interpreted the concept of "public" in the context of "insult."

> "The factual statements and expressions made in the presence of at least one third person may be regarded as public. They are regarded to be made in the presence of a third person also in case the third person makes statements and expressions connected in substance with the expressions and

> factual statements made by the insulter (for example, insulting by two or more persons). In such a case the damage is caused jointly."

This interpretation is also in line with Decision N 997 of the RA Constitutional Court dated 15.11.2011, according to which an insult made in the presence of at least one third person is regarded as made in public.

The following interpretation of the Cassation Court sheds more light on the concept of "expression made in public":

> "The making of such statements to the addressee cannot be regarded as public if the person presenting them has made sufficient efforts to ensuring their privacy so that they do not become accessible to others."

This interpretation can reasonably embrace cases when a journalist notifies the interviewee about the fact of recording of the conversation. In that case even though the journalist and the interviewee are the only parties to the conversation, the fact of being informed about the recording may mean that the statements made by the interviewee were made in public given that the person making those statements did not make sufficient efforts to ensure their confidentiality despite the fact of being aware that the interview was being recorded. When informed about the fact of recording, the public nature of the statements made in the absence of a third person logically derives from the essence of the principle of the public nature of an insult. Further clarification and interpretation on this issue by the Cassation Court could have an important practical meaning in resolving similar cases in the future.

According to Article 1087.1 of the RA Civil Code, within the meaning of the Code a public expression in a given situation and by its content may not be regarded as an insult if it is based on precise facts (except for natural impairments) or is justified by an overriding public interest.

As regard the term "precise facts," the Court emphasized that such are the facts, which are corroborated with evidence at the time of the publication or facts, which are universally known (with no need for proof).

Nevertheless, we believe that this interpretation, which implies a need for corroboration of the statements with evidence at the time of publication or presenting universally known facts is questionable. This conclusion also derives from the proviso of the overriding public interest contained in the mentioned norm. The point is that the need for considering the public interest and the factual basis of a value judgment derives from the ECtHR case law. The ECtHR has never required precise facts to substantiate a value judgment. In the context of Article 10 ECHR, a value judgment does not have to be based on precise facts. It is enough to show a sufficient factual basis supporting a value judgment, while the more serious the allegation is, the more solid the factual basis should be.

The ECtHR has developed the following principles regarding the proof of an impugned statement in Article 10 cases:

> "The existence of facts can be demonstrated, whereas the truth of value judgments is not susceptible of proof. As regards value-judgments this requirement is impossible of fulfil and it infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10 of the Convention (Lingens v. Austria, 08/07/1986, Application No 9815/82, para 46).
>
> "Where a statement amounts to a value judgment, the proportionality of an interference may depend on whether there exists a sufficient factual basis for the impugned statement, since even a value judgment without any factual basis to support it may be excessive. The necessity of a link between a value judgment and its supporting facts may vary from case to case according to the specific circumstances (Feldeck v. Slovakia, 12/07/2001, Application No 29032/95, para 76)."

Therefore, conditioning the qualification of an expression as an insult by the existence of precise facts does not stem from the requirements of Article 10 ECHR.

The Cassation Court noted that when examining similar cases courts have to pay attention to the explanations and approaches of individuals having made public statements, their attitude to the impugned factual statements in order to find out whether they had a purpose of damaging anyone or whether they objectively made their value judgments in good faith.

The Cassation Court also interpreted the concept of "defamation," by stating that:

> "Statements may be regarded as defamation if they contain information on violation of requirements of law by physical or legal entities, unfair behavior, conduct contravening with ethical standards in personal, public and political life, dishonesty in economic and business activities, infringement of business customs and other information which is not substantiated by any relevant and acceptable evidence (not real), diminish or degrade an individual in honour, dignity or business reputation."

Referring to the criteria for qualifying an expression as defamation, the Cassation Court noted:

1. Factual statements have to be presented about a person, i.e. they should contain concrete and precise information on a specific action or inaction, they should not be abstract;
2. The factual statements about a person have to be presented in public;
3. The presented factual statements must not be true, i.e. they have to be untrue, ungrounded, and unreliable;
4. The presented factual statements have to damage an individual's honour, dignity or professional reputation.

All the aforementioned criteria established by the Cassation Court have an important practical value for courts in defamation and insult cases.

Of particular importance is also the following clarification made by the Cassation Court:

> "In order for an interference with freedom of expression to be proportional with the legitimate aim it pursues, i.e. protection of reputation of others, an objective link is required between a value judgment

> and a person filing a lawsuit with the court. Merely presuming or suspecting a defamatory nature of a publication is not enough for establishing that damage has been caused to a particular person. There has to be a circumstance in the facts of the case, which will enable an ordinary reader to perceive that the statement is in reality addressed to the applicant or that he has been the subject of criticism (Dyuldin and Kislov v. Russia, 31/07/2007, Application No 25968/02, para 38).

The Cassation Court also addressed the conditions under which a public presentation of factual statements is not regarded as defamation.

In this context a particular importance has to be assigned to the interpretation of the term "good faith," which is of great practical importance. Hence, the Court underlined that in the context of a particular provision good faith prompts complete reproduction of the information (facts) without changing any of the significant facts.

References to good faith reproduction are contained in Paragraph 6 of Article 1087.1 of the RA Civil Code. The above interpretation of the Cassation Court implies that if, for example, a journalist has reproduced information published in another media outlet, changes in the wording without changing any of the significant facts of the publication, it has to fall within the scope of good faith reproduction.

The Court also interpreted the term "balanced." In particular, the Cassation Court stated that a balance has to be achieved in the relationship between statements of fact and an overriding public interest. Publications of facts conditioned by an overriding public interest must not contain any other defamatory information unrelated to the specific issue.

Conditions established by the aforementioned provision mostly stem from the ECtHR case law, and they serve as a basis for dispensing journalists from their ordinary obligation to verify the factual allegations. However, such interpretation of the term "balanced" differs from the interpretation used in the ECtHR case law. So, the term "balanced" needs further interpretation and clarification.

The Cassation Court also addressed the grounds for exempting a person from liability in accordance with Paragraph 6 of Article 1087.1 of the RA Civil Code.

A person is exempted from liability for insult or defamation if the statement of fact presented by him/her is a verbatim or good faith reproduction of information disseminated by a news agency or information contained in a public speech of another person, in official documents, in another mass media outlet or an author's work and a reference has been made to the source (author) while disseminating it.

In accordance with Paragraph 9 of the same article, if no reference has been made to the source of information (author) at the time of defamation or insult or the source of information (author) is unknown or the mass media outlet, resorting to its right not to disclose the source of information, refuses to disclose the name of the author, the obligation to pay damages lies with the person having publicly presented the defamatory statements, or if contained in the information disseminated by a mass media outlet, this obligation lies with him.

Following a comprehensive analysis of the mentioned provisions the Court arrived at the following conclusion:

> "Paragraphs 6 and 9 of Article 1087.1 of the RA Civil Code imply that a person is exempted from liability in case of simultaneous presence of two conditions: a statement of fact expressed or presented by him is a verbatim or good faith reproduction of the information disseminated by a news agency or information contained in a public speech of another person, official documents, another mass media outlet or an author's work and a reference has been made to the source (author) while disseminating it. The legislative requirement of verbatim or good faith reproduction aims at ensuring the verbatim reproduction of information contained in the disclosed source or at publishing it in a way that does not change both the entire meaning or the information on certain facts."

Afterwards, taking account of the aforementioned provisions and clarifications, the Cassation Court came up with the following interpretation:

> "The Cassation Court finds it necessary to address the concept of the "source of information" stipulated in Paragraphs 6 and 9 of Article 1087.1. The analysis of the aforementioned provision allows stating that in the context of Article 1087.1 the sources of information are the entities (legal and physical), which publicize information through various media. Authors and news agencies are sources of information. The Cassation Court underlines that public speeches, official documents, author's works indicated in the article are the means used by sources of information. Taking into account the mentioned conclusion the Cassation Court notes that when a reference is made to a source of information but the information contained in the same source is not published verbatim or in good faith, in other words, when the publisher has modified the information, added, subtracted or changed the facts (wording or some parts of it), then the person having publicized the information is not exempted from liability."

This explanation manifests a contradiction between the two interpretations made by the Cassation Court. In particular, in the same decision, where the Court interpreted the concept of "good faith reproduction," it stressed that good faith presumes integral reproduction of information (facts), without changing the significant facts, whereas in this part of the decision the Cassation Court does not regard it to be good faith reproduction when the person having publicized the information adds, subtracts or modifies the facts (wording or some parts of it). Moreover, no reference is made to the significance of the relevant facts, or the compliance with the reality of the facts added to the text.

The Cassation Court made another questionable interpretation in the context of clarification of the concept of source of information. In particular, it stated:

> "The same rule also applies in case when the person disseminating information reproduces the text either verbatim or in good faith, but makes a reference to a source which is not considered as a source of information in the context of Article 1087.1 of the RA Civil Code, i.e. is not an author or a news agency. In both of these cases the person having publicized the information is regarded to be the insulter or defamer."

In fact, the Court has limited the scope of sources of information with entities (physical and legal), which publicize information by different means, i.e. authors and news

agencies, which is not in line with the ECtHR case law on Article 10. In our view, this interpretation of Paragraphs 6 and 9 of Article 1087.1, prompting such a conclusion stems neither from the content of the article nor the requirements of Article 10 ECHR. It is also worth mentioning that Paragraph 6 of the mentioned article refers to the exemption from liability and Paragraph 9 regulates change in subjects having an obligation to compensate rather than the cases of exemption.

Nevertheless, the Cassation Court noted that even if the person having publicized the information did it verbatim or in good faith and made a reference to the source of information, s/he is not exempted from liability if during the judicial examination it is proved that s/he knew or must evidently have known that the information had a defamatory nature since in that case a person had to have an intention to defame. In this case both the source of information and the person having publicized it are jointly liable for jointly causing damages.

Although this interpretation is in line with the general logic of the ECtHR case law, it still contradicts Paragraph 9 of Article 1087.1. In these circumstances, in our view, this issue can be resolved by legislative regulation and cannot be settled by giving an interpretation directly contravening the law.

In the light of the principles established by the ECtHR on the disclosure of the sources of information, the following interpretation of the Cassation Court looks even more questionable and contradictory:

> "The Cassation Court deems it necessary to note that the disclosure of the sources of information has to be done at the time of dissemination of information. Disclosure of a source of information during dissemination of information rather than afterwards aims at ensuring awareness about the fact that a defamation or insult originates from a specific subject and not the publisher or subjects of unknown number. The disclosure of a source depending on the type of a source may have an impact on the formation of public opinion. Meanwhile, disclosing a source of information during a judicial process does not fully ensure public knowledge on the insulting or defaming person."

The Cassation Court made a clarification regarding the subjects that have an obligation to submit evidence and present arguments on the Defendant's proprietary status. This clarification is more than necessary in judicial practice in view of the fact that due to contradictory approaches to this issue by courts the obligation to submit evidence on the Defendant's proprietary status has been shifted to the Plaintiff. The Cassation Court emphasized:

> "in case of awarding damages it is important that courts pay particular attention to defining the size of a damages award, demand from defendants financial and other documents submitted to the competent state bodies (for example, tax reports submitted to the State Revenue Committee under the RA Government). Otherwise, large sums of awards may have heavy consequences on the continuation of their ordinary activities. Moreover, while examining the issue courts should pay attention to the arguments of the defendant on the damages award claim filed by the plaintiff, which also should contain information on the financial impact of the claimed compensation on their ordinary activities."

Thus, the Cassation Court unequivocally stated that the burden of presenting evidence on the proprietary status of the defendant lies with the defendant. Another important interpretation made by the Court in defining the criteria for determining the damages award is:

> "… when an insult or defamation continues also in the course of judicial process this circumstance has to be taken into account in defining the size of the damages award."

This conclusion is also in line with the ECtHR case law and Decision N 997 of the RA Constitutional Court dated 15.11.2011.

The consistent analysis of the decision of the RA Cassation Court implies that it contains important and practical interpretations and clarifications, which can play a substantial role for courts in examining defamation cases. This said, some interpretations contained in the decision can lead to disproportional restrictions of freedom of expression in judicial practice, thus resulting in the violation of Article 10 ECHR.

SUSANNA BAGHDASARYAN V. THE NEWSPAPER "HAYQ," ARMAN GALOYAN AND SVETLANA ARAKELYAN

The Facts of the Case

On 27.09.2011, the Court of General Jurisdiction of Kentron and Nork-Marash Administrative Districts of Yerevan examined the civil suit brought by Susanna Baghdasaryan (hereinafter: the Plaintiff) against the newspaper "Hayq," its reporter Arman Galoyan and Svetlana Arakelyan (hereinafter: the Defendants), claiming that the article entitled "Tracing a Murder" published in the newspaper and authored by the second Defendant, profaned the memory of her deceased son, and damaged his reputation and good name. The Plaintiff demanded a retraction of the respective information. The Court granted the claim in part.

In accordance with Paragraph 3 of Article 31 of the RA Civil Procedure Code, Svetlana Arakelyan, was engaged in the process as a witness and then was endowed with the status of the second Defendant.

On 21 February 2007, in the village of Areni of Vayots Dzor region the Plaintiff's parents-in-law found their grandson Hayk Baghdasaryan (born on 28.20.1989) dead in front of the door of their own house with a plastic bag around his head and some compound on his face. The results of the forensic medical and forensic chemical expert examination of the deceased boy did not show that he had taken drugs.

The Plaintiff's husband, Hamlet Baghdasaryan, having some suspicions of his co-villager Karen Manukyan's participation in the murder of his son, and having met him by chance in the evening of 18 August 2007, as well as having become convinced of his suspicions during the conversation with the latter, murdered him. The Plaintiff's husband received a 10-year prison sentence for the murder. Different rumors, versions and interpretations were circulated among the public about these two murders.

Arman Galoyan, a reporter of the newspaper "Hayq" and the author of the publication, spoke to Svetlana, the wife of the deceased Karen Manukyan, who referred to Hayk Baghdasaryan as a drug addict during the conversation. The conversation was followed by a publication authored by Arman Galoyan in the newspaper "Hayq" under the headline "Tracing a Murder," which was worded as follows:

> "The relevant case is about the murder of Karen Manukyan, who lived in the village of Areni and worked as a guard at a stone mine belonging to "Amprop" Ltd. His wife told that on 18 August 2007, Karen had gone out and did not return. ... To our question about the reason of the murder, the widow answered that Gegham Baghdasaryan suspected Karen in the death of his grandson, Hayk. Hayk died in February 2006 as a result of taking drugs. "Gegham was convinced that Karen had taught him to take drugs. But Karen never knew what drugs were, besides, when Hayk came from Russia he had already been a drug addict. Everybody knew about it, even his father, who came to the funeral and told that he had known that sooner or later his son would die"- told Karine".

The publication implied that Hayk died of drugs. The Plaintiff asked to retract the information published in the article profaning the memory of her deceased son, defaming his reputation and good name. Taking into consideration the fact that Svetlana Arakelyan provided the defamatory information, the Plaintiff addressed her claim to the Defendant Svetlana Arakelyan as well.

The Judgment of the Court

In her testimony given to the Court, Svetlana Arakelyan stated that she had told the information to a person who visited her without knowing that he was a reporter.

The Court found that the published factual statements were defamatory as they were reproachable by the public.

The fact that Hayk Baghdasaryan died due to taking drugs, had not been confirmed by the evidence examined in the judicial process. Moreover, not having the burden of proof, the Plaintiff, through her representative, submitted to the Court an expert opinion from the clinic "Psychiatric Medical Center" CJSC, according to which, there were no traces of alcohol or drugs in Hayk Baghdasaryan's sample of urine. She also presented an expert opinion from the scientific medical center at the Ministry of Health of the RA, according to which the forensic chemical examination found no drugs, alcohol or pesticides in Hayk Baghdasaryan's urine and internal organs.

The evidence examined during the judicial process corroborated that Karine, mentioned in the publication as Karen Manukyan's wife, was Svetlana Arakelyan, one of the Defendants in the instant proceedings, and that her statements were reproduced verbatim in the publication. This fact was also confirmed by Svetlana Arakelyan in her testimony. Moreover, the statements were quoted in brackets as a reported speech of a third person (Svetlana Arakelyan). Therefore, a reference to the source was made in the publication, which was not disputed by the source. Under these conditions the liability provided by Article 19 of the RA Civil Code of RA lied with Svetlana Arakelyan as a person having disseminated damaging factual statements by means of a newspaper. Finding it proven that the statements defamatory of Hayk Baghdasaryan had been disseminated by Svetlana Arakelyan on the basis of the evidence examined in the Court and taking into consideration that the truth of the relevant information had not been proven, the Court found that the factual allegations published in the newspaper "Hayq" under the headline "Tracing a Murder" (Hayk died in

February of 2006 as a result of taking drugs, when Hayk came from Russia he had already been a drug addict) were subject to retraction.

By the Court's judgment S. Arakelyan was obligated to retract the statements published in the article "Tracing a Murder," which were defamatory of Hayk Baghdasaryan and publish the retraction in the same newspaper. The Plaintiff's motion on rendering a supplementary judgment (noting that the newspaper is not published anymore), was rejected by the Court.

The Legal Analysis of the Judicial Act in the Light of Article 10 of the European Convention on Human Rights and Other International Standards on Freedom of Expression

Public interest

The publication, alongside other information, discussed the circumstances of Hayk Baghdasaryan's death, mentioning that he had died due to taking drugs.

In accordance with the ECtHR case law, the Court awards extended protection to freedom of expression if the contested statements have been made in the context of a public debate (Flux v. Moldova, 20/11/2007, Application No 28702/03, Krasulya v. Russia, 22/02/2007, Application No 12365/03). Public interest is distinguished by the Court in two aspects, in regard to subjects towards whom the limits of acceptable criticism are broader comparing with private individuals and the scope of issues which relate to the public interest. The Court has consistently distinguished between cases in which there exists a right of the public to be informed and those in which the publication merely serves to satisfy the curiosity of a certain readership (Standard Verlags GmbH v. Austria, 04/06/2009, Application No 34702/07, para 32).

The Court did not consider at all whether there was a public interest in publishing the article in question, which does not stem at least from the content of the article.

The Personality and the Status of the Plaintiff

The Plaintiff is the mother of Hayk Baghdasaryan, the boy mentioned in the publication. She filed a complaint for the protection of his honour and dignity after his death.

The publication implies that H. Baghdasaryan is a private individual who the ECtHR awards greater protection from defamatory statements in Article 10 cases because private individuals do not lay themselves open to the public scrutiny of their every word and deed (Tammer v. Estonia, 06/02/2001, Application No 41205/98).

Statements of Facts v. Value Judgments

The Court did not consider separately the nature of the published statements (whether they were facts or value judgments). The publication implies that the impugned information was a statement of fact.

The article quoted the speech of Karine, presented as Karen Manukyan's wife, which contained the contested statements. The judicial examination confirmed that Karine was

in fact Svetlana Arakelyan and one of the Defendants in these proceedings. Although the identity of S. Arakelyan was established during the trial as a source of the impugned information, this circumstance was not, however, considered by the Court as a factor in not clearly identifying the source of information by the journalist, which would imply that the journalist had not ensured sufficient distance from the defamatory allegation.

The principles established by the ECtHR in respect of the reproduction of allegations made by others are the following:

> "The punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so (Jersild v Denmark, 23/09/1994, Application No 15890/89, para 35)."

> "A general requirement for journalists systematically and formally to distance themselves from the content of a quotation that might insult or provoke others or damage their reputation was not reconcilable with the press's role of providing information on current events, opinions and ideas (Thoma v. Luxembourg, 29/03/2001, Application No 38432/97, para 64)."

In the case of Erla Hlynsdottir v. Iceland (10/07/2012, Application No 43380/10, para 70) the ECtHR stated that:

> "…by reproducing not only Mr B and Mr Y's versions of events but also that of Mr A /subject of accusation/, the applicant must be considered to have sought to achieve a balance in her reporting. … Though they may have been capable of causing injury to Mr A's reputation, the Court sees no cause for criticizing the applicant for not having distanced herself from the contents of Mr B's statements.'

In the instant case Svetlana Arakelyan told in her testimony to the Court that she had provided the impugned information to the person visiting her without knowledge of his status of a journalist.

The principles established by the ECtHR in its case law relating to assistance by journalists to others in the dissemination of their statements and their subsequent exemption from liability are hardly applicable in this case since the person having publicized these statements had not been S. Arakelyan but the journalist and the media. At the same time, S. Arakelyan told that information to the journalist without knowing his status and thus without having an intention to disseminate the impugned information. Furthermore, the journalist did not properly identify his source of information in the publication. In the light of the aforementioned considerations obligating S. Arakelyan to retract the information in the publication in a newspaper becomes questionable.

The judgment is also questionable in regard to the fact that at the time of rendering the judgment the newspaper "Hayq" was not published anymore, so the retraction would not be possible to publish.

The following principles established by the ECtHR are applicable to the present case as well.

"Protection of the right of journalists to impart information on issues of general interest requires that they should act in good faith and on an accurate factual basis and provide "reliable and precise" information, in accordance with the ethics of journalism (Bladet Tromsø and Stensaas v Norway, 20/05/1999, Application No 21980/93, para 65, Prager and Oberschlick v. Austria, 26/04/1995, Application No 15974/90, para 37)."

"Under the terms of paragraph 2 of Article 10 of the Convention, freedom of expression carries with it "duties and responsibilities", which also apply to the media even with respect to matters of serious public concern. These "duties and responsibilities" are significant when there is a question of attacking the reputation of a named individual and infringing the "rights of others". The more serious the allegation is, the more solid the factual basis should be (Europapress Holding D.O.O. v. Croatia, 22/10/2009, Application No 25333/06, para 66).

The first-instance Court did not make any reference to the ECHR and the case law of the ECtHR, neither did the Court analyze the factual circumstances of the case in the light of the aforementioned ECtHR principles.

GEVORG HAYRAPETYAN V. "MULTI MEDIA KENTRON TV" CJSC

The Facts of the Case

In the framework of its television programme series Inquiry, the television company "Multi Media Kentron TV" (hereinafter: the Defendant) released a video, in which Gevorg Hayrapetyan (hereinafter: the Plaintiff) was shown as a person who had committed state treason through espionage. It also broadcast that the Court of General Jurisdiction of Avan and Nor Nork Administrative Districts of Yerevan passed a convicting judgment regarding Gevorg Hayrapetyan. It was broadcast that the DVD, which had been passed to the defendant Bagheri had been hidden at the bottom of his bag and was detected by the members of the staff of the National Security Service. In the broadcasted part by engaging in espionage Gevorg Hayrapetyan anticipated to receive 60.000 USD, while in order to inform about the places of mines in Kelbajar he was promised 1000 USD for each mine. The video showed footage in which somebody was handing over money to somebody else. At the time of broadcast, there was no indication that it was not surveillance footage. The video was released in the period of 14-21 November 2010.

In a letter addressed to the television company "Kentron" dated 01.12.2010. the Plaintiff's representative stated that the judgment of the Court of General Jurisdiction of Avan and Nor Nork Administrative Districts of Yerevan regarding Gevorg Hayrapetyan had not become effective. Therefore, under such circumstances release of such a video was a violation of the right to a presumption of innocence of Gevorg Hayrapetyan's rights under Article 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 21(1) of the RA Constitution and Article 18(1) of the RA Criminal Procedure Code.

The Proceedings of the Case

On 28.12.2012, Gevorg Hayrapetyan (hereinafter: the Plaintiff) lodged a complaint with the Court of General Jurisdiction of Ajapnyak and Davtashen Administrative Districts of Yerevan (hereinafter: the Court) against "Multi Media Kentron TV" CJSC (hereinafter: the Defendant) demanding free TV time to be able to refute the information damaging his honour and dignity. On 17.02.2011, the Plaintiff's representative amended the claim and requested the Court to exact 3.000.000 AMD from the Defendant in favour of Gevorg Hayrapetyan as award of non-pecuniary damage.

On 16.10.2011, the Court of General Jurisdiction of Ajapnyak and Davtashen administrative districts of Yerevan passed a judgment, by which it dismissed Gevorg Hayrapetyan's complaint against "Multi Media Kentron" CJSC on finding the fact of violation of the right to a presumption of innocence under Article 6 ECHR, on giving free TV time to the Plaintiff for the purpose of refuting the information damaging his honour and dignity and on non-pecuniary damages award.

Gevorg Hayrapetyan and his representative lodged an appeal against this judgment.

On 15 September 2011, the RA Appeal Court dismissed the appeal of Gevorg Hayrapetyan and his representative. Gevorg Hayrapetyan's representative lodged a cassation appeal against this decision. However, the RA Cassation Court decided to return the appeal.

The Legal Analysis of the Judicial Act in the Light of Article 10 of the European Convention on Human Rights and Other International Freedom of Expression Standards

In its judgment, the Court referred to Article 10 ECHR and Article 27 of the RA Constitution, which guarantee the right to freedom of expression. It also referred to the RA Law on Freedom of Information and the RA Law on Mass Communication.

By invoking these legal acts, the Court came to the conclusion that the right to freedom of information is guaranteed in the RA, and the mass media are entitled to seek, receive and impart information.

The Court noted that the materials of the criminal case instituted against Gevorg Hayrapetyan, as long as they are not classified within the meaning of the RA Law on Freedom of Information, are information and may be made public.

The Court noted that by broadcasting the video, the mass media outlet presented exclusively that which was reflected in the materials of the criminal case and did not express any personal views. The Court deemed it confirmed that the Defendant company broadcast information, which it found exclusively in the materials of the case and the court judgment and that it had made reference to the source of information.

The Court found that the demand of finding a violation of the right to a presumption of innocence under Article 6 ECHR is without any legal and legislative basis and must, therefore, be dismissed.

As regards the Plaintiff's demand for the award of non-pecuniary damages in the amount of 3.000.000 AMD, the Court stated that the legislature, along with the instruments of defence of the person's honour, dignity and professional reputation, foresaw a possibility to demand from the Defendant via the Court the pecuniary damage, including the reasonable court expenses and any other expenses incurred for restoring a violated right, but not – non-pecuniary damages.

As regards the demand for retraction, the Court noted that the legislature had foreseen the ways of retracting factual inaccuracies that violate a person's rights and did not

foresee allocation of free TV time to the victim of the human rights violation or his/her representative.

The Court decided to dismiss the complaint and to exact 60.000 AMD from the Plaintiff as court fee.

The Appeal Court, having examined the grounds of appeal regarding the violation of a substantive right, invoked Article 3 of the RA Constitution, which states that the human being, his/her dignity and fundamental rights are of supreme value; Article 14 of the RA Constitution, according to which, human dignity is respected and protected by the State as an inviolable foundation of human rights and freedoms; Article 18 of the RA Constitution, which stipulates that everyone has a right to an effective legal remedy to protect his rights and freedoms; Article 19(1) of the RA Civil Code which prescribes that a citizen has a right to demand by court to retract any information damaging to his honour, dignity and professional reputation if the party that has disseminated this information fails to prove that it is true.

The Appeal Court also invoked the UN Charter, which has declared the protection of human rights and freedoms, as well as the Universal Declaration of Human Rights adopted by the UN General Assembly, which says that no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence.

The Appeal Court found that by means of an analysis of the evidence examined by the Court, the latter came to the correct conclusion regarding the dispute. Therefore, the Appeal Court found that the arguments of the appeal regarding judicial errors were groundless. The Appeal Court thus dismissed the appeal.

The Cassation Court, having examined the reasoning of the Plainitff on the admissibility and substance of the cassation complaint, found that the cassation appeal must be returned. The Cassation Court found that the reasons adduced by the appellant on judicial error were refuted by the reasoning of the Appeal Court.

The Appeal Court noted that "it was established by the Court that the Defendant company had broadcast information, which was found exclusively in the materials of the criminal case and the judgment of the Court and had made a reference to its sources."

The Cassation Court noted that in its judgment dated 17.06.2008 in the case of Meltex Ltd and Mesrop Movsesyan (Application No 32283/04) the ECtHR expressed its viewpoint regarding the reasoning of the RA Cassation Court, according to which the competence of the Cassation Court was limited to the examination of the matters of law.

The Cassation Court decided to return the cassation appeal lodged by Gevorg Hayrapetyan's representative.

The domestic courts in this case failed to apply a number of principles reflected in the ECtHR case law regarding Articles 6 and 13 ECHR.

Article 6 ECHR stipulates:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." According to Paragraph 2 of Article 6, "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

Article 13 ECHR stipulates:

> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

The ECtHR regards the right to a presumption of innocence guaranteed under Article 6(2) ECHR as one of the pre-conditions of the right to a fair trial stipulated under Article 6(1) ECHR. Accordingly, the domestic courts had to examine the case in the light of the interconnection between these two parts of the article, which would bring them to the idea that broadcasting such a video prior to the entry into force of the judgment was a violation of the Plaintiff's right to a fair trial.

The ECtHR noted that the coverage of current events by the mass media is part of the right to freedom of expression guaranteed under Article 10 ECHR. However, the domestic courts ignored the fact that the criminal proceedings in the case of Gevorg Hayrapetyan were behind closed doors, the materials of the case had not been made public due to being classified information. Under such circumstances broadcasting such footage confirms the Defendant's guilt, which is a violation of the right to a presumption of innocence under Article 6(2) ECHR.

In the case of Bladet Tromsø and Stensaas v. Norway, 20/05/1999 (Application No 21980/93, para 65) the ECtHR noted, in particular, that:

> "Article 10 of the Convention does not, however, guarantee a wholly unrestricted freedom of expression even with respect to press coverage of matters of serious public concern. Under the terms of paragraph 2 of the Article the exercise of this freedom carries with it "duties and responsibilities", which also apply to the press. These "duties and responsibilities" are liable to assume significance when, as in the present case, there is question of attacking the reputation of private individuals and undermining the "rights of others". As pointed out by the Government, the seal hunters" right to protection of their honour and reputation is itself internationally recognised under Article 17 of the International Covenant on Civil and Political Rights. Also of relevance for the balancing of competing interests which the Court must carry out is the fact that under Article 6 § 2 of the Convention the seal hunters had a right to be presumed innocent of any criminal offence until proved guilty. By reason of the "duties and responsibilities" inherent in the exercise of the freedom of expression, the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism."

According to the ECtHR, another "legitimate aim" of restricting the right to freedom of expression is "maintaining the authority and impartiality of the judiciary."

In this regard, the ECtHR found in the case of Worm v. Austria (29/08/1997, Application No 22714/93, para 40) that:

> "The phrase "authority of the judiciary" includes, in particular, the notion that the courts are, and are accepted by the public at large as being, the proper forum for the settlement of legal disputes and for the determination of a person's guilt or innocence on a criminal charge; further, that the public at large have respect for and confidence in the courts" capacity to fulfil that function… "Impartiality" normally denotes lack of prejudice or bias… what is at stake in maintaining the impartiality of the judiciary is the confidence which the courts in a democratic society must inspire in the accused, as far as criminal proceedings are concerned, and also in the public at large."

It becomes clear from the above ECtHR principles that Gevorg Hayrapetyan could not have confidence in the Court for the protection of his rights if he could not fully exercise his right to a fair trial by an independent and impartial court at the time of appeal of the judgment against him.

In the case of Jersild v Denmark (23/09/1994, Application No 15890/89, para 31) the ECtHR has found that:

> "In considering the "duties and responsibilities" of a journalist, the potential impact of the medium concerned is an important factor and it is commonly acknowledged that the audiovisual media have often a much more immediate and powerful effect than the print media…. The audiovisual media have means of conveying through images meanings which the print media are not able to impart."

The domestic courts also failed to look at the case in the light of the right to respect for privacy.

Article 8 ECHR stipulates:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the 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 the rights and freedoms of others.'

In the case of Von Hannovver v. Germany (07/02/2012, Application No 40660/08, para 98-99), when the applicant tried to prevent the publication of her and her family's photographs in several newspapers of European states, the ECtHR noted as follows:

> "While the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this negative undertaking, there may be positive obligations inherent in effective respect for private or family life….The boundary between the State's positive and negative obligations under Article 8 does not lend itself to precise definition; the applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the relevant competing interests"

Where the Court has to balance the right to privacy of a human being and the right to freedom of expression, the ECtHR has always stressed the role of pictures and articles in stimulating discussion in newspapers.

In conclusion, by failing to assess the issue of protection of the right to privacy under Article 8 ECHR, the courts also ignored the question of whether dissemination of such information about Gevorg Hayrapetyan contributed to any public debate or whether it was done for the sole purpose of influencing the audience.

Finally, this analysis has revealed that the decisions of domestic courts failed to apply any of the principles set by the ECtHR case law.

THE 15 NOVEMBER 2011 DECISION NO DCC-997 OF THE RA CONSTITUTIONAL COURT

On 15 November 2011 the RA Constitutional Court pronounced its Decision No DCC-997 in response to the application of the RA Human Rights Defender dated 13 October 2011 on the verification of the constitutionality of Article 1087.1 of the RA Civil Code. The Constitutional Court, thus, adopted a 37-page document, which apart from a couple of positive clarifications, contains a number of uncertain definitions and wordings, which, if taken into account, will add to the confusion surrounding the limited understanding of the field in the current judicial practice.

Among the positive clarifications note, in particular, should be taken of:

1. The view, according to which the RA courts must accept the principle reflected in the case law of the European Court of Human Rights regarding the wider limits of acceptable criticism of public figures and politicians (DCC-997, p. 25),
2. The fundamental approach according to which the term "person" does not apply to public bodies as legal persons;
3. The introduction of the Armenian term "defamation" as a generic term for both defamation and insult;

As to the shortcomings, the following is worth mentioning:

1. There are two models of defamation law – the British and continental. The first employs the term defamation, which can have oral (slander) and written (libel) forms. To defame, in other words, to lessen the name or fame may occur through expression of information – facts or factual statements, or ideas – opinions or value judgments. In the first case the defaming individual who acquires the legal status of the defendant in the civil process, may avail himself/herself of either the defence of truth/justification or the defence of public interest, while in the second case, the defence of a fair comment on a matter of public interest. The countries of continental law employ two concepts: defamation – publication of defamatory information or facts or factual statements, and insult – publication of insulting ideas or opinions or value judgments. Due to lack of awareness of

the distinction between these two models, the decision of the RA Constitutional Court offers the following definitions invoking the expressions defined in 2005 by the OSCE: defamation, libel (a written statement which defames an individual), and insult (a statement or act said or made with a view to insulting a person).

2. The wordings of the Constitutional Court on conditioning these two torts by the existence of "intent" are not proof of profound understanding either. Most probably what the Constitutional Court understands by the word "intent" is the concept of "malice" in the British defamation law, which has two variations: legal malice, which implies that the information or ideas have been published dishonestly or with reckless disregard for truth and actual malice, which implies spite or pecuniary interest. Hence, the concept of legal malice has elements of both intent and recklessness. At any rate, the burden of proving malice rests with the plaintiff. It remains to be seen what the Constitutional Court means by "intent" and how it has reconciled the above approach with the general rule in Article 1087.1, according to which the burden of proving the existence or non-existence of the relevant factual circumstances in such cases rests with the defendant.

3. The Constitutional Court does not deem value judgments as insult since "a value judgment is a conclusion made on the basis of the analysis of factual circumstances." But why a journalist cannot arrive at a dishonest value judgment on the basis of the analysis of factual circumstances is a question unanswered by the Constitutional Court perhaps due to the fact that in its decision it makes an extraordinary differentiation between opinions and value judgments where these two are just the same.

4. A number of related important terms are translated wrongly in the decision of the Constitutional Court. For example, the formulation of the most important case of the ECtHR, Handyside v UK, 1976 is worded as follows: "Freedom of expression … is applicable not only to "information and ideas" that are favourably received or regarded as inoffensive but also to those that insult, shock or disturb…". Leaving aside the fact that the Decision contains no reference to this particular judgment, which set for the first time this important principle and the fact that these three words are not even used consistently throughout the text appearing in different combinations, which is also unacceptable for a legal text, it should be noted that the terms used by the European Court of Human Rights are "offend, shock or disturb," - not "insult" but "offend", the difference being in the extremity or degree of damage.

5. Another serious mistake that is found in the Decision of the Constitutional Court is the misconception of the notion of compensation for non-pecuniary damage. Having borrowed the expression "compensation for non-pecuniary damage" from the case law of the ECtHR (""the critical assessment of facts ... cannot serve as a basis for allowing compensation claims for moral damage". However, if the right

to a good reputation of a person is violated, even though a defamatory statement was a value judgment, the courts can award compensation for non-pecuniary damage." Ukrainian Media Group v Ukraine, 2005, Judgment of 29 March 2005), DCC-997, p. 33), the Constitutional Court obviously has no understanding of its meaning. This is testified by the last sentence of the last paragraph on page 29 of the Decision, whereby the Constitutional Court attaches special significance to the fact that "paragraphs 7 and 8 of the contested Article, in addition to pecuniary compensation, foresee forms of non-pecuniary compensation." This conclusion is reinforced by the reading of paragraph 5 of page 35 of the Decision: "forms of non-pecuniary compensation should be applied as a matter of priority in case of damage as a result of defamatory expressions (actions)…". However, according to the ECtHR, compensation for non-pecuniary damage is again a monetary form of damages awarded to compensate for the pain, suffering, anguish, or, in our case, loss of reputation. Accordingly, Paragraphs 7 and 8 of Article 1087.1 of the RA Civil Code prescribe an award for non-pecuniary damage in the amount of up to 1000 and 2000 (respectively) multiplied by the minimum salary. The rest are just means of redress of violated rights rather than non-pecuniary compensation.

Finally, the Constitutional Court should have answered the questions regarding the constitutionality of the relevant provisions of the RA Civil Code. In at least two cases these questions begged for clear answers, which the Constitutional Court failed to provide.

The first was whether regarding insult as insult only by virtue of its public nature does not violate the constitutional provision on the prohibition of discrimination. The Constitutional Court gave the following answer: "it is outside the scope of the relevant Article to regulate relations of private law nature. However, the Constitutional Court believes that rather than being a gap of the named Article of the Code, this is a gap of general regulation to fill which the RA National Assembly should within the scope of its competence consider the issue of legal regulation of defence from non-public insult." A question arises: what do the RA Civil Code in general and this Article in particular, regulate if not relations of private law nature? Public?

Secondly, as to the question on whether the maximum threshold of damages awards in Article 1087.1 does not contradict the constitutional principle of proportionality, the Constitutional Court again failed to provide an exhaustive answer by advising the RA National Assembly to review this threshold to prevent disproportionate limitations of the right to freedom of expression. If the Constitutional Court believes there is a proportionality problem, it means the provision contradicts the constitutional principle of proportionality and is unconstitutional. Sending messages to the National Assembly is a step that comes next. If, however, there is no such problem, then why should the upper threshold be reviewed?

GLENDALE HILLS CJSC V. THE NEWSPAPER ZHAMANAK, PUBLISHER: "SKIZB MEDIA KENTRON" LTD

The Facts of the Case

In this case Glendale Hills CJSC (hereinafter: the Plaintiff) engaged in construction activity (the subject matter of this case) at the expense of the state resources. At the same time, the company was an organization discharging public functions on the basis of various deals made with the Government.

The Defendant in this case was the "Skizb Media Kentron" Ltd., which publishes the daily newspaper "Zhamanak."

In the issue No 136 dated 26.08.2010 of the Defendant's mass media outlet an article entitled "1000$ for Silence" was published with the following content:

> "We learnt from well-informed sources that following the self-collapse of one of the buildings made by "Glendale Hills" in the Mush-2 neighbourhood, the Gyumri representatives of the organization tried by all means to persuade the inhabitants not to inform the mass media of what had happened. Our source, who did not want to introduce himself, informed us that "Glendale Hills" offered 1000USD in cash, as well as promised to quickly repair their flats on the condition that this topic does not appear in the mass media. If not, they threatened not to repair the flats. The victims, however, refused to strike any dark deals with "Glendale Hills".

In the issue No 140 dated 01.09.2010 of the same newspaper, an article entitled "They Even Dare to Talk" which stated as follows:

> "…it turns out that their lawlessness does not have any limits. Lately, they dared to send a text, which reminds marasmus or murmurings of a mental patient to our editorial office and demand that it be published as a retraction. Of course, we are publishing that text not because we feel obliged but to show our readers, the inhabitants of Gyumri, the true face of this company."

Within the frames of its case the Plaintiff spent 500.000 AMD on the lawyer's fee whereas the Defendant's gross income in 2010 was 9.934.500 AMD, of which 7.450.000 AMD were the reductions from the gross income. The taxable income of the reporting year was 1.895.000.

By applying to the Court, the Plaintiff demanded that the Defendant be obligated to retract the information damaging its professional reputation and exact from the Defendant in favour of "Glendale Hills" CJSC 2.000.000 AMD as damages for defamation, as well as 500.000 AMD as the lawyer's fee.

On 30.01.2012, the Court granted the complaint in part and obligated "Skizb Media Kentron" Ltd. to retract the information damaging the professional reputation of the Plaintiff "Glendale Hills" CJSC published in the issue No 136 of Zhamanak daily dated 26 August 2010, as well as exact 2.000.000 AMD from the Defendant as damages for defamation. The Defendant was also exacted 300.000 AMD as the lawyer's fee and 10.000 as court fee. The complaint in its other parts was dismissed.

This judgment was appealed to the RA Appeal Court, which left the judgment unchanged. The RA Cassation Court returned the cassation appeal against the decision of the Appeal Court.

The Legal Analysis of the Judicial Act in the Light of Article 10 of the European Convention on Human Rights and Other International Freedom of Expression Standards

This analysis addresses those fundamental freedom of expression principles, which the courts having examined this case had ignored. This had therefore led to a disproporional violation of the Defendant mass media outlet's freedom of expression.

The Person and the Status of the Plaintiff

The Plaintiff in this case was a company engaged in large-scale construction activity at the expense of the state budget. Although it was a private commercial entity, it nevertheless operated in an area, which was of huge public interest – construction and rehabilitation in the earthquake zone. In addition to this, the Plaintiff was a contractor in a number of wide-scale construction projects implemented at the expense of budget resources and, when engaged in these activities, the organization performed public functions in many parts of the State, including negotiations with the inhabitants and proprietors in the framework of the construction project in the centre of Yerevan to achieve the forced alienation of their property in the public interest, applying to the court against the proprietors and other rights bearers on behalf of the State and exercising judicial representation of the State in that area, etc.

This circumstance was altogether ignored by both the parties to the proceedings and the Court in a situation where there is a significant difference in the requirement of tolerance to critical speech in the case of an organization performing such functions and an ordinary commercial entity. It goes without saying, that in this case an organization of such a status as the Plaintiff's had to be more tolerant to criticism directed at its activities, including when this criticism was exaggerated.

Meanwhile, the Court made a slim reference to this circumstance for the opposite purpose. As has been described in this analysis in the part on the proportionality of

interference, the Plaintiff's status was invoked by the Court of General Jurisdiction to substantiate the damages award.

In other words, in the part related to the person and status of the Plaintiff, the Court making an absolutely formal reference to a number of the ECtHR cases, applied the standards of these cases contrary to the spirit and purpose of Article 10 ECHR.

The Person and the Status of the Defendant

Likewise, the courts ignored the Defendant's status. In particular, the fact that the Defendant was a mass media outlet was not assessed properly by the courts. Meanwhile, in its early case law on Article 10 ECHR, such as Sunday Times v. UK (26/04/1979, Application No 6538/74, para 50(b)), the ECtHR stated:

> "These principles are of particular importance as far as the press is concerned. Whilst it must not overstep the bounds set, inter alia, in the "interests of national security" or for "maintaining the authority of the judiciary", it is nevertheless incumbent on it to impart information and ideas on matters of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog"."

The status of the Defendant is especially important in this case in the light of the circumstances of another ECtHR case - Prager and Oberschlick v. Austria (26/04/1995, Application No 15974/84, para 38), which prescribed that:

> "…journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation…"

Again, as in the case of the Plaintiff's status, not only did the courts failed to take account of the fact that the Defendant was a mass media outlet but used it with a view to aggravating the responsibility by referring to the fact of dissemination of information by means of the press. In other words, as in the case with the status of the Plaintiff, the approaches related to the status of the Defendant were applied by the courts contrary to the requirements and the purposes of Article 10 ECHR.

The Public Interest Aspect of the Expression

The issue of whether the expressions in question were a matter of public interest was not assessed by the courts either. Meanwhile, in conformity with the norms of both international law (Article 10 ECHR) and domestic law (Paragraph 5 of Article 1087.1 of the RA Civil Code) the responsibility for publishing defamatory information can also be restricted if the dissemination of such information in a particular situation and by its content is of public interest and the person having made it public proves that s/he had taken all the necessary measures to find out whether it was true and accurate. In this case, the Defendant submitted to the court information, which proved that if not completely, there had to some extent been a self-collapse of a part of a residential building, which was used in an exaggerated manner by the Defendant mass media outlet as self-collapse of the whole building.

In other words, the dismissal of such a defence led to a situation, in which the Court was not longer able to assess reasonably the issue of necessity and proportionality of the interference. It should be noted in this regard that the impossibility of this assessment was clearly conditioned by the failure of the Defendant to put it before the courts in a well-grounded and clear manner.

The Application of the Principle of Proportionality

In this case the approach of the Court of General Jurisdiction is worth mentioning due to its invocation and application of a criterion – humanity - which is outright irrelevant to this case. In its reasoning, the Court noted:

> "It follows from the analysis of the above articles that the legislature, pursuing a legitimate aim, enabled the person of civil law whose professional reputation is damaged by defamation to demand from the Defendant as non-pecuniary damages, up to 2000 multiplied by minimum salary having set criteria (the proprietary situation of the libeler), which the Court must be guided when administering justice. In other words, the legislature, taking account of the principle of humanity, conferred on the Court a wide discretion in determining the damages award."

It should also be noted that when assessing the question of interference with the right to freedom of expression of the mass media outlet the courts showed an extremely formalistic approach when they regarded the fact of damage to the Plaintiff's reputation as the sole ground for awarding damages. The Court noted, in particular, that:

> "In this case deeming it confirmed that the Defendant had damaged the Plaintiff's professional reputation by means of defamation, the Court finds that "Skizb Media Kentron' Ltd. must be exacted 200.000 AMD for damages taking account of the manner and scope of dissemination of the defamation, as well as the proprietary situation of "Skizb Media Kentron" Ltd.

However, the Court had to assess the proprietary situation of the Defendant mass media outlet. In particular, in a situation where the annual net income of the Defendant mass media outlet was only 1.895.000 AMD, the award of damages in the amount of 200.000 AMD along with 300.000 AMD as the lawyer's fee and 10.000 AMD as the court fee would lead to a situation in which the Defendant had to bear a burden of damages which was more than a quarter of its annual net income.

Therefore, the restriction of the Defendant mass media outlet's right to freedom of expression could not by any means be deemed "necessary in a democratic society" having led to a violation of Article 27 of the RA Constitution and Article 10 ECHR.

ARTHUR GRIGORYAN V. "HRAPARAK DAILY" LTD

The Facts of the Case

In January 2011 a letter by two citizens addressed to the Minister of Justice was made public. According to the legal counsel Arthur Grigoryan (hereinafter: the Plaintiff), it contained expressions damaging his honour, dignity and professional reputation. Later, on 10.08.2011 the website of Hraparak daily (www.hraparak.am) (hereinafter: the Defendant) published an article entitled "Citizens as Victims of Bad Faith Counsel," which referred to the above letter and the events that followed its publication. The website has a possibility of comments by the readers, including anonymous.

On 23.09.2011 the Plaintiff learned that some unknown readers left some 6 comments under the article, which he regarded to be defamatory and insulting. They are:

> "Artak
>
> Interestingly, this little counsel anticipates fair trial for himself. I wonder if he has already paid for this "fair" trial. Guys, many have suffered from his deeds and one day everything would surface…
>
> Anahit
>
> I am sorry that such … are also considered to be counsel … As a counsel myself, I would first of all like to note that he should have informed the citizens applying to him that cases are admitted to the European Court of Human Rights also in Armenian, and that there is no need for knowledge of English. He did not tell this but he could very easily found out everything about the progress of the case, which in my belief he did but concealed it from his clients… a very base thing to do, had he not been stingy he would have returned the money. As regards seminars and other such basest lies, he had better apologize to all his above clients instead of such rubbish, return them their money and eat his licence in public.
>
> Iskuhi
>
> I wonder how people trust such … even his looks are enough for people not to trust him. They create a false image of knowledge of English and deceive the people. 99 % of the so-called successful counsel in Armenia co-operate with briber judges and not one judgment is passed without bribery and everybody knows about that - both the people and the authorities. Prior to familiarizing themselves

with the case the respectful counsel find out how much the people are ready to pay for the case and then they go to "talk" with the judge. If there is somebody whose case was not resolved by such means, s/he should let us know for us to register him in the Red Book.

Garik

This ugly so-called counsel is nothing but a rogue and a liar. In our case by the same scenario he first signed a contract at 150.000 and then he raised it to 600.000 and only tried to resolve the case through mediating with the judge. He told us to give him money cause he had agreed with the judge. It was not clear then why we were paying him if he was only to agree with the judge…Then they say where from corruption starts in courts. Of course from such inhuman jerks.

Sahak

Because of Artur Grigoryan we missed out right to appeal in a North Avenue case merely due to his being late with the appeal… Then it turned out that he did that for money, I was then looking for him to kill him like a dog…Then he has such an ugly conduct. This needs to be regulated by the Chamber. By helping such counsel Sahakyan Rubik disqualifies himself and the institute of legal counsel in general.

Sergey

I wonder if anyone has told him that lying and extortion of money are not good things unbefitting a counsel. This case is a veritable case of extortion… extortion of money by deceit … this is what fortune-tellers do… they take money for lying… there are all the elements of a crime in the case of Artur Grigoryan."

On 17.10.2011, the Plaintiff applied to the Court against "Hraparak Daily" Ltd., requesting that the latter be exacted 18.000.000 AMD in his favour as non-pecuniary damages for defamation and insult. He insisted that the Defendant had to be held liable for each comment and pay 1.000.000 AMD for the insult and 2.000.000 AMD for defamation found in each of them. The Court declared the complaint admissible, as well as applied a measure to secure the complaint, by which it imposed an arrest in the amount of 18.000.000 AMD on the Defendant's property and money. By its decision dated 08.11.2011 this measure of securing the complaint was replaced and arrest in the amount of 18.000.000 AMD was imposed on the Defendant's property. In the Court the Plaintiff stated that he was aware of the fact that one-time payment of 18.000.000 AMD may drive the Defendant to bankruptcy, which may endanger the meeting of the claim. Therefore, he changed the object of the complaint demanding that the Defendant paid the amount not at once but in installments within six months 250.000 AMD each month.

The Defendant stated that the Internet was one of the most important rights in a democratic society, one of the most important tools for the exercise of the right to freedom of expression in the framework of which human beings exercise their right to seek, receive and impart information, while various fora, social networks and blogs are information resources where by leaving their comments human beings exercise their right to freedom of expression. In any case they declared that at some point during the

court proceedings they erased the comments in question to show good will and readiness to meet Arthur Grigoryan's demand.

The Legal Analysis of the Judicial Act in the Light of Article 10 of the European Convention on Human Rights and Other International Freedom of Expression Standards

Having examined the facts of the case and the submitted evidence, the Court found that the complaint was groundless and must, therefore, be dismissed. Although in its reasoning the Court addressed the standards under Article 10 ECHR, its interpretation of some of the most essential Convention principles was, however, incomplete and in some cases even outright wrong, which had an impact on the case. They include issues related to the public interest of the subject-matter of the publication, the Plaintiff's status, the Defendant's status, the differentiation between facts and value judgments, the factor of the Internet and the proportionality of the compensation.

The Issue of Public Interest

In conformity with the principle reaffirmed by the ECtHR, the press enjoys a special status and protection since it is incumbent on the press to impart information and ideas on all matters of public interest, whereas the public has a right to receive such information (Sunday Times v. UK, 26/04/1979, Application No 6538/74, para 50 (b)). According to the case law of the Court, included among the issues of public interest[1] are those related to public health care (Hertel v Switzerland, 25/08/1998, Application No 25181/94), safety of a patient (Selisto v Finland, 16/11/2004, Application No 56767/00), unlawful conduct by prosecutors (Rizos and Daskas v Greece, 27/05/2004, Application No 65545/01) abuse by politicians or local officials (Lingens v. Austria, 08/07/1986, Application No 9815/82), acts of powerful legal entities (Steel and Morris v United Kingdom, 15/02/2005, Application No 68416/01). In this regard, there is no doubt that possible abuse and bad faith conduct by a well-known counsel is a matter of public interest, and the Court had to have examined this aspect of the case.

The Plaintiff's Status

For many years the ECtHR has reaffirmed that politicians and public figures have to display greater tolerance to critical speech (Lingens v. Austria (08/07/1986, Application No 9815/82, para 42).

According to the ECtHR, famous lawyers also have to show greater degree of tolerance to critical expression. In particular, in its case of Bodrožić v. Serbia 23/06/2009, Application No 38435/05, para 34), the ECtHR stated that:

> "As to whether S.K. could be regarded as a public figure, the Court reiterates that a private individual lays himself open to public scrutiny when he or she enters the arena of public debate. In the instant case, the parties agreed that S.K., who was an attorney, had represented the management of a factory in a high-profile insolvency case and had therefore become a well-known figure in the town of

[1] Gavin Millar, Freedom of Expression, Workshop, Yerevan, November 2011, p 10.

> Kikinda. Given that the articles had been published in that town's local newspaper, the Court accepts the qualification of S.K. as a public figure by the domestic courts. S.K. had entered the arena of public debate and therefore should have had a higher threshold of tolerance towards any criticism directed at him."

The Defendant's Status

The Court did not examine the Defendant's status either. In particular, the fact that the Defendant was a mass media outlet was not properly assessed by the Court. Meanwhile, in its early cases under Article 10 (Sunday Times v. UK, 26/04/1979, Application No 6538/74, para 50 (b)) ECtHR noted that:

> " … it is … incumbent on [the press] to impart information and ideas on matters of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog"."

Facts v. Value Judgments

The ECtHR has consistently emphasized the need to differentiate between facts and value judgments. According to the Court:

> "The existence of facts can be demonstrated, whereas the truth of value-judgments is not susceptible of proof. … As regards value-judgments this requirement is impossible of fulfillment and it infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10 (art. 10) of the Convention." (Lingens v. Austria, 08/07/1986, Application No 9815/82, para 46).

In view of the importance of the need to distinguish between insult and defamation in each case, the analysis of the first-instance Court should have also been built on the need to distinguish between value judgments and facts and the degree of required proof conditioned on it. When the expression is a value judgment, the proporionality of interference depends on whether there is sufficient factual basis for making the disputed expression, since even a value judgment without any factual basis supporting it may be excessive (Dichand and Others v. Austria, 26/02/2002, Application No 29271/95, para 41).

Meanwhile, the Court did not even find it necessary to make this distinction by emphasizing that:

> "The Court finds that in this case it is necessary to prove whether Hraparak Daily Ltd. may be held liable for 6 comments written in the part for comments under the article by its correspondent Sona Harutyunyan entitled "Citizens as Victims of Unconscientous Counsel" posted on 10.08.2011 at www.hraparak.am. Therefore, the Court does not address the analysis of the words in the comments and does not register which of these expressions contain insult, defamation or whether they contain elements of defamation and insult."

The Factor of the Internet

It was also necessary for the Court to examine the factor of the Internet which the Court did to some extent but not sufficiently. In conformity with the modern international

theory in the field of freedom of expression, the Internet is a new means of imparting information and ideas which has some very important characteristics which increase the dangers of imparting irresponsible expression.

The first is anonymity: "The Internet permits users and creators of communications to remain hidden. This makes it far easier to produce, create and consume false, illegal and dangerous material."[2]

The second is lack of quality control: "Almost anyone can post almost anything on the Internet. This is very different from conventional publishing where much inaccurate and misleading information is filtered out by the publishing system.... On the Internet unsubstantiated assertions are as easily pubished as well-researched articles."[3]

The Court had to take into account to what extent these circumstances had the potential to damage the Plaintiff's honour, dignity and professional reputation. In addition to this, the Court could have taken another circumstance into account – to what extent may comments by people unknown to the public damage the Plaintiff's reputation. One important factor related to the Internet was, however, noted by the Court – that is the fact that the Plaintiff might also freely post comments on the website of the Defendant mass media outlet, which he failed to do.

The Proporionality of the Requested Damages Award

In the case of Romanenko and others v. Russia, 08/10/2009, Application No 11751/03, para 48), the ECtHR found that the applicant's right to freedom of expression was also violated on account that the domestic courts had failed to analyze to what extent were the requested damages awards proportional with the applicant's income and whether by virtue of this fact they did not have to bear a disproportional liability. Meanwhile, according to the applicant, something that had not been disputed by the Government of the Russian Federation, the requested damages award amounted his four-month income and was, therefore, disproportional. Accordigly, the ECtHR found that the principle of proportionality had been violated and recognized the fact of violation of the Convention. The Domestic Court also had to assess the issue of proportionality of the damages award requested by the Plaintiff, which it failed to do.

2 Free Speech: A Very Short Introduction by Nigel Warburton, p. 82.
3 Ibid.

NVER POGHOSYAN V. "THE EDITORIAL OFFICE OF THE NEWSPAPER ZHOGHOVURD" LTD AND ANNA TOROSYAN

The Facts of the Case

On 7 October 2011, an article enttled "The Regional Governor Took a Bribe" was published in the issue no 171 of the newspaper "Zhoghovurd," which stated, in particular, that:

> "Nver Poghosyan, the regional governor of Gegharkunik, took money in the amount of 3000 USD through his driver for awarding "victory" in the tender for the position of a teacher of history in the village of Ttujur. This information was passed to Zhoghovurd by Anna Torosyan, another participant of the tender. Everyone knows that bordering Tchambarak region is one of the poorest residential areas but it turns out that in our country there are public officials, sometimes building a prosperous Armenia who are not interested in where the people can find money from to bribe them. It is more important that the money enters their pockets. Instead of creating conditions for people to work with love in villages that lack teachers, they want bribes. When the newspaper Zhoghovurd asked a question to Baghdasar Mheryan, the press secretary of Prosperous Armenia, he said that no such thing could have happened and if it did happen, let the guilty be punished. It appears that "Prosperous Armenia" is not responsible for the actions of its regional governor..."

The article was also reprinted in a number of other websites, such as www.aravot.am, www.hetq.am, www.panorama.am, www.armtown.com, etc, which referred to Zhoghovurd daily.

On 11 October 2011, Nver Poghosyan, the regional governor of Gegharkunik, (hereinafter: the Plaintiff) submitted a complaint to the Court of General Jurisdiction against "The Editorial Office of the Newspaper Zhoghovurd" Ltd. and Anna Torosyan with a request to obligate the Defendants to publish a retraction in Zhoghovurd daily, to pay 2.000.000 AMD for the non-pecuniary damage and reimburse his lawyer's fee in the amount of 500.000 AMD.

On 11 October 2011, the Defendant Anna Torosyan sent a letter to the editorial office of Zhoghovurd daily with the following wording and requested that it be published:

> "... I declare publicly that I have made my statement on the basis of inaccurate data and I apologize to the regional governor of Gegharkunik, Nver Poghosyan for using his name improperly."

On 30.11.2011, the Defendant company lodged a counter-complaint with the Court demanding that the information damaging its honour and dignity be retracted and for a non-pecuniary damages award.

On 19 March 2012, the General Jurisdiction Court granted the complaint in part obligating the Defendant to publish a text of retraction in the newspaper Zhoghovurd and exact 100.000 AMD from the Defendant as non-pecuniary damages and 100.000 AMD as the lawyer's fee. The Court dismissed the counter complaint of "The Editorial Office of the Newspaper Zhoghovurd" against Nver Poghosyan.

Neither of the parties has appealed the mentioned judicial act and one month later it entered into legal force.

The Importance of Freedom of Expression

The Court did not in any way refer to the importance of freedom of expression in a democratic society although in all of its judgments related to the right to freedom of expression, the ECtHR empasizes the importance of freedom of expression by invoking, in particular, the case of Handyside v. UK, 07/12/1976, Application No 5493/72, para 49), according to which:

> "Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society"."

The Three-Wing Test

In its judgment the Court invoked quite professionally the three-wing test foreseen by Article 10 of the Convention. In particular, the Court attempted to examine whether the restriction of the right to freedom of expression in that case was:

1. "prescribed by law": the Court invoked the ECtHR case of Silver v. UK (25/03/1983, Application No 5947/72), which stated that any restriction of the right to freedom of expression has been prescribed by law, if that law is "adequatley accessible to everyone and formulated with sufficient precision to enable the citizen to regulate his conduct: s/he must be able – if need be with appropriate advice to foresee, to a degree that is reasonble in the circumstances, the consequenes which a given action may entail" (para 87-88).

2. "pursues a legitimate aim": as regards this aspect, the Court referred to the case of Cumpana v. Romania, 33348/96, Application No 17/12/2004, para 86), which states that in defamation cases the legitimate aim is the protection of a person's reputation. The Court also added "that the human right to the protection of reputation is a right guaranteed under Article 8 of the Convention as an element of the right to respect for privacy.

3. "Necessary in a democratic spciety": when assessing this element of the test the Court, by invoking the case of Handyside v the UK (07/12/1976, Application No 5493/72, para 49) has to determine whether the interference is "necessary in a democratic society," taking account of the fact that "necessary" means more than "useful," "reasonable" or "desirable," it has to stem from a "pressing social need," be proportional with the legitimate aim pursued … and that the "necessity for restriction must be convincingly established" (Barthold v. Germany, Application No 8734/79, para 55).

Nevertheless, it becomes clear from the analysis of the judgment that the Court applied the three-wing test wrongly since rather than assessing the extent to which the interference with freedom of expression stems from a "pressing social need', the Court assessed the extent to which the Defendant's publication stems from a "pressing social need":

> «…By exercising its public administration powers in the region, the Plaintiff has so far manifested good faith, worked in the framework of the principle of lawfulness, no single case of bribe-taking has been registered so far. As a result, the informtion published by the Defendant does not in this case "stem from a pressing social need," in which case the characteristic of "bribe-taking" cannot remain unpunished in a democratic society, be acceptable in a democratic society and "pursue a legitimate aim," whereas the facts of the case testify to the fact that the Plaintiff has shown good, while the Defendant has shown only negative conduct. Hence the fact of damage to the Plaintiff's honour and dignity is convincingly established by the sufficient and weighty combination of the facts of the case."

Meanwhile, it is possible to assess the "pressing social need" only in case of a restriction of the right to freedom of expression rather than its exercise.

The Requirement of Greater Tolerance by Politicians

The Court did not in any way assess whether in this case the regional governor of Gegharkunik had to display greater tolerance to the publication in question although the ECtHR in its case of Lingens v. Austria (08/07/1986, Application No 9815/82, para 41-42) set clearly the need for greater tolerance by politicians:

> "…The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance…"

Facts v. Value Judgments

In its judgment the Court also acknowledged the need to distinguish between facts and value judgments. By invoking the case of Lingens v. Austria, 08/07/1986, Application No 9815/82, para 46), the Court stated that:

> "When assessing defamatory allegations, it is necessary to make a clear distinction between facts and opinions (pr "value judgments"). The reason for this is that "the existence of facts can be demonstrated, whereas the truth of value-judgments is not susceptible of proof". This makes the defence of an opinion impossible if truth is the only defence. This does not mean that Article 10(2) of the Convention

cannot be applied in a case which concerns an opinion rather than a fact. Even in case of an opinion there has to be an estblished or accepted factual basis for expressing that opinion which has to be expressed in good faith."

And although with a wrong reasoning, the Court, nevertheless, assessed correctly that the expression "took a bribe" was a fact rather than a value judgment.

"…The Plaintiff in its reasons characterizes the published information with such facts that concern the facts of defamation and cannot be regarded as insult, since the Plainitff insists that the above information does not conform to the truth and that it has damaged its person (damaged rather than pursuing the aim of damaging, especially if the information is not true). Therefore, the Plaintiff's claim has to be examined as typical of defamation. In this case, the facts of the case affirm that the information published by the Defendant in the newspaper Zhoghovurd are factual statements, since they were reflected in an article published as a result of an interview given by Anna Torosyan to a journalist.'

When assessing the expressions in question the Court assessed whether the published factual statements were true and failed to assess whether they could have been reasonably published, as was the case in Alithia Publishing Company LTD and Constantinides v Cyprus, 22/05/2008, Application No 17550/03, para 49):

"In previous cases, when the Court has been called upon to decide whether to exempt newspapers from their ordinary obligation to verify factual statements that are defamatory of private individuals, it has exercised a discretion after taking into account various factors, particularly the nature and degree of the defamation and the extent to which the newspaper could have reasonably regarded its sources as reliable with regard to the allegations (Bladet Tromsø and Stensaas v. Norway [GC], no. 21980/93, § 66, ECHR 1999-III). These factors, in turn, require consideration of other elements such as the authority of the source (Bladet Tromsø and Stensaas, cited above), whether the newspaper had conducted a reasonable amount of research before publication (Prager and Oberschlick v. Austria, judgment of 26 April 1995, Series A no. 313, § 37), whether the newspaper presented the story in a reasonably balanced manner (Bergens Tidende and Others v. Norway, no. 26132/95, § 57, ECHR 2000-IV) and whether the newspaper gave the persons defamed the opportunity to defend themselves (Bergens Tidende and Others v. Norway, cited above, § 58). Hence, the nature of such an exemption from the ordinary requirement of prior verification of defamatory statements of fact is such that, in order to apply it in a manner consistent with the case-law of this Court, the domestic courts have to exercise a degree of discretion after taking into account the particular circumstances of the case under consideration."

The defence of reasonable publication is also foreseen by Article 1087.1(5)(2) of the RA Civil Code.

The Duty of Journalists to Act Responsibly

The Court emphasized correctly the duty of journalists to act responsibly invoking the case of Pedersen and Baadsgaard v Denmark (17/12/2004, Application No 49017/99, para 78), in which the ECtHR stated, in particular, that:

> "This obligation required that [journalists] should have relied on a sufficiently accurate and reliable factual basis which could be considered proportionate to the nature and degree of their allegation, given that the more serious the allegation, the more solid the factual basis has to be."

The Issue of Proportionality of Interference

The Court also assessed the issue of proportionality of the requested damages award, and although it failed to invoke any case, it nevertheless noted correctly that:

> "In this regard the case law of the European Court requires that in defamaton or insult cases the damages award bears a reasonable relation of proportionality to the damage to a person's reputation."

The Court could have invoked the case of Romanenko and others v. Russia, (08/10/2009, Application No 11751/03, para 48), in which the ECtHR found that the applicant's right to freedom of expression was also violated on account that the domestic courts had failed to analyze to what extent were the requested damages awards proportional with the applicant's income and whether by virtue of this fact they did not have to bear a disproportional liability. Meanwhile, according to the applicant, something that had not been disputed by the Government of the Russian Federation, the requested damages award amounted his four-month income and was, therefore, disproportional. Accordigly, the ECtHR found that the principle of proportionality had been violated and recognized the fact of violation of the Convention.

TIGRAN TERTERYAN V. "168 HOURS" LTD. AND MARINEH MARTIROSYAN

The Facts of the Case

"168 Hours" Ltd (hereinafter: the Defendant) is the publisher of "168 Hours" daily. In its issue no 53(813) dated 26-27 May 2011, an article entitled "The Principal Sued the Ministry of Education and Science" was published. The article contained, in particular, the following statements regarding Tigran Terteryan "hereinafter: the Plaintiff": "According to the inhabitants of Ethchmiadzin, the son of the former principal of the school burnt the archive of documents of the school." Through his legal representatives, Hamlet Terteryan and Susan Nazaryan, Tigran Terteryan sued "168 Hours" Ltd. and its journalist Marineh Martirosyan arguing that the expressions published about him in the above article are defamatory. By his complaint, the Plaintiff therefore asked that "168 Hours" daily published a retraction and that both the Defendant company and the journalist jointly paid him non-pecuniary damages in the amount of 2.000.000 AMD.

The Court of General Jurisdiction passed its judgment on 13 April 2012, by which it dismissed the complaint in whole, thereby upholding the company's and the journalist's right to freedom of expression. Neither the Plaintiff nor the Defendant appealed against this judicial act of the first instance Court, and one month later it came into force.

The Importance of Freedom of Expression

The Court essentially recognized in its judgment the importance of freedom of expression by referring to the ECtHR case of Handyside v. UK, (07/12/1976, Application No 5493/72, para 49), which states, in particular, that:

> "Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society"."

The Three-Wing Test

The next important step that the Court did in its reasoning was applying the three-wing test foreseen by Article 10 of the Convention. In particular, in its judgment the Court assessed the extent to which interference with the right to freedom of expression was:

1. "prescribed by law": the Court invoked the ECtHR case of Silver v. UK (25/03/1983, Application No 5947/72), which stated that any restriction of the right to freedom of expression has been prescribed by law, if that law is "adequatley accessible to everyone and formulated with sufficient precision to enable the citizen to regulate his conduct: s/he must be able – if need be with appropriate advice to foresee, to a degree that is reasonble in the circumstances, the consequenes which a given action may entail" (para 87-88).

2. "pursues a legitimate aim": as regards this aspect, the Court referred to the case of Cumpana v. Romania, 33348/96, Application No 17/12/2004, para 86), which states that in defamation cases the legitimate aim is the protection of a person's reputation. The Court also added "that the human right to the protection of reputation is a right guaranteed under Article 8 of the Convention as an element of the right to respect for privacy.

3. "Necessary in a democratic spciety": when assessing this element of the test the Court, by invoking the case of Handyside v the UK (07/12/1976, Application No 5493/72, para 49) has to determine whether the interference is "necessary in a democratic society," taking account of the fact that "necessary" means more than "useful," "reasonable" or "desirable," it has to stem from a "pressing social need," be proportional with the legitimate aim pursued … and that the "necessity for restriction must be convincingly established" (Barthold v. Germany, Application No 8734/79, para 55).

The Issue of Public Interest

The Court also failed to apply another principle established by the ECtHR in the case of Lingens v Austria (08/07/1986, Application No 9815/82, para 41), according to which the mass media have a right and duty to impart information and ideas on any matter of public interest:

> "…it is … incumbent on [the press] to impart information and ideas on political issues just as on those in other areas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them."

Nevertheless, the Court examined the extent to which the publication in question stemmed frm a public interest:

> "Based on the facts of this case the Court found out and deems in proved that prior to the dissemination of the information which the publication focused on the topic of conversation among wide circles of the inhabitants of Etchmiadzin was the issue of dismissal of Susanna Nazaryan, high school No 2

> after Narekatsi and a number of related circumstances, which means that the news about her and family members were in the focus of attention of the public of Etchmiadzin, i.e. they were broadly circulated. In other words, they stemmed from a public interest since they were one of the main topics of conversations of the inhabitants."

The Court, however, did not assess correctly what was an issue of public interest in that publication. The fact that the former principal was widely discussed by the inhabitants of Etchmiadzin does not mean that the publication stems from a public interest, since there is a need for a clear distinction between a matter of public interest and a matter the public is interested in (Von Hannovver v. Germany, 07/02/2012, Application No 40660/08, paras 98-99). In this case, of public interest was the issue of a minor having committed a crime – intentional destruction of property – in aggravating circumstances – through arsony.

Facts v. Value Judgments

In its judgment the Court also noted the necessity to differentiate between facts and value judgments. Although the Court failed to indicate the ECtHR case in which the Strasbourg court expressed its position regarding the need for a clear distinction between facts and value judgments, the Court nevertheless stated that:

> "The European Court of Human Rights stressed the need for a clear distinction between facts and value judgments since the existence of facts can be proved while the truth of value judgments is not susceptible of proof. In this regard, it is impossible to meet the need of proving the truth of one's arguments and it infringes the freedom of opinion itself, which is a key elements of the right guaranteed under Article 10 of the Convention."

Nevertheless, the Court did not assess correctly whether the expression of the article stating that "according to the inhabitants of Etchmiadzin, the son of the former principal of the school burnt the archive of documents of the school" is a fact or a falue judgment. The Court found that the expression was a value judgment, an opinion and, accordingly, not susceptible of proof.

> "In this case the information published by the Defendant was a good faith reproduction of a news of great public interest, i.e. by the published information, the journalist and the company acted within the bundaries of their special position in a democratic society. They published information on such factual statements, which had been passed to them by the inhabitants. Therefore, they are not in the position of either the press or the journalist supported by their own personal evidence regarding the existing and truthful facts. Nevertheless, the critical expression published by the Defendant company and the authors may be regarded as opinion received from a published source "the truth of which by definition is not susceptible of proof.""

Along with this, an opinion should not be without a sufficient factual basis either. Accordingly, the position of the ECtHR in the case of Shabanov and Tren v. Russia (14/12/2006, Application No 5433/02, para 41) is as follows:

"The Court reiterates that even where a statement amounts to a value judgment, the proportionality of an interference may depend on whether there exists a sufficient factual basis for the impugned statement, since even a value judgment without any factual basis to support it may be excessive."

The expression "According to the inhabitants of Etchmiadzin, the son of the former principal of the school burnt the archive of documents of the school" is a factual statement rather than a value judgment. And the fact that the journalist referred to "the inhabitants of Etchmiadzin" does not in any way transform it into a value judgment. The Defendant company and the journalist had to prove that either it was true or that it was a "reasonable publication". The first they failed to do. Hence, the Court had to assess whether it could be argued that the expression was a reasonable publication, which according to the ECtHR implies:

"In previous cases, when the Court has been called upon to decide whether to exempt newspapers from their ordinary obligation to verify factual statements that are defamatory of private individuals, it has exercised a discretion after taking into account various factors, particularly the nature and degree of the defamation and the extent to which the newspaper could have reasonably regarded its sources as reliable with regard to the allegations (Bladet Tromsø and Stensaas v. Norway [GC], no. 21980/93, § 66, ECHR 1999-III). These factors, in turn, require consideration of other elements such as the authority of the source (Bladet Tromsø and Stensaas, cited above), whether the newspaper had conducted a reasonable amount of research before publication (Prager and Oberschlick v. Austria, judgment of 26 April 1995, Series A no. 313, § 37), whether the newspaper presented the story in a reasonably balanced manner (Bergens Tidende and Others v. Norway, no. 26132/95, § 57, ECHR 2000-IV) and whether the newspaper gave the persons defamed the opportunity to defend themselves (Bergens Tidende and Others v. Norway, cited above, § 58). Hence, the nature of such an exemption from the ordinary requirement of prior verification of defamatory statements of fact is such that, in order to apply it in a manner consistent with the case-law of this Court, the domestic courts have to exercise a degree of discretion after taking into account the particular circumstances of the case under consideration." (Alithia Publishing Company LTD and Constantinides v Cyprus, 22/05/2008, Application No 17550/03, para 49).

Article 1087.1 (5)(2) of the RA Civil Code also stipulates the defence of reasonable publication by stating that publishing of factual statements may not be regarded defamation if:

"in a given situation and by its substance, it is conditioned by the predominant public interest and if the person having made the statement of fact public, proves that s/he has taken all reasonable actions to find out whether they were accurate or justified, as well as s/he has presented these facts in a balanced manner and in good faith."

Adequate Distance from the Source of Information

The Court, nevertheless, assessed correctly whether the journalist had distanced herself properly from her source of information, and it is clear from the analysis of the article that she is not the author of allegations.

Nevertheless, the Court failed to analyze whether it was possible to maintain that the Defendant acted in good faith and on an accurate factual basis, as well as whether she imparted "reliable and precise" information when she merely invoked the inhabitants of Etchmiadzin and later when only one inhabitant whose wife was a staff member of the school testified before the Court in a situation when the journalist never tried to balance the allegation by seeking comments from the other party.

"IJEVAN ROAD CONSTRUCTION" CJSC V.
"IJEVAN STUDIA" LTD

The Facts of the Case

During the 21.06.2011 news programme Lraber broadcast by the second Armenian TV channel H2 a 3-minute video material entitled "Where are the Destroyed Slabs?" prepared by Naira Khachikyan and Armen Asatryan were broadcast by Ijevan television company (hereinafter: the Defendant), in which the following expressions were made about "Ijevan Road Construction" CJSC (hereinafter: the Plaintiff): "Veritable destroyers are hidden behind a businessman's mask with the simple name of Ijevan Road Construction", "They destroyed and secretly sold the slabs," "Perhaps it is the lack of professional quality and imartiality that generated such consequences," "they were sold by the light hand of Ijevan Road Construction," "Inhabitants raise the issue of wasting and squnadering of 36 milion AMD in Metaghagorts Street after heavy rains."

In the course of the 27.06.2011 broadcast the video material "The Slabs in Safe Haven" was shown, in the course of which the director and staff of "Ijevan Road Construction" provided clarifications in connection with the infomation broadcast in the 21.06.2011 video material.

On 15.07.2011 "Ijevan Road Construction" filed a complaint with the Court of General Jurisdiction of Tavoush Region (hereinafter: the Court) against "Ijevan Studia" Ltd. and Naira Khachikyan demanding an apology and an award of damages. On 20.07.2011 the complaint was declared admissible by the Court.

By its judgment dated 27.04.2012 the Court granted the complaint in part.

The Plaintiff "Ijevan Road Construction" CJSC filed an appeal against the 27.04.2012 judgment of the Court of General Jurisdiction of Tavoush Region.

On 04.07.2012 the Civil Court of Appeal decided to grant the appeal and quash completely the judgment of 27.04.2012 of the Court of General Jurisdiction of the RA Ravoush Region and to refer the case to the same court for full re-examination.

Following the quashing on 24.08.2012, the case was admitted by the Court of General Jurisdiction and is currently at the stage of preliminary hearing.

The Importance of Freedom of Expression

The Court essentially recognized in its judgment the importance of the right to freedom of expression by referring, in the first place, to Article 10 ECHR and, secondly, to the ECtHR case of Handyside v. UK/07/12/1976, Application No 5493/72, para 49, which says:

> "Subject to paragraph 2 of Article 10 … is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". This means, amongst other things, that every "formality", "condition", "restriction" or "penalty" imposed in this sphere must be proportionate to the legitimate aim pursued."

The Three-Wing Test

The next important thing that the Court should have done in its reasoning was the application of the three-wing test under Article 10 of the Convention. In particular, in its judgment the Court should have assessed whether in that particular case the restriction of freedom of expression was:

1. "prescribed by law": in this regard the Court could have invoked the ECtHR case of Silver v. UK (25/03/1983, Application 5947/72), which requires that the law is "adequatley accessible to everyone and formulated with sufficient precision to enable the citizen to regulate his conduct: s/he must be able – if need be with appropriate advice to foresee, to a degree that is reasonble in the circumstances, the consequenes which a given action may entail" (para 87-88).

2. "pursues a legitimate aim": an important precedent in this case is Cumpana v. Romania, which states that in defamation cases the legitimate aim is the protection of the reputation of a person. The Court has noted that the human right to the protection of reputation is a right guaranteed under Article 8 of the Convention as an element of the right to respect for privacy.

3. "necessary in a democratic society": when assessing this element of the test, the Court could have invoked the case of Handyside v. UK (07/12/1976, Application No 5493/72, para 48), which clarified the meaning of "necessary in a democratic society":

   > "...it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals … By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them. The Court notes at this juncture that, whilst the adjective "necessary", within the meaning of Article 10 para. 2, is not synonymous with "indispensable", the words "absolutely necessary" and "strictly necessary"…, neither has it the flexibility of such expressions as "admissible", "ordinary", "useful", "reasonable" or "desirable".

The ECtHR has also pointed that the "necessity for restriction must be convincingly established" (Barthold v. Germany, Application No 8734/79, para 55).

The Issue of Public Interest

The Court invoked an important principle established by the ECtHR in the case of Lingens v. Austria (08/07/1986, Application No 9815/82, para 41-42), according to which the mass media have a right and a duty to impart information and ideas on any matter of public interest:

> "… it is incumbent on [the press] to impart information and ideas on political issues just as on those in other areas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them."

Nonetheless, the Court failed to examine the extent to which the publication in question stemmed from public interest.

The Court should have examined the issue of "public interest," which was in this case the possible expropriation of the property of Ijevan community – the destruction of the slabbed road and the transportation of the slabs to its storehouse – without the relevant permit, which could be a criminally punishable act.

Facts v. Value Judgments

In its judgment, the Court also acknowledged the need for a distinction between facts and value judgments. Based on the analysis of the case law cited by the Court, as well as the reasoning and assessment of the Court it may be inferred that the Court did not understand correctly the ECtHR judgments and its findings. Otherwise, it is difficult to explain why having referred to the three aforementioned ECtHR judgments the Court failed to analyze and assess in the light of the ECtHR's clear and consistent position the rest of the factual circumstances of the case and limited itself to not assessing as insult the expressions "veritable destroyers are hidden behind a businessman's mask with the simple name of Ijevan Road Construction", "perhaps it is the lack of professional quality and imartiality that generated such consequences," noting that since the journalist used the word "perhaps," it means that in this case Naira Khachikyan, when performing her professional duties, essentially presented her subjective opinion on the reasons why the streets shown in the material were in such a desperate state and, perhaps, resorted to a certain degree of exaggeration in her assessment. Apart from this, the Court noted that although Naira Khachikyan did not specify whose "professional quality" and "impartiality" she was talking about, it was clear from the general context of the video material that it referred to the Plaintiff. The Court found that these expressions were not insulting since they were value judgments whose critical or "shocking" nature was not sufficient for qualifying them as insult. Therefore, the Court found that the claims of obligating the Defendant to apologize and to pay damages in the amount of 1.000.000 AMD had to be dismissed.

Interestingly, it becomes clear from the analysis of the ECtHR judgments that when assessing an expression the Court pays attention to the overall content and context of the article (Perna v. Italy, 06/05/2003, Application No 48898/99, para 45, Marônek v. Slovakia, 19/04/2001,

Application No 32686/96, para 53) and does not assess any expression taken out of its context. In another case too (Dyuldin and Kislov v. Russia, 31/07/2007, Application No 25968/02, 31.10.2007, para 44), the ECtHR clearly indicated that:

> "The Court considers that, for an interference with the right to freedom of expression to be proportionate to the legitimate aim of the protection of the reputation of others, the existence of an objective link between the impugned statement and the person suing in defamation is a requisite element. Mere personal conjecture or subjective perception of a publication as defamatory does not suffice to establish that the person was directly affected by the publication."

Meanwhile, in a particular case the first-instance Court clearly deviated from the ECtHR case law by applying a selective approach: in one case referring to this stand of the ECtHR, and in another case taking the opposite action and taking individual expressions out of the general context and that of the broadcast and ignoring the necessity for any comprehensive examination and assessment of the form and manner of their use. Moreover, it dissected the expressions and revealed the explanatory meanings of some of them in the following manner:

> "The expressions "Inhabitants raise the issue of wasting of 36 milion AMD in Metaghagorts Street after heavy rains," "they destroyed and secretly sold the slabs," "they were sold by the light hand of Ijevan Road Construction" are factual statements, which characterize negatively "Ijevan Road Construction" CJSC and are essentially damaging to its professional reputation. The word "waste" is used with the following meanings: "misuse," "squander," "use" and "fritter away" (Explanatory Dictionary of Modern Armenian, Yerevan, 1974, Volume 3, p. 562). The word "secretly" in addition to its meanings of "by stealth," "behind someone's back," "clandestinely," etc., also has the following meanings: "behind the authorities" back," "illegally," "illicitly" (Explanatory Dictionary of Modern Armenian, Yerevan, 1974, Volume 2, p. 614). Under such conditions and as a result of dissemination of such factual statements, an impartial audience has or may have an impression that the Plaintiff "illicitly" and "behind somebody's back" has sold the slabs owned by Ijevan community and has "squandered" the money foreseen for construction works, i.e. has committed unlawful acts which reflects negatively upon the public opinion of the Plaintiff's business and professional qualities, in other words, the professional reputation of "Ijevan Road Construction" CJSC.

This said, the Court failed to assess properly whether the expressions made during the broadcast were factual statements, value judgments or questions prompted by the given situation since it was not guided by the necessity of analyzing the expressions in the full context of the progress of the events.

At the same time, any opinion must not be void of sufficient factual basis. Accordingly, it was the ECtHR's view in the case of Shabanov and Tren v. Russia (14/12/2006, Application No 5433/02, para 41) that:

> "The Court reiterates that even where a statement amounts to a value judgment, the proportionality of an interference may depend on whether there exists a sufficient factual basis for the impugned statement, since even a value judgment without any factual basis to support it may be excessive."

The fact that according to Defendant Naira Khachikyan "the slabs had been sold,""the money was wasted" were expressions heard from the people at the time of shooting and the fact that the journalist referred to the "inhabitants of Ijevan," does not transform the expression into a value judgment. In this case the Defendant should have been able to prove that the factual statements expressed were true or that they were "reasonably made." She was unable to prove the first. Therefore, the Court had to examine whether the expression was a "reasonable publication." According to the ECtHR, the elements of "reasonable publication" include:

> "In previous cases, when the Court has been called upon to decide whether to exempt newspapers from their ordinary obligation to verify factual statements that are defamatory of private individuals, it has exercised a discretion after taking into account various factors, particularly the nature and degree of the defamation and the extent to which the newspaper could have reasonably regarded its sources as reliable with regard to the allegations (Bladet Tromsø and Stensaas v. Norway [GC], no. 21980/93, § 66, ECHR 1999-III). These factors, in turn, require consideration of other elements such as the authority of the source (Bladet Tromsø and Stensaas, cited above), whether the newspaper had conducted a reasonable amount of research before publication (Prager and Oberschlick v. Austria, judgment of 26 April 1995, Series A no. 313, § 37), whether the newspaper presented the story in a reasonably balanced manner (Bergens Tidende and Others v. Norway, no. 26132/95, § 57, ECHR 2000-IV) and whether the newspaper gave the persons defamed the opportunity to defend themselves (Bergens Tidende and Others v. Norway, cited above, § 58). Hence, the nature of such an exemption from the ordinary requirement of prior verification of defamatory statements of fact is such that, in order to apply it in a manner consistent with the case-law of this Court, the domestic courts have to exercise a degree of discretion after taking into account the particular circumstances of the case under consideration." (Alithia Publishing Company LTD and Constantinides v Cyprus, 22/05/2008, Application No 17550/03, para 49).

Article 1087.1(5)(2) of the RA Civil Code also provides the guarantees of reasonable publication.

When determining the issue of the Defendant's liability, the Court took account of the fact that the 27.06.2011 broadcast of Lraber by the second Armenian TV channel, both the director and staff of "Ijevan Road Construction" CJSC essentially presented their reply to the information broadcast via the 21.06.2011 video, which implies that the same audience essentially had a possibility to familiarize themselves with their position. The Court should have considered this fact in the context of the principles of "responsible journalism" and "reasonable publication" referring accordingly to the case of Handyside v. UK (07/12/1976, Application No 5493/72, para 48), according to which a person is exempted from liability if s/he acted in good faith without an intention to damage the victim's reputation and honour. The Court should also have considered the Resolution No 1577(2007) on Decriminalization of Defamation dated 4.10.2007, which stressed that any statement made in the public interest even if it is proved that it is not true must not be punished if made without the knowledge that they were not accurate, without an intention to damage and having made the relevant efforts for their verification.

Instead, the Court found that in that particular case the facts that the slabs were owned by the community and that the construction works were done without the relevant permit were not of relevance to this dispute to the extent that the expressions reflected in the video that acted as a basis for applying to the Court rather than concerning the fact of performing construction works without a relevant permit concerned the facts of "secretly selling" and "selling by the light hand ..." of these slabs, which, as has already been mentioned, were not true and were damaging to the Plaintiff's professional reputation. Meanwhile, these are the circumstances that are of relevance to the examination of this case since by means of assessing their relevance and groundedness, the Court must assess the existence and level of the social need, as well as the fact of their stemming from the context and having a sufficient factual basis, as well as the permitted degree of exaggeration and provocation. Interestingly, the Court emphasized that the bank account statement from "Haybusinessbank" CJSC, the statement No 01/105 dated 09.09.2011, as well as the photographs and the disk found in the case proved that the slabs were transported and stored in the warehouse owned by the Plaintiff, while the money for performing construction works was transferred to the Plainitff on 21.07.2011.

Therefore, the Court found that the factual statements "the slabs were destroyed and sold secretly," "by the light hand of Ijevan Road Construction," and "wasting and squandering 36 million AMD" were not true. In this regard, the very fact that the Defendant obtained the above evidence and submitted it to the Court proves that the person having made the factual statements took measures to a reasonable degree to find out whether they were true, while the fact that the Defendant in a few days made it possible for the Plaintiff to present its counter-arguments within the frames of the same broadcast and on the same topic, proves that the Defendant presented these data in a balanced manner and in good faith creating equal conditions for both parties and covering both the inhabitants" concerns and the viewpoint of "Ijevan Road Construction" CJSC. The fact that it took place a few days later is conditioned by the differences between the television and the press and their respective peculiarities, the urgency and public interest of the case as well as the necessity to shoot on the spot.

However, the developments of a few days and the fact that the issue was of public interest does not allow looking at the events separately and unites them in one chain.

Adequate Distance from the Source of Information

The Court failed to consider and assess whether the journalist ensured an adequate distance between its publication and the source of information and whether for any objective observer it was clear that she was not the author of the allegation.

Accordingly, the Court failed to analyze whether it could be argued that the Defendant acted in good faith and on an accurate factual basis providing "reliable and precise" information. Meanwhile, the ECtHR in its judgment in the case of Pedersen and Baadsgaard v Denmark (17/12/2004, Application No 49017/99, para 78) stated that:

> "… journalists … should act in good faith and on an accurate factual basis and provide "reliable and precise" information in accordance with the ethics of journalism … these "duties and responsibilities" are liable to assume significance when there is a question of attacking the reputation of a named individual and infringing the "rights of others". Thus, special grounds are required before the media can be dispensed from their ordinary obligation to verify factual statements that are defamatory of private individuals."

To sum up, it may be noted that this situation emerged due to the fact that instead of subjecting the facts of the case to an objective analysis, the Court essentially tried to forecast the possible solutions of the case and the posible desirable and undesirable responses and implications, and based on that adapted both the legislation and the ECtHR case law to the aim of passing a relatively favourable judgment.

The Appeal Court, in its turn, referring to the ECtHR judgment of Kraska v. Switzerland (19/04/1993, Application No 13942/88) reasoning that a number of findings in the judgment of the Court of general jurisdiction were not properly grounded decided to quash the judgment of 27.04.2012 and to refer the case to the same Court for a re-examination.

VANO YEGHIAZARYAN V. ADRINEH TOROSYAN, THIRD PARTY – "HETQ" WEEKLY

The Facts of the Case

On 29.06.2012, the Court of General Jurisdiction of the RA Lori Region (hereinafter: the Court), having examined the civil case based on the complaint of Vano Yeghiazaryan (hereinafter: the Plaintiff) v. Adrineh Torosyan (hereinafter: the Defendant) (with "Hetq" daily on the side of the Defendant) on the claim of damages for the honour, dignity and professional reputation, decided to dismiss it and to exact 150.000 AMD from Vano Yeghiazaryan in favour of Adrine Torosyan as reasonable lawyer's fee.

By applying to the Court on 05.09.2011, and later on 16.09.2011, Vano Yeghiazaryan demanded that the Defendant should be obligated to publicly retract by the newspaper "Hetq" the factual statements damaging his reputation, to exact from the Defendant 1.000.000 AMD in favour of the Plaintiff, as well as the court fee foreseen by Article 68 of the RA Civil Procedure Code, and to publish the following text in the newspaper "Hetq":

> "I, Adrine Torosyan, hereby apologize to Vano Yeghiazaryan, Mayor of Lernapat for defamatory statements made in the article entitled "The Word Graze Said about the Village Mayor Costs 1 Million", since I made the following defamatory statements regarding the mayor: the title "The Word Graze Said about the Village Mayor Costs 1 Million" is a defamation since the Mayor only asked an apology for the word "graze," which was granted by the judge. "Mayor V. Yeghiazaryan demanded 1 million AMD from an inhabitant of his village for insulting him and 2.000.000 AMD for defamation, as well as the court fees. Judge V. Hovnanyan granted the mayor's financial request in part" made by journalist Adrine Torosyan is a defamation since the mayor only asked G. Melkonyan to retract the defamation, to apologize for insult and to pay for the court fee. "...although the mayor having made this expression in the complaint, stressed that it was a rhetorical question" is a defamation since there was no such thing in the complaint.

The Legal Analysis of the Judicial Act in the Light of Article 10 of the European Convention on Human Rights and Other International Freedom of Expression Standards

The Issue of Public Interest

In conformity with the ECtHR case law, the media enjoy higher protection in covering matters of public interest. The ECtHR has emphasized time and again the importance of freedom of expression if the object is to take part in the discussion of matters of public interest (Hertel v. Switzerland, 25/08/1998, Application No 25181/94). The ECtHR has also stressed that there was no need for a distinction between political matters and other matters of public interest (Thorgeir Thorgeirson v. Iceland, 25/06/1992, Application No 13778/88, para 64).

Although the first-instance Court has not examined the issue of whether the article was of public interest, which is an important element in assessing by the ECtHR the violations of Article 10 ECHR, by distinguishing properly between factual statements and value judgments in the disputed article, the Court passed a judgment which is fully in line with the requirements of the ECtHR case law.

In the context of this case and in view of the fact of coverage of a court case by a journalist, the following principle of the ECtHR established in the case of Sunday Times v. UK (26/04/1979, Application No 6538/74, para 65) applied:

> "There is general recognition of the fact that the courts cannot operate in a vacuum. Whilst they are the forum for the settlement of disputes, this does not mean that there can be no prior discussion of disputes elsewhere, be it in specialised journals, in the general press or amongst the public at large. Furthermore, whilst the mass media must not overstep the bounds imposed in the interests of the proper administration of justice, it is incumbent on them to impart information and ideas concerning matters that come before the courts just as in other areas of public interest. Not only do the media have the task of imparting such information and ideas: the public also has a right to receive them."

The Plaintiff's Status

> "The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance (Lingens v. Austria, 08/07/1986, Application No 9815/82, para 41-42, Incal v. Turkey, 09/06/1998, Application No 22678/93, para 46)."

The limits of permissible criticism are wider with regard to the government than in relation to a private citizen, or even a politician. In a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion (Sener v. Turkey, 18/07/2000, Application No 26680/95, para 40). Being an elected body, the local council must display a greater degree of tolerance to critical speech (Lombardo and others v. Malta, 24/04/2007, Application No 7333/06, para 54).

Therefore, the mayor of Lernapat community, being an elected body at a local level, which represents the interests of his community as such must display a greater degree of tolerance to critical speech.

The Court has not considered the Plaintiff's status. However, given the fact that the Court

assessed properly the value judgments and the factual statements and taking account of the fact that the expressions in question were not damaging, this circumstance did not affect the outcome of the case.

Factual Statements v. Value Judgments

As regards the expressions in the article which the Plaintiff regarded as insult and defamation, the Court came to the following conclusion:
a/ The Court does not regard the title of the article "The Word Graze Said about the Village Mayor Costs 1 Million" to be a defamation, since this expression does not contain factual data about the person of the Plaintiff and it does not contain concrete and clear information about a specific action or inaction. It is quite abstract. Apart from this, the title of the article does not and cannot damage the Plaintiff's honour, dignity or professional reputation since in conformity with the judgment pronounced on 08.07.2011 in the civil case No LD/0748/02/10, having applied to the Court for two times, Plaintiff Vano Yeghiazaryan demanded that Gevorg Souleyman Melkonyan be obligated to apologize in public to him for insult by the same mass media outlet and to exact 1.000.000 AMD from G. Melkonyan in favour of V. Yeghiazaryan, to obligate the Defendant to retract publicly the defamatory factual statements and to exact from Gevorg Souleyman melkonyan 2.000.000 AMD in favour of Vano Yeghiazaryan, as well as the court fees foreseen by Article 68 of the RA Civil Procedure Code. This means that even this fact could form an opinion with the Defendant that the Plaintiff too regarded the possibility of exacting this amount as a reasonable measure against the expression made about him.

b/ the idea expressed by the journalist in the article according to which "Mayor V. Yeghiazaryan demanded 1 million AMD from an inhabitant of his village for insulting him and 2.000.000 AMD for defamation, as well as the court fees. Judge Hovnanyan granted the mayor's financial claim in small part" the Court does not regard it to be a defamation, since in the past the Plaintiff had made this claim twice, while the idea that the Court granted the complaint in part, although untrue, does not and cannot damage the Plaintiff's honour, dignity or professional reputation.

c/ From another expression made by the journalist – "One of the expressions "We want to know if the one grazing there is going to be Samvel, the mayor or the council", mayor Yeghiazaryan qualified an insult although having made this expression in the complaint, he stressed that it was a rhetorical question" and espesially from the word "qualify" the Plaintiff found that the journalist did not agree that it was insulting, which again was insulting. Furthermore, in the complaint V. Yeghiazaryan did not emphasize that it was a rhetorical question, therefore he regarded this expression as both insulting an defamatory. The Court finds that this idea cannot be regarded as either defamation or insult since it does not and cannot damage the Plaintiff's honour, dignity or professional reputation. Any disagreement by a journalist with the Plaintiff in regard to any issue may not be regarded insult directed at the Plaintiff, since the journalist, although with some shortcomings simply covered the case examined by the court informing the society of the proceedings... Also, the journalist's

idea with regard to the Plaintiff's "rhetorical question" although was not mentioned in the complaint, was expressed by the Plaintiff in his testimony before the Court, and this idea was expressed in the relevant part of the judicial act as the Plaintiff's testimony before the court.

The analysis of the Court was in line with the requirements of the ECtHR case law. Irrespective of whether the disputed expressions are factual statements or value judgments, in order to qualify as insult or defamation they need to be damaging. The ECtHR's approach to this issue is as follows:

> "Article 10 of the Convention protects journalists" right to divulge information on issues of general interest provided that they are acting in good faith and on an accurate factual basis and provide "reliable and precise" information in accordance with the ethics of journalism" (Bladet Tromsø and Stensaas v. Norway, 20/05/1999, Application No 21980/93, para 65, Prager and Oberschlick v. Austria, 26/04/1995, Application No 15974/90, para 37).

In conformity with Paragraph 2 of Article 10 ECHR, the exercise of this freedom assumes "duties and responsibility," which also apply to the press. These "duties and responsibilities" become essential when an individual's reputation suffers and when "rights of others" are violated.

It is obvious that the failure to make use of a defence may not be regarded as a step damaging a person's honour and reputation. On the contrary, this defence is foreseen for the protection of a person's honour and dignity. In this case the Court was able to make a clear distinction between facts and value judgments and conditioned the need for their proof by this. The Court also addressed the issue of the disputed articles being taken in inverted commas by which the journalist ensured an adequate distance between herself and the person having made it. The judgment of the Court complies with the requirements of Article 10 ECHR and the case law of the European Court of Human Rights.

THE NGO HELSINKI CITIZENS" ASSEMBLY OF VANADZOR V. VLADIMIR GASPARYAN

The Facts of the Case

On 17.10.2011, an interview with Vladimir Gasparyan entitled "Whoever Feeds on Blood, Let Them Come Against His Child" was published in www.hraparak.am in which he made the following statements:

> "A suffering parent cannot be impudent, a suffering parent stands but I now see impudence in regard to the army, to the Minister, I see poison in them. The 20-year-old puppies with tails brought by Helsinki organizations and the expressions in the mouths of these puppies are nothing but personal insults. When a slobbery puppy insults anyone who has fought for the country, who has suffered for this country by impudent exclamations, I am not going to tolerate this...They insult the Minister of Defence calling him "that one-legged." I say, "our one-legged does more work than you who are four-legged. I am not defending him but whatever he did, he did for this country when he lost his leg."

The electronic carrier with the interview given by Vladimir Gasaryan during the television programme "Zinouzh" contains the following opinion:

> "How can someone's heart ache for the army of a country when s/he gets his/her funds and salary from another country? How can someone's heart ache when s/he thinks the noisier, the worse the incident, the better because s/he can make more money on it? The people who do this do not have a homeland or a state. They are talentless people, who just do things to please others, who like to serve others, they are shere undignified servants."

The NGO Helsinki Citizen's Assembly of Vanadzor (hereinafter: the Plaintiff) submitted a civil complaint to the Court of General Jurisdiction of Kentron and Nork-Marash Administrative Districts (hereinafter: the Court) against Vladimir Gasparyan (hereinafter: the Defendant) and requested the Court to obligate the Defendant to retract the defamatory information by the same mass media outlet and to exact from the latter in favour of the Plaintiff 10 AMD as damages to his professional reputation.

On 20.07.2012 the Court found that:

> "The complaint of the NGO "Helsinki Citizens" Assembly of Vanadzor" against Vladimir Gasparyan on damages to the professional reputation should be dismissed. The claim in its part related to the honour and dignity of "Helsinki Citizens" Assembly of Vanadzor" and the mother having lost sons in the RA armed forces staging protest acts in front of the RA Government building should be discontinued."

The Plaintiff submitted an appeal against the judgment of the Court, and the Defendant submitted a response to the appeal.

On 10.09.2012 the Appeal Court passed a decision to declare the appeal admissible, and on 17.10.2012 to dismiss the appeal and to leave the judgment passed by the Court of General Jurisdiction of Kentron and Nork Marash Administrative Districts of Yerevan of 20.07.2012 in the civil case no EKD 3047/02/11 in legal force.

The Importance of Freedom of Expression

The Court at first sight did recognize the importance of the right to freedom of expression by invoking in detail Article 10 ECHR. Later, it stressed:

> "In a number of cases the ECtHR has stated that [f]reedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10…, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society." This means, amongst other things, that every "formality", "condition", "restriction" or "penalty" imposed in this sphere must be proportionate to the legitimate aim pursued" (Handyside v. UK, 07/12/1976, Application No 5493/72, para 49, Thorgeir Thorgeirson v. Iceland, 25/06/1992, Application No 13778/88, para 63, Guja v. Moldova, 12.02.2008, Application No 14277/04, para 69 (i), Jersild v Denmark, 23/09/1994, Application No 15890/89, para 31, Hertel v Switzerland, 25/08/1998, Application No 25181/94, para 46, Steel and Morris v United Kingdom, 15/02/2005, Application No 68416/01, para 87, Fressoz and Roire v. France, 21.01.1995, Application No 29183/95, (Grand Chamber), para 45, Vogt v. Germany, 26.09.1995, Application No 17851/91, para 52, Filipovic v. Serbia, 20.11.2007, Application No 23935/05, para 53).

Apart from this, referring to the ECtHR case of X and Y v. the Netherlands, (26.03.1985, Application No 8978/80, para 91) the Court noted that the right to freedom of expression is one of the preconditions of democracy and that the real and effective exercise of this right depends not only on non-interference by the State but it also requires positive steps on the part of the State even in relations between individuals. Nonetheless, it is worth mentioning that this case is essentially about the protection of the right to privacy guaranteed under Article 8 of the Convention, and the paragraph cited by the Court, which is the 23rd rather than 91st in the text of the judgment, refers to this right rather than the right to free expression.

The Court has also indicated that:

> "… for an interference with the right to freedom of expression to be proportionate to the legitimate aim of the protection of the reputation of others, the existence of an objective link between the impugned

> statement and the person suing in defamation is a requisite element. Mere personal conjecture or subjective perception of a publication as defamatory does not suffice to establish that the person was directly affected by the publication. There must be something in the circumstances of a particular case to make the ordinary reader feel that the statement reflected directly on the individual claimant or that he was targeted by the criticism (Dyuldin and Kislov v. Russia, 31/07/2007, Application 25968/02, para 38)."

Nevertheless, in the above case referred by the Court, the ECtHR has clearly stated that to assess what intereference was necessary in a democratic society, the Court must examine the published or broadcast material in its integrity to find out its general meaning and purpose. The words must identify the Plaintiff as a person against who a defamatory allegation is directed. It is absolutely essential that the Court looks at the context in which the impugned allegation has been made.

The domestic Court found that the ECtHR's position is to protect a negative opinion or value judgment as long as it has a sufficient factual basis. In contrast to facts, which may be proved, value judgments may not be proved. The requirement to prove the truth of a value judgment is impossible to fulfil and it infringes upon the right to freedom of opinion, which is an important element of the right guaranteed under Article 10 ECHR. If an expression is qualified as a value judgment, it is necessary that it has a sufficient factual basis. And finally, the ECtHR has made a clear distinction between facts and value judgments stating that:

> "... a careful distinction needs to be made between facts and value-judgments. The existence of facts can be demonstrated, whereas the truth of value-judgments is not susceptible of proof. … As regards value-judgments this requirement is impossible of fulfilment and it infringes freedom of opinion itself… (Lingens v. Austria, 08/07/1986, Application No 9815/82, para 46)."

However, based on the peculiarities of this case it is also necessary to examine and assess the subject of the dispute in the light of Article 10(2) ECHR, which foresees that the exercise of this freedom carries with it "duties and responsibilities." And this does not imply that Article 10(2) may not be applied in a case that refers to an opinion rather than a fact. Even in case of an opinion there has to be an established or accepted factual basis for expressing that opinion which has to be expressed in good faith (Lingens v. Austria, 08/07/1986, Application No 9815/82, para 46, see also Prager & Oberschlick v Austria, 26/04/1995, Application No 15974/90, para 37).

The ECtHR has also expressed a similar view in the case of Shabanov and Tren v. Russia, 14/12/2006, Application No 5433/02, para 41):

> ""The Court reiterates that even where a statement amounts to a value judgment, the proportionality of an interference may depend on whether there exists a sufficient factual basis for the impugned statement, since even a value judgment without any factual basis to support it may be excessive.'"

The Court has failed to analyze if it could be argued that the Defendant acted in good faith and on the basis of a sufficient factual basis and if it has provided a "reliable and accurate" data when in the interviews given to www.hraparak.am on 17.10.2011 and by the programme "Zinouzh" of 15.10.2011 he made the statements giving rise to the complaint.

Naturally, this was liable to a more careful assessment especially in view of the fact that a human rights organization resorted to judicial protection from statements and assessments made by a public official. In this regard, the Court had to take into consideration the position of the Defendant and the impact made by him given the fact that the Defendant was the Chief of Police, which again was not assessed by the Court.

The Legal Analysis of the Judicial Act in the Light of Article 10 of the European Convention on Human Rights and Other International Freedom of Expression Standards

The first-instance Court made an incomplete and sometimes wrong analysis of a number of fundamental principles stemming from the ECHR which had a direct impact on this case and to substantiate its interpretation, it referred to a number of ECtHR judgments, which, however, were not used properly. These principles included:

- whether the article was of public interest;
- the status of both the Plaintiff and the Defendant;
- the distinction between facts and value judgments;
- whether the compensation was proportionate.

In view of the necessity to make a distinction between facts and value judgments in all cases, the analysis of the first-instance Court should have been built around the need for a distinction between facts and value judgments, and conditioned on this, the level of required proof given the fact that the link between value judgments and the facts supporting it may be different depending on the circumstances of the case (Feldek v. Slovakia, 12/07/2001, Application No 29032/95, para 75). When the impugned statement is a value-judgment, the question whether the interference was proportional would depeng on whether there was a sufficient factual basis for making it since even a value judgment without any factual basis may be excessive (Dichand and Others v. Austria, 26/02/2002, Application No 29271/95, para 41).

It becomes clear from the analysis of the ECtHR case law that when assessing any disputed expression the Court takes account of the content and context of the article (Perna v. Italy, 06/05/2003, Application No 48898/99, para 45, Marônek v. Slovakia, 19/04/2001, Application No 32686/96, para 53), and not a single expression is taken out of its context. In the meantime, in this particular case the first-instance Court, having clearly disregarded the ECtHR case law has taken an opposite course, stressing clearly that:

> "The Court does not see an insult or defamation in the expression "The 20-year-old puppies with tails brought by Helsinki organizations" which would damage the professional reputation of the organization since it was an abstract value judgment which did not have a specific addressee and was directed to an indefinite circle of people."

As regards the expressions "20-year-old puppies with tails" and "four-legged," the Court found that they were not addressed to the Plaintiff but to people having insulted the RA Minister of Defence, which is clearly evident from the article.

The domestic Court also mentioned that the expression "Helsinki organization" is not the Plaintiff's name since the latter's name is "Helsinki Citizens" Assembly of Vanadzor."

The Court did not see elements of either defamation or insult in the statements recorded on the electronic carrier made by V. Gasparyan by the programme "Zinouzh" on 15.10.2011, reasoning that:

> "The opinions that "The people who do this do not have a homeland or a state. They are talentless people, who just do things to please others, who like to serve others, they are shere undignified servants..." are again addressed to an indefinite circle of people rather than the Plaintiff. In this case, the Defendant's opinion does not have a specific addressee, while the expressions "people who do not have a homeland or a state" were addressed to people who were got their funding and salary from another state and think the noisier and the worse an incident, the better since they could earn more money on that."

The Court continues its reasoning by stating that:

> "In the programme "Zinouzh" of 15.10.2011, Defendant V. Gasparyan merely criticized the negative phenomena in our society rather than individuals or the Plaintiff."

The Court found the Defendant's argument that a person may not due to his subjective perceptions attribute or not attribute any information to themselves, as well as whether any information refers to a person must be clear and concrete, and, therefore, the opinion made did not refer to the organization and in this regard there was no need to apply the defences foreseen by the RA Civil Code.

When subjecting the articles to a more detailed and comprehensive analysis though both the sequence of events and the true addressees of V. Gasparyan's statements, as well as the events acting as the basis for the Defendant's "value judgments" become clear along with the fact that the domestic Court failed to subject them to a profound analysis.

Another important principle established by the ECtHR case law is that the heavier the allegation the stronger the factual basis to support it (Mahmudov v. Azerbaijan, 18/12/2008, Application No 35877/04). This principle was especially emphasized in the context of criminal allegations.

In the light of the aforementioned principles the Court should at least have examined the possibility of proving that the statement in question was true in view of a number of expressions in the Defendant's statements such as "sponsorship," "getting the funding and the salary from another country," the subjects having complained to the Court, the source of information (the Defendant's person and position), the nature of damaging statements.

Instead, having adopted the Defendant's arguments, the Court did not even attempt to assess or distinguish between "value judgments" and "facts," re-confirming the Defendant's thesis that the impugned statements were value judgments rather than facts, and, therefore, there was no need to prove them, and that these statements were not defamatory or insulting for the following reason:

"Firstly, in both cases the statements were directed at an indefinite circle of individuals and the name of a concrete organization was not mentioned. In other words, the logic of general statements prompts that the Plaintiff NGO "Helsinki Citizens" Assembly of Vanadzor" was not the target of Defendant V. Gasparyan's criticism. Therefore, the expressions made by V. Gasparyan were not damaging to the Plaintiff's professional reputation."

In this regard, it should be noted that the Court had the necessary and sufficient grounds to establish by assessing the context of the interviews that in the territory of the RA there were 4 organizations known as "Helsinki organizations" and that broader layers of population did not know their full and real names, therefore, in British law[4], for example, any of these organizations had a right to apply to the Court. Apart from this, the ECtHR in the case of Thoma v. Luxemburg (29/03/2001, Application No 38432/97, para 56) stated that:

"The Court notes at the outset that there is a special feature to be taken into account in view of the size of the country. Even though the applicant made his remarks in the programme without mentioning anyone by name, the engineers and wardens were easily identifiable to listeners, given the limited number of officials working for the Water and Forestry Commission in Luxembourg."

Had the Court engaged in such a comprehensive analysis, it would have seen that it was the Plaintiff organization that had staged the protest act from among the rest of human rights organizations, and the relevant expressions made by the Chief of Police in his interviews were addressed to the participants of this protest action.

Apart from this, the Court failed to assess the fact that in the course of the judicial proceedings the Defendant never denied that he meant the Plaintiff, and never gave any clear answer to the question "whether the Defendant spoke about the Plaintiff," while the Defendant's arguments were nothing but a clever means of defence. All of this becomes clear from a comprehensive analysis of the articles in question and the context of the developments of the events, which was not done:

Where the Appeal Court is concerned, it went even further and said:

"Where the expression "the Helsinki organizations" is concerned, it does not mean that it necessarily refers to the Plaintiff, since the latter's name is "Helsinki Citizens" Assembly of Vanadzor" NGO and by the same logic it can be assumed that in case of the application of any word included in the name of the organization, the organization must have assumed that it was the object of the publication.

The expressions made by the Defendant in his interview of 15.10.2011 by the programme "Zinouzh" were defamatory and insulting either, and the expressed opinion was again directed at an indefinite circle of people rather than the Plaintiff.

In view of the aforementioned, the Appeal Court notes that in this case the Defendant only criticized the negative phenomena in the society rather than concrete individuals including the Plaintiff, taking account of the fact that the Plaintiff, being a non-governmental organization, aims to strengthen

4 Geoffrey Robertson, QC and Adrew Nicol, QC, Media Law, p. 118

democracy and the development of civil society, in other words, is essentially for identifying and criticizing any negative phenomena in the society."

As regards the rest of the decision, the Appeal Court repeated verbatim the positions expressed by the Court of general jurisdiction.

MARGARITA KHACHATRYAN V "HRAPARAK DAILY" LTD

The Facts of the Case

On 21.04.2011 an article was published in issue No 73(684) of "Hraparak" daily which contained the following paragraph:

> "Margarita Khachatryan, the Chairwoman of the Human Rights Co-ordinating Council "Zinvor" for Co-operation of Non-Governmental Organizations who is also famous by her nickname "Moroz," regularly pays checkng visits to RA military units. She is famous for her rude behavior: when she detects shortcomings and violations in military units she even swears. According to the information that we have, during one of her last visits to an NKR military unit, an arguments started between Margarita Khachatryan and the commanders, and things even developed into beatings. However, Ms Margarita denied this: "Nothing of the sort, child. I was most welcome there. I gave them a son. I am Tanjo's mom, and so far nobody has told Tanjo's mother: "Let the wind blow you away." I have got 20 medals. Had they beaten me I would not have any medals.""

Margarita Khachatryan (hereinafter: the Plaintiff) filed a complaint with the Court of General Jurisdiction of Kentron and Nork-Marask Administrative Districts of Yerevan (hereinafter: the Court) against "Hraparak Daily" Ltd (hereinafter: the Defendant), requesting that the latter:

1. be obligated to publish a retraction of the article in issue No 73(684) of 21 April 2011;
2. be obligated to pay her compensation for moral damages in the amount of 2.000.000 AMD;
3. be obligated to compensate for the state fee paid for the complaint.

The Court passed its judgment on 30 July 2012 by which it dismissed the complaint in whole upholding the right to freedom of expression of the publishing company and the journalist. The Plaintiff appealed this judgment on 27.08.2012. The Appeal Court declared it admissible on 11.09.2012 and appointed a hearing on 09.11.2012.

The Importance of Freedom of Expression

In its judgments the Court did not make any reference to the importance of freedom of expression by invoking the case of Handyside v. UK, 07/12/1976, Application No 5493/72). Nevertheless, the Court considered the principle of "reasonable publication" found in the relevant international practice, according to which a person is exempt from liability for disseminating defamatory statements if s/he acted in good faith without an intention to damage the victim's honour and reputation, referring to the Resolution No 1577(2007) adopted by the PACE on 4 October 2007 towards decriminalization of defamation, which emphasizes that:

> "... statements or allegations which are made in the public interest, even if they prove to be inaccurate, should not be punishable provided that they were made without knowledge of their inaccuracy, without intention to cause harm, and their truthfulness was checked with proper diligence."

The Court could also have invoked the ECtHR case of Alithia Publishing Company LTD and Constantinides v Cyprus (22/05/2008, application No 17550/03, para 49), which stated that:

> "In previous cases, when the Court has been called upon to decide whether to exempt newspapers from their ordinary obligation to verify factual statements that are defamatory of private individuals, it has exercised a discretion after taking into account various factors, particularly the nature and degree of the defamation and the extent to which the newspaper could have reasonably regarded its sources as reliable with regard to the allegations (Bladet Tromsø and Stensaas v. Norway [GC], no. 21980/93, § 66, ECHR 1999-III). These factors, in turn, require consideration of other elements such as the authority of the source (Bladet Tromsø and Stensaas, cited above), whether the newspaper had conducted a reasonable amount of research before publication (Prager and Oberschlick v. Austria, judgment of 26 April 1995, Series A no. 313, § 37), whether the newspaper presented the story in a reasonably balanced manner (Bergens Tidende and Others v. Norway, no. 26132/95, § 57, ECHR 2000-IV) and whether the newspaper gave the persons defamed the opportunity to defend themselves (Bergens Tidende and Others v. Norway, cited above, § 58). Hence, the nature of such an exemption from the ordinary requirement of prior verification of defamatory statements of fact is such that, in order to apply it in a manner consistent with the case-law of this Court, the domestic courts have to exercise a degree of discretion after taking into account the particular circumstances of the case under consideration."

The Three-Wing Test

In this case, in its reasoning the Court did not adhere to the three-wing test foreseen under Article 10 ECHR. In particular, the Court failed to assess in its judgment whether the restriction of freedom of expression:

1. was "prescribed by law,"
2. whether it "pursued a legitimate aim," and
3. whether it was "necessary in a democratic society."

Nevertheless, the Court analyzed correctly whether it could be argued that the Defendant acted in good faith and on precise factual basis, as well as whether the latter provided "reliable and precise information" by making the necessary and sufficient efforts to verify the facts and guided by the principle of "reasonable publication." In this regard, in its case of Pedersen and Baadsgaard v Denmark (17/12/2004, Application No 49017/99, para 78) the ECtHR stated that:

> "… [journalists] should act in good faith and on an accurate factual basis and provide "reliable and precise" information in accordance with the ethics of journalism…these "duties and responsibilities" are liable to assume significance when there is a question of attacking the reputation of a named individual and infringing the "rights of others". Thus, special grounds are required before the media can be dispensed from their ordinary obligation to verify factual statements that are defamatory of private individuals."

The Court referred to Paragraph 5(2) of Article 1087.1 of the RA Civil Code, which also stipulates the "reasonable publication" guarantee, stating that publication of factual statements is not defamatory if:

> "in a given situation and by its substance, it is conditioned by the predominant public interest and if the person having made the statement of fact public, proves that s/he has taken all reasonable actions to find out whether they were accurate or justified, as well as s/he has presented these facts in a balanced manner and in good faith."

The Court also referred to the international practice, which holds that the publication of "defamatory" material regarding a public figure cannot be considered to be reasonable or lawful unless:

1. it is proved that there were reasonable grounds to rely on the truth of information;
2. it is proved that all necessary measures to verify the truth of information have been taken and the limits of the possibilities of verifying the information have been exhausted;
3. the person having published the defamatory material had the grounds to rely on the truth of this information. The publication of such material cannot be deemed either reasonable or lawful if the party imparting the information has not verified whether it was true by making an inquiry to the relevant person, and has avoided to publish that person's viewpoint, excluding the cases when it was impossible or it was evident that there was no such need.

As a result of the examination of the text of the published article, the Court correctly noted that the journalist had acted in good faith. Particularly, she heard the view of the person in question and published it in the same article, thereby presenting the material in a balanced manner.

According to the Court, it follows from this that the journalist published the disputed article in such a way that the reader (or the objective observer) does not develop a

conviction or impression that the incident described in the article had actually taken place or that Margarita Khachatryan displayed rude behavior by arguing and swearing.

As a result of the analysis of the aforementioned, the Court found that when publishing the article the journalist essentially had taken reasonable measures to verify whether the published factual statements were true and justified. In other words, from the very beginning the journalist did not aim or intend to cause harm to Margarita Khachatryan's honour, dignity and professional reputation, while the fact that in this case the Defendant performed its duty of imparting information in good faith relying on the existing information on the Plaintiff, at the same time taking measures to acquire new evidence and undertaking to submit it to the Court, making references to an article entitled "A Little about the Lives of NGOs" posted at http://www.armtimes.com/25242 on 24.04.2011, the article "What is the Non-Governmental Council "Zinvor" Doing?" posted at www.hra.am/am/events/2010/10/15/soldier on 15.10.2010 and the article "The Number of Victims in the Army has Reached 40" posted at www.armtown.com/news/am/zam/20071203/7685/ on 03.12.2007, as well as the fact that Defendant did verify the truth of information by asking the relevant person to comment and later publishing it, the Court found that the Defendant had carefully researched the issue to be covered, obtained sufficient evidence and having subjected it to close scrutiny decided that the infotmation published in the article was true or at least has the relevant factual basis. Therefore, the Defendant cannot be held liable for disseminating defamatory statements. Hence Margarita Khachatryan's complaint seeking protection of her honour and dignity must be dismissed.

Where the Defendant's arguments to the effect that the complaint must be dismissed for failure by the Plaintiff to first resort to the extrajudicial procedure for retraction of information is concerned, the Court was right to find that applying to a mass media outlet to restore the violated right outside the court is not a necessary pre-condition for submitting a complaint for the protection of a right.

YEREVAN STATE UNIVERSITY AND ARA GABOUZYAN V. "BANADZEV" LTD, JOURNALIST SONA HAROUTYUNYAN AND SIREKAN YEGHIAZARYAN

The Facts of the Case

In 2010, Sirekan Yeghiazaryan applied for taking an exam for the part-time Master's Programme at YSU Law Faculty. Out of 20 possible units he scored 5. The passing score was 8. Sirekan Yeghiazaryan complained against his score to the Ministry of Education and Science, following which his paper was reviewed by the Criminal Law Department of the YSU Law Faculty, and his mark was found to be well-grounded.

The programme "Eyewitness" prepared by "Banadzev" Ltd. was broadcast by the television channel H1 on 28 May 2011 and posted on the web. The programme was broadcast under the title "The Lawless Lawyer." During the programme the presenter made the following statements:

> "In the mother university the applicant's paper was assessed unsatisfactory without looking at its substance by its size only."
>
> ""The Eyewitness" uncovers the mistake of the university provost and the teacher's deceipt."
>
> "Our today's eyewitness is a lover of justice and law, he tells us his own story, he complains and he fights because the law has been infringed although he understands perfectly well that after this programme the doors of Yerevan State University may forever shut for him."
>
> "Whatever you're going to hear today is not humour. Sirak Yeghiazaryan comes to Yerevan to become a Master of Laws in the mother university. He passes his exams and gets an unsatisfactory mark. The complaint against the results and the discovery that his paper in fact merited more than satisfactory… Sirak would not have spoken if the Ministry corrected the teacher's mistake and helped him…The mother university is becoming a disaster."
>
> "Instead of an explanation on the result of the examination Sirak was told: "The important thing is the size of the paper, how may pages you have filled.""
>
> "The seriousness of the problem goes farther than the mark: lawyers have obvious doubts that the case has corruption risks. They apply to the Ministry of Education and Science to study the issue

and to prevent the possible corruption…Suspicion on concealed corruption is expressed not only by one ordinary young man but by a whole group of lawyers…Sirak was never admitted to the mother university because he was not prepared for that or because the examining teacher displayed arbitrariness. To find mistakes the Ministry looked everywhere except for where it should have looked at."

"The legal expert has serious suspicions that the Criminal Law Department looks sideways at students who do not live in the capital and breaks the principle of equality."

"The university lawyers started another wave of persecution of dissidents."

"How can corruption be fought if those who are supposed to fight against it keep silent."

"The story is about the mistake of one teacher or one department: this does not mean that the whole system is vicious. However, to punish one culprit and his bad example does not infect the others like weeds, the superior body must…"

"Our camera catches everybody, and now possibly another liar."

In the programme Sirekan Yeghiazaryan made the following statements:

"They say, "We work on the size, the content is unimportant to us.""

"I was an eyewitness of an action taken in the area of education, which contain corruption risks."

"If professionals study, they may confidently conclude that it does not comply, the results of the exam do not comply with the reality. … according to specialists, my paper merited more than 5 and more than 8. In other words, it was a minimal score, which was a passing score in Yerevan State University."

"The funny thing was that Mr. Gabouzyan and his like think that rather than citing the law correctly one must make the white paper black. "

The Plaintiffs submitted a claim against Sona Harutyunyan on 29.11.2011.

By applying to the Court, the YSU and the teacher of the university, Ara Gabouzyan requested that the Defendants be obligated to apologize publicly to YSU and to retract the defamatory factual statements, and the Defendants Sirekan Yeghiazaryan and "Banadzev" Ltd. Be obligated to apologize publicly to Plaintiff Ara Gabouzyan and to retract the factual statements defamatory of him by posting the video also on the TV programme's website and to publicize the judgment.

On 30.07.2012, the Court of General Jurisdiction granted the claim in part. The Defendants Sirekan Yeghiazaryan and "Banadzev" Ltd. were obligated to apologize publicly to Plaintiff Ara Gabouzyan. Sirak Yeghiazaryan and "Banadzev" Ltd. Were obligated to retract the following factual statements, which were defamatory of Plaintiff A. Gabouzyan:

"They say, "We work on the size, the content is unimportant to us.""

"…according to specialists, my paper merited more than 5 and more than 8."

"Banadzev" Ltd. was obligated to retract the following factual statements defamatory of Plaintiff A. Gabouzyan:

> "In the mother university the applicant's paper was assessed unsatisfactory without looking at its substance by its size only."
>
> "Instead of an explanation on the result of the examination Sirak was told: "The important thing is the size of the paper, how may pages you have filled.""
>
> "The seriousness of the problem goes farther than the mark: lawyers have obvious doubts that the case has corruption risks. They apply to the Ministry of Education and Science to study the issue and to prevent the possible corruption…Suspicion on concealed corruption is expressed not only by one ordinary young man but by a whole group of lawyers… To find mistakes the Ministry looks everywhere except for where it should have looked at."
>
> "The story is about the mistake of one teacher or one department…"

"Banadzev" Ltd. was obligated to publicize the full text of the judgment along with the relevant text about the apology to Plaintiffs.

The Court provided the following reasons for its judgment:

1. A state non-commercial organization cannot be a subject having such non-proprietary rights as honour and dignity and cannot submit a complaint for the protection of such rights. Therefore, in conformity with Article 2 of the RA Civil Procedure Code, "Yerevan State University" state non-commercial organization is not a proper Plaintiff for the submitted claim and in that part the complaint has to be dismissed;

2. The submitted claim in regard to Defendant Sona Harutyunyan is to be dismissed due to the omission of the deadline for applying to the court with such complaints (6 months);

3. As regards Plaintiff Ara Gabouzyan, his claims were well-grounded and must, therefore, be granted due to the fact that the Court considered some expressions made in regard to him to be defamatory, whereas others – insulting.

4. The aforementioned insulting and defamatory expressions were made in public since they were transmitted on television, as well as conveyed to the public by the Internet;

5. The Court also paid attention to the fact that the primary purpose of the Defendants was the attempt to use their right to freedom of expression to damage Ara Gabouzyan's honour and dignity. By invoking the regulations given by the ECtHR case of Shabanov and Tren v. Russia (14/12/2006, Application No 5433/02), the Court noted that in this case the Defendant "Banadzev" Ltd. acted only on the basis

of the facts presented by Sirekan Yeghiazaryan, which were never proved to be true and it did not show good faith in trying to find out the opinions of the other participants.

The Legal Analysis of the Judicial Act in the Light of Article 10 of the European Convention on Human Rights and Other International Freedom of Expression Standards

This analysis of the above case refers to those fundamental principles underlying freedom of expression, which are important for the case and could have had an impact on the restriction of the Defendant's right to freedom of expression.

The Issue of Public Interest with Regards to the Expressions

The Court of General Jurisdiction ignored the question whether these expressions had been made in public interest. Meanwhile, according to the norms of both international law (Article 10 ECHR) and domestic law (Paragraph 5 of Article 1087.1 of the RA Civil Code), liability for any damaging information can be restricted also in cases when the publication of such information was conditioned by the predominant public interest and if the person having made the statement of fact public, proves that s/he has taken all reasonable actions to find out whether they were accurate or justified, as well as s/he has presented these facts in a balanced manner and in good faith. Information on corruption in higher education establishments is, of course, in public interest, and, therefore, the given publication in view of its being made in public interest, could imply the relevance of the defence foreseen by that norm for the Defendants. However, the mere existence of a public interest does not imply absolute protection on this ground. Although the Court disregarded the question whether the broadcast had been made in public interest, the fact that the information reflected in this broadcast was damaging to A. Gabouzyan's honour and dignity and that the facts and value judgments in these expressions did not even have the minimal factual basis was sufficient for the findings of the Court.

At the same time, it is worth mentioning that the reasons put forward by the Court of General Jurisdiction regarding the one-sided nature of the material justify the permissibility for the State to interfere with the Defendants" right to freedom of expression made in public interest and the need for such interference from the point of view of the protection of the Plaintiff's honour and dignity.

The interference by the State with the Defendants" right to freedom of expression in this case (considering the reasons in the judgment) was fully compatible with the requirements of the three-wing test set by the Constitution and Article 10 ECHR.

THE RELIGIOUS ORGANIZATION ""THE WORD OF LIFE" CHURCH" AND ARTUR SIMONYAN V. "IRAVUNQ MEDIA" LTD., THE PUBLISHER OF THE NEWSPAPERS "IRAVUNQI HETAQNNUTYUN" AND "ARGUMENTI NEDELI V ARMENII"

The Facts of the Case

The Court of General Jurisdiction of Kentron and Nork-Marash Administrative Districts of Yerevan, having examined the civil complaint of the religious organization ""The Word of Life" Church of Christians of Armenian Evangelical Faith" and Arthur Simonyan v. "Iravunq Media" Ltd., the publisher of the newspapers "Iravunqi Hetaqnnutyun" and "Argumenti Nedeli v Armenii" regarding the claims of retraction of the information damaging to the organization's honour, dignity and good reputation and publishing an apology, decided to dismiss the complaint.

In the newspaper articles the author writes:

> "Some newspapers are flooded with headlines declaring sensational revelations, exclusive interviews and other suchlike "attractions"' in opening to the public scrutiny the relations of actress Anzhela Sargsyan, her "man" and the family members of these two individuals. We would never have discussed her immoral conduct quite typical to the Armenian show-business and the disgusting porn footage, had there not been two circumstances. Firstly, Anzhela Sargsyan, the "heroine" of the porn scandal is a follower of the largest sect in Armenia – "The Word of Life."

Then the author makes a very concrete reference to the original source:

> "...Marina Arayan who is the mother of the person detained in the criminal case publicly accused the sectant-talented actress of immoral actions in regard to her son..."

Then the author writes:

> "The sect "The Word of Life" is known to the Armenian public as an organization the hidden or explicit influence of which has also spread to some television companies and tiers of the power..."

Then referring to the source the author writes:

> "Karen's mother is seriously terrified. Here's what she confesses: "I am suffering a lot now that I didn't believe my son, that I argued so much with him. He used to say: "Mom, she's threatening me, she is boasting that her husband and herself have some powerful sponsors in the upper tiers, she is threatening that the strongest and the most powerful church is backing her, some "Word of Life". And that they have very strong positions in it, that her sister is some leader there." My answer was "Why are you scared, let her sister be some leader, let her be in "The Word of Life," let them have sponsors

in the upper tiers, what have you done to be afraid?" He would say, "I have done nothing but I expect everything from her because she is a very dangerous person."""

Then the author continues:

"The public is interested in another question: is Anzhela Sargsyan a member of "The Word of Life" after the latest revelations? If yes, then it becomes clear which "gods" she meant when she confessed to "The Apple of Discord" that she often prayed…"

At the top of the article there was a collage with Anzhela Sargsyan's photograph and next to it the collage photograph of the Plaintiff Arthur Simonyan with the words "Word of Life," in the background there was a photograph of a man which read "A Piece of Word of Life" and then "Hey Ghazar, this is our Anzhela. Don't call an angel a whore! It's a sin! Sect Gospel according to Arthur Simonyan."

The Analysis of the Court

The materials published in the media confirm that the photos and expressions cannot contain insult and defamation since they were exaggerations made by the journalist, which is allowed for this profession, and the journalist resorted to some provocation doing his job on the basis of the existing information based on the principles of freedom, thought and speech and conditioned by the requirements of the law.

At the same time, the Court noted that the disputed articles did not contain any insulting or defamatory words and ideas. Although they were formulated with a degree of exaggeration, nevertheless their approach was balanced, and a reference was made to the source, which is fully in line with the permissible limits of journalistic freedom of imparting speech. Therefore, the Court found that the articles and photographs in question in a given situation and by their content were conditioned by the overriding public interest. In this case the critical words published by the journalist might, according to the Court, be regarded as opinion. On the basis of the aforementioned, the Court noted that it stemmed from the facts of the case that the factual data published in the form of the above expressions and photographs, although public, regardless of whether they were true or false, did not pursue the aim of damaging the Plaintiffs" honour and dignity. In particular, the expressions in the above articles regarded as insulting and defamatory by the Plaintiff, although made with a degree of exaggeration and some even with a certain degree of provocation, capable of offending, shocking or disturbing the Plaintiffs, by means of several expressions in the published materials the journalist acted on the basis of the principle of plurality, and therefore his expressions must be regarded by the organization and its head with special tolerance, since the limits of acceptable criticism are broader in regard to them than private individuals, and in this regard they must display greater tolerance to any criticism made in their regard (Pakdemirli v. Turkey, 22/02/2005, Application No 35839/97, para 45). In the case of Jerusalem v. Austria (27/02/2001, Application No 26958/95, para 38) the ECtHR found that any individual or association might be criticized from the moment it entered the arena of public debate.

In this case, the Court regarded it confirmed that the articles and photographs were

published only after the scandal related to actress Anzhela Sargsyan, in which the latter's person was linked to a religious organization, while the religious organization was regarded as a sect and subjected to criticism. Once the Plaintiffs entered the arena of a public debate, the latter had to display a greater degree of tolerance to critical expression since these expressions were a matter of general debate pursuing the aim of spreading certain religious ideas among the society or with a view to advising the public not to deviate from the Armenian Apostolic Church rather than personalized insult or defamation.

The words used by the Defendant company and the author aimed to cover and to criticize a religious organization and its leader and to arouse certain responses in the society. Therefore, the Court found that the expressions published in the material could not be regarded as insulting and defamatory.

The Court regarded the word "sect" used by the author in the article as the author's value judgment. The Court noted that in the course of the hearing the Plaintiffs" representative admitted that the Plaintiffs were not related to the Armenian Apostolic Church.

On the basis of the obtained evidence the Court noted that the activities the Plaintiffs had been engaged in were a deviation from the faith of the Armenian Apostolic Church, and its ceremonies and customs did not conform with the religious and traditional principles of the church. This was also confirmed by the reply to the inquiry of the Defendant's representative to the Armenian Catholicos. Therefore, the Court fund that calling the Plaintiff's organization a sect by the author of the article did not aim to either insult or defame it but was the author's opinion and value judgment about the given religious organization and its leader.

TheLegal Analysis of the Judgment of the First-Instance Court in the Light of Article 10 of the European Convention on Human Rights and Other International Standards on Freedom of Expression

The style of writing, as well as the accompanying collage have to be looked at in the light of the relevant ECtHR principles.

The ECtHR has consistently accorded higher protection to freedom of expression if the contested statements have been made in an ironic or satirical manner, since ironic and satirical statements—like parodies—by their very nature involve exaggeration and provocation. Prohibiting an ironic or satirical statement would deprive the applicant of his freedom of expression, while allowing it would arguably have a minor impact on the reputation of the plaintiff, given the clearly humorous tone of the statement (Nikowitz v. Austria, 22/02/2007, Application No 5266/03, para 26).

In the case of Vereinigung Bildener Künstler v. Austria (25/01/2007, Application No 68354/01, para 33) the ECtHR noted that the painting was satirical and intended to distort reality and provoke, and therefore interference with such expression had to be examined with particular care.

In the instant case the humorous and ironic style of the illustration accompanying the

publication is evident to the reader, thus its adverse effect on the Plaintiffs" reputation was also inconsequential. The contested articles contained a number of statements, which contained irony. The publication also contained a number of value judgments.

Nevertheless, it is worth mentioning that some expressions contained in the publication were presented as statements of fact but qualified as value judgments by the Court. They include, for example, the expressions pertaining to the Plaintiff organization's description as a sect.

The following statement contained in the publication seems problematic: "Anzhela Sargsyan, the "heroine" of the porn scandal is a follower of the largest sect in Armenia – "The Word of Life." It appears that given A. Sargsyan's behaviour, the public may draw conclusions about the activities of the organization from the fact of her membership of that religious organization. The mentioned statement is in fact worded as a statement of fact. Later, Marina Arayan, the mother of the detained person was quoted: "… she is backed by the strongest, the most powerful church, seemingly, "Word of Life, he said. And they are in a very good position there…"

This quotation implies that the statement relating to A. Sargsyan's membership of the "Word of Life" is based on the public statement of a third person. In this context, the principles established by the ECtHR in respect of the protection of the reproduction of third parties" statements had to be a subject of consideration by the Court in order to assess to what extent the journalist made a grounded statement and distanced himself from the defamatory statement.

The ECtHR principles in the field of the protection of statements made by third parties are as follows:

"News reporting based on interviews, whether edited or not, constitutes one of the most important means whereby the press is able to play its vital role of "public watchdog" (Observer and Guardian v the UK, 26/11/91, Application No 13585/88, para 59 (b))."

"The punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so (Jersild v Denmark, 23/09/1994, Application No 15890/89, para 35)."

Nevertheless, the situation changes when a journalist attempts to endorse or adopt the defamatory statement. In the case of Thoma v Luxembourg (29/03/2001, Application No 38432/97, para 64) the ECtHR noted that the journalist had seemingly adopted – at least in part – the content of the quotation in issue, which he cited on the radio. However, the Court rejected the argument that there was a general requirement for journalists systematically and formally to distance themselves from the content of a quotation that might insult or provoke others or damage their reputation.

In the light of the aforementioned principles the journalist's obligation to verify

defamatory statements had to be a subject of consideration by the Court.

The ECtHR has established that "under special grounds the media can be dispensed from their ordinary obligation to verify factual statements that are defamatory of private individuals. Whether such grounds exist depends in particular on the nature and degree of the defamation in question and the extent to which the media can reasonably regard their sources as reliable with respect to the allegations (Pedersen and Baadsgaard v. Denmark, 17/12/2004, Application No 49017/99, para 78, Bladet Tromsø and Stensaas v. Norway, 20.03.1999, Application No 21980/93, para 65, McVicar v. the United Kingdom, 07/05/2002, Application No 46311/99, para 84)."

The overall assessment would depend on a comprehensive analysis of the aforementioned principles and their application to the facts of this case.

Where the issue of public interest of the publication is concerned, the following legal approach of the Court deserves a particular attention:

> "Expressions contained in the mentioned illustrations and the publication imply that the author's publication concerns actress Anzhela Sargsyan, who has appeared in the public spotlight. They also relate to a religious organization and its activities. Therefore, the Court finds that the lawsuit has to be considered in the light of these significant facts since opinions expressed by the media in respect of such individuals in the ECtHR case law receive a broader regulation, where freedom of expression is manifested more broadly."

The Court's description of Anzhela Sargsyan as an actress having appeared in the public spotlight is problematic since the Court conditioned the broader regulation of freedom of expression by this circumstance. The European Court has consistently distinguished between cases in which there exists a right of the public to be informed and those in which the publication merely serves to satisfy the curiosity of a certain readership (Standard Verlags GmbH v. Austria, 04/06/2009, Application No 34702/07, para 32).

The reasoning of the Court on the issue of public interest explained by the journalist's balanced approach and the reference to the source is also problematic.

Finally, the Court cited certain ECtHR cases and principles with wrong formulations, which in practice led to a changed meaning of the relevant principles.

ARTHUR SAKUNTS V. ROUBEN HAYRAPETYAN AND THE PUBLIC TELEVISION OF ARMENIA

The Facts of the Case

In this case Rouben Hayrapetyan (hereinafter: the Defendant) made the following statements during the sports programme "Overtime" broadcast on the Public Television of Armenia on 26.05.2012:

> "When I want to build a football school in Vanadzor, I do not see any tree or bush, I build the school on top of a hill but then, I don't know, some Helsinki son of a bitch appeared along with his bizarre rings and sued us, the Municipality, the decision of the Council, including the Federation as a third party, the Defendant."

Plaintiff Arthur Sakunts (hereinafter: the Plaintiff) is the President of the NGO Helsinki Citizens" Assembly of Vanadzor. Before that the NGO Helsinki Citizens" Assembly of Vanadzor had applied to the RA Administrative Court against Vanadzor Mayor's Administration demanding that a decision of Vanadzor City Council be annulled. The association of legal entities "Armenia Football Federation" headed by Defendant Rouben Hayrapetyan was also involved as a third party.

Arguing that the Defendant insulted his honour and dignity by his expressions, the Plaintiff applied the Court of General Jurisdiction of Kentron and Nork-Marash Districts of Yerevan (hereinafter: the Court) claiming that:

- Defendant Rouben Hayrapetyan be obligated to apologize to the Plaintiff. The text of apology was also submitted, and
- The Defendant be exacted 1 RA luma.

On 29.08.2012, the Court dismissed the complaint reasoning that it had not been proved that the expressions made by R. Hayrapetyan were directed at the Plaintiff. It basically upheld the position put forward by the Defendant's representative. The judgment was not appealed to the Civil Court of Appeal, and it, therefore, entered into force.

The Legal Analysis of the Judicial Act in the Light of Article 10 of the European Convention on Human Rights and Other International Freedom of Expression Standards

In this case, the hearing was only limited to finding out if the expressions made by Defendant Rouben Hayrapetyan were directed at Plaintiff Arthur Sakunts. Finding it established that the Defendant's expressions were not directed at the Plaintiff, the Court of General Jurisdiction narrowed down the scope of its reasoning and merely invoked the general principles at the beginning of the text.

In this regard, it is evident that in defamation and/or insult cases the incidents in which potential Defendants frequently avoid liability for insult and/or defamation by means resorting to the protection of their procedural rights. As regards the circumstances of this case, it is worth mentioning that the fact that the expressions made by the Defendant were not directed at the Plaintiff were, as opposed to the case of the NGO Helsinki Citizens" Assembly of Vanadzor, clearly confirmed by the Defendant's representative. Regardless of to what extent the Defendants value (and in concrete cases) fail to value their public speeches and, conditioned by it, their candid stance of not avoiding liability, even the voicing of such positions in courts (by the representatives of such defendants though) may act as a means of redress of damages to the Plaintiffs" honour and dignity.

In such cases, the approach of the Defendants" representatives to avoid the addressees of such expressions by means of maximally resorting to their procedural rights may be fully accommodated with the logic of procedural and substantive defences. However, in case of Defendants who are public figures, such approaches may damage their reputation even further compared to the recognition by the Court of the fact of infringement by them of the honour and dignity of a person by means of insult or defamation.

PHARAON MIRZOYAN V. THE NEWSPAPER "CHORRORD INQNISHKHANUTYUN"

The Facts of the Case

On 02.10.2012, the Court of General Jurisdiction of Kentron and Nork-Marash Administrative Districts of Yerevan, having examined the civil case based on the civil complaint of Pharaon Mirzoyan (hereinafter: the Plaintiff) against "Koghmnaki Andzants M" Ltd., the publisher of "Chorrord Inqnishkhanutyun" daily and Sergey Gasparyan (hereinafter: the Defendants), claiming to obligate the Defendants to retract the statements damaging the Plaintiff and to exact from the Defendants 2.000.000 AMD for defamation, 1.000.000 for insult, as well as 300.000 as the lawyer's fee and the court fee, decided to dismiss the complaint.

The Plaintiff Pharaon Mirzoyan is the director of the National Gallery. On 9 April 2011, an article authored by Karine Ashughyan and entitled "Know the Pharaoh" was published in both the daily and the online version of "Chorrord Inqnishkhanutyun." It was worded as follows:

> "Pharaon Mirzoyan, the Director of the National Gallery was offended during an event organized on the occasion of the 65th anniversary of the Armenia Academy of the Fine Arts. The reason was that he was "only" awarded a letter of gratitude and by saying "A distinguished person of art should not be given a letter of gratitude,"' he refused to take the gift which was not befitting to a pharaoh from the hands of Minister Armen Ashotyan. ...In order to receive comments yesterday we called Pharaon Mirzoyan who had confused the letter of gratitude with a school letter of praise and had gone to the event anticipating the Nobel Prize.
>
> ...Nevertheless, we tried to understand whether there was any need to award a letter of gratitude Pharaon Mirzoyan for his long-term contribution to art or not....
>
> Suffice it to remember the story of appropriation and sale of about 800 works handed over to the National Gallery by Sergey Gasparyan, a glass artist from "Hayapaki" CJSC. Gasparyan sent open letters to all possible instances accusing Pharaon of intentionally delaying the exhibition of his works, appropriation of half of them and selling them to A. Kocharyan, owner of the "Glass World Company." In one of the open letters Gasparyan wrote about Pharaon: "Mirzoyan destroyed and robbed the museum... I am going to paint his portrait and write on it "The Biggest Scoundrel." How can a painter

rob another painter of his works and sell them?""Hetq" which has regularly written about this problem also reproduced the following words of Gasparyan: "They say that the works have been returned. It's a lie, they do not show my works because they do not exist. I can imagine that if such robbery takes place when a painter is alive then what is happening to the works of those who are dead.""

The Plaintiff regarded the following expressions to be defamatory:

1. "Suffice it to remember the story of appropriation and sale of about 800 works handed over to the National Gallery by Sergey Gasparyan, a glass artist from "Hayapaki.""
2. "Perhaps, the Minister of Education and Science decided to give a letter of gratitude to Pharaon for the appropriation and sale of the works of grey-haired Sergey Gasparyan?"
3. "But one has to confess that for the Armenian society that has seen everything it is unprecedented to see how an artist can be robbed by daylight, and Pharaon had all the grounds to anticipate an award, which was worthy of a Pharaoh."

The Plaintiff considered the following expressions attributed to Sergey Gasparyan to be insulting, pursuing the aim of damaging his honour and dignity and qualifying them as both defamation and insult.

1. "Gasparyan sent open letters to all possible instances accusing Pharaon of intentionally delaying the exhibition of his works, appropriation of half of them and selling them to A. Kocharyan, owner of the "Glass World Company.""
2. "In one of the open letters Gasparyan wrote about Pharaon: "Mirzoyan destroyed and robbed the museum... I am going to paint his portrait and write on it "The Biggest Scoundrel.""

The Analysis of the Court

The Court noted that the information that was damaging to the Plaintiff's honour and dignity, as well as the insulting and defamatory expressions contained verbatim reproductions from Sergey Gasparyan's interviews published on the Internet mass media outlet "Hetq" (the articles published on 8.11.2010 and 20.12.2010). Essentially, the information that was damaging to the Plaintiff's honour and dignity were published on the basis of Sergey Gasparyan's interviews on the website of "Hetq" and were authored by journalist Karine Ashughyan.

In these circumstances the Court found that the Plaintiff missed the statute of limitations foreseen by the Law of the Republic of Armenia on Mass Communication, since following the publication of these articles in the above media outlet he had not applied for a retraction or a right of reply.

The Court found it confirmed that in the given case the mass media outlet was not an appropriate Defendant in view of the fact that the material had been published by journalist Karine Ashughyan, whereas in the disputed article the basis for her opinion or "value

judgments" was the interviews of Sergey Gasparyan published on 08.11.2010 and 20.12.2010 in the online media outlet "Hetq."

The Court noted that the author of the disputed article was K. Ashughyan and not the mass media outlet, and that the latter could not be held liable for the former's professional activities. The legal basis for such an interpretation was Paragraph 9 of Article 1087.1 of the RA Civil Code.

At the same time, the Court noted that the diputed articles, although formulated with a measure of exaggeration, contained a reference to their source, which was fully in line with the permissible limits of journalistic freedom of imparting information. They merely repeated the conclusion of the formerly published material.

The Legal Analysis of the Judgment of the First-Instance Court in the light of Article 10 of the European Convention on Human Rights and Other International Standards on the Freedom of Expression

This case is of interest by virtue of the comprehensive analysis by the Plaintiff, the Defendants and the first-instance Court of the ECtHR case law.

The Plaintiff referred to the cases of Lingens v. Austria, Galina Chernisheva v. RF, whereas the Defendant referred to the cases of Lingens v. Austria, Prager and Oberschlick v. Austria, De Haes and Gijsels v. Belgium, Chemodurov v. RF, Shabanov and Tren v. RF, Karman v. RF, Grinberg v. RF. Then the Court in its reasoning referred to the cases of Shabanov and Tren v. RF, Handyside v United Kingdom, De Haes and Gijsels v. Belgium, Jerusalem v. Austria, Prager and Oberschlick v. Austria.

The majority of the mentioned judgments were cited correctly. The Court was correct in its reference to the ECtHR case law in the context of the exaggerated nature of the contested statements. The publication is to a certain degree worded in a humorous and exaggerated style, the information posted on the website of the media outlet "Hetq" and the interviews of S. Gasparyan on the appropriation and sale of his works by Pharaon Mirzoyan was interpreted and presented by the journalist in an ironic tone and with assessments, which were properly assessed by the Court as a journalistic opinion. In particular, the first-instance Court underlined the principle, according to which, journalistic freedom also covered possible recourse to a degree of exaggeration, or even provocation.

It is worth mentioning that the ECtHR has consistently accorded higher protection to freedom of expression if the contested statements have been made in an ironic or satirical manner, since ironic and satirical statements-like parodies-by their very nature involve exaggeration and provocation.

The analysis of the articles published on the website of the media outlet "Hetq" on 08.11.2010 and 20.12.2010 implies that the Court arrived at the right conclusion when it stated that the journalist's opinions or "value judgments" had been based on Sergey Gasparyan's interviews published at "Hetq."

So, based on the interviews with S. Gasparyan, "Hetq" published information relating to his inquiries on the whereabouts of his collection in the National Gallery, which he had submitted to the President of the Republic, the Prime Minister, the Chairman of the National Assembly, the General Prosecutor of the RA, the Chairman of the RA Control Chamber, the sale of his works to A. Kocharyan, the director of "Glass World Company" Ltd., the intentional delays by Ph. Mirzoyan of the exhibition of his works in the gallery for years, the sale of most part of the museum of a national value, as well as the letter of the three well-known Russian artists sent to the RA Government in June 2008 calling for the saving of the museum created by S. Gasparyan, refuting the fact that the returned works to the National Gallery were his works, stealing and destroying his exclusive collection of crystals. A number of direct citations of S. Gasparyan's words were also made in the impugned article of the newspaper "Chorord Inqnishkhanutyun." Videos of the interviews were also posted.

On 20.12.2010 another article was published on "Hetq" with a headline: "It's a pity that this person is sick, I could file a lawsuit against him for blackmailing," which reproduced the interview with Ph. Mirzoyan on the same topic.

As regards the disputed statements made by the journalist, such as the award of a letter of gratitude to Pharaon Mirzoyan by the Minister of Education and Science for the appropriation and sale of the works of the grey-haired glass artist Sergey Gasparyan, how unprecedented it was for the Armenian society that has seen everything to see how an artist can be robbed by daylight, and that Pharaon had all the grounds to anticipate for an award, which was worthy of a Pharaoh, these were assessed to be value judgments by the Court and based on the aforementioned information.

The ECtHR's approach in this regard is as follows:

> "Where a statement amounts to a value judgment, the proportionality of an interference may depend on whether there exists a sufficient factual basis for the impugned statement, since even a value judgment without any factual basis to support it may be excessive (Dichand and Others v. Austria, 26/02/2002, Application No 29271/95, para 41).
>
> "Freedom of expression protects not only the substance of the ideas and information expressed but also the form in which they are conveyed (Feldek v. Slovakia, 12/07/2001, Application No 29032/95, para 72)."
>
> "The more serious the allegation is, the more solid the factual basis should be (Europapress Holding D.O.O. v. Croatia, 22/10/2009, Application No 25333/06, para 66)."
>
> "While fulfilling its function as a public watchdog coverage by media in the light of stories, rumors and public opinion should be protected if it is not entirely groundless (Thorgeir Thorgeirson v. Iceland, 25/06/1992, Application 13778/88, para 63)."
>
> "The punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so (Jersild v Denmark, Application No 15890/89, para 35)."

"A general requirement for journalists systematically and formally to distance themselves from the content of a quotation that might insult or provoke others or damage their reputation was not reconcilable with the press's role of providing information on current events, opinions and ideas (Thoma v. Luxembourg, 29/03/2001, Application No 38432/97, para 64)."

"Special grounds are required before the media can be dispensed from their ordinary obligation to verify factual statements that are defamatory of private individuals. Whether such grounds exist depends in particular on the nature and degree of the defamation in question and the extent to which the media can reasonably regard their sources as reliable (Pedersen and Baadsgaard v. Denmark, 17/12/2004, Application No 49017/99, para 78; Bladet Tromsø v. Norway, 20.03.1999, Application No 21980/93, para 65)."

"Prohibiting an ironic or satirical statement would deprive the applicant of his freedom of expression, while allowing it would arguably have a minor impact on the reputation of the plaintiff, given the clearly humorous tone of the statement (Nikowitz v. Austria, 22/02/2007, Application No 5266/03, para 26)."

The defamatory statements contained in the impugned article had already been published by the electronic media outlet "Hetq." The publication in question referred to this source, and in some cases S. Gasparyan's words were quoted verbatim. The Court did not consider the issue of whether the journalist had to verify the contested statements, taking into account the fact that they had already been published in other media and remained uncontested by the Plaintiff.

THE MAYOR OF IJEVAN AND IJEVAN MAYOR'S ADMINISTRATION V. THE NGO INVESTIGATIVE JOURNALISTS

The Facts of the Case

Upon the initiative of the NGO Investigative Journalists (hereinafter: the Defendant) an article by Voskan Sargsyan entitled "Who's Pocketing the Money from the Sand Mine" was published in the 20.05.2008 issue of "Azg" daily. In the article, the author discussed the problem of removal of sand from the reservoir "White Water" on the river Aghstev. The author of the articles cited the driver transporting sand who allegedly said that "8,000 AMD are paid for one lorry of sand and 20,000 drams for a bigger lorry." Then the author indicated that according to the information available to him, this business was controlled by Varouzhan Nersisyan, the Mayor of Ijevan. The article was accompanied by photographs, which depicted sand mining activities. On 26.05.2008, the NGO Investigative Journalists posted the same information on its website.

The following are the relevant excerpts from the article:

> "… The highway to Yerevan passes along the lake and thousands of passengers witness the extraction of sand from the lake every day. For many years powerful excavators and cranes have operated in this area. There is now a construction boom in the administrative districts of Ijevan and Dilijan for which sand is needed. The driver transporting sand for the construction in the town of Dilijan testified that they are paid 8 000 AMD for one lorry of sand. To load a bigger lorry, 20 000 AMD is required. Who are those that benefit from the wealth of this reservoir and who receive illicit and tax-free big incomes on the pretext of cleansing the lake from mud?
>
> According to the information that we have, this business is controlled by the Mayor of Ijevan, Varouzhan Nersisyan. To officially verify this information in October 2007 we sent a letter to Tavoush Regional Prosecutor's Office on the extraction of sand from the lake. The letter of reply signed by V. Araqelyan, Senior Prosecutor of Tavoush Regional Prosecutor's Office dated 22 October reads: "We have carried out an inquiry following your letter regarding the illicit use of sand from the artificial reservoir Spitak Jour, as a result of which we have found out that a renovation and construction project is implmented in the town park and included in the list of works is the leveling of a 2-hectare green area of the park with a view to planting couch-grass. As it is stated in the letter from the Mayor's Administration, only mud from the above lake has been transported and no sand has or will be used. If there are reliable

data on the illicit use of sand by the Mayor's Administration, you may report this to Ijevan police station or the regional prosecutor's office."

In June 2008, Ijevan Mayor and Ijevan Mayor's Administration (hereinafter: the Plaintiffs) applied to the Court demanding that the NGO Investigative Journalists be obligated to retract the ungrounded information damaging the honour, dignity and professional reputation of Mayor Varouzhan Nersisyan and exact from the Defendant 930.000 AMD as compensation for the lawyer's fee.

On 10.07.2009, the Court of General Jurisdiction of Kentron and Nork-Marash Districts of Yerevan dismissed the complaint.

Both Ijevan Mayor's Administration and Mayor V. Nersisyan appealed the judgment. By its decision dated 13.11.2009 the Appeal Court granted the appeal and referred the case to the Court of General Jurisdiction of Kentron and Nork-Marash Districts of Yerevan for re-examination. Both the NGO Investigative Journalists and "Azg Daily" Ltd. brought a cassation appeal against the decision of the Appeal Court, which was returned by the Cassation Court's decision of 20.06.2010.

On 9 July 2010, the Court, having examined the civil case, granted the complaint. The Court found that the Defendant by its actions damaged the professional reputation of Ijevan Mayor's Administration and the honour and dignity of the Mayor of Ijevan Varouzhan Nersisyan. The Court examined Article 19(1) of the RA Civil Code, according to which a citizen may demand via court that the information damaging his/her honour, dignity and professional reputation be retracted if the person having disseminated this information fails to prove that this information is not true.

The Court indicated that in the hearing the Defendant failed to submit any proper proof to the effect that the published information was true, i.e. in the hearing the Defendant did not fulfil its imperative duty under Article 19(1) of the RA Civil Code, which means that the information in question was not true but rather invented. And since on the basis of the above analysis the Court came to the conclusion that the information published in the article did in fact damage the honour and dignity of the Mayor of Ijevan Varouzhan Nersisyan, the Court found that it was susceptible of retraction.

Considering that the claim of the Plaintiff on retraction must be granted, the Court found that the claim on compensation for damages must also be granted, i.e. 930.000 AMD must be exacted from the Defendant to compensate for the Plaintiff's expenses made for the protection of his rights. The Court, thus, granted the complaint.

On 27 December 2010, the RA Civil Court of Appeal having examined the appeal of the NGO Investigative Journalists against the judgment of the Court of General Jurisdiction of Kentron and Nork-Marash Communities of Yerevan, decided to grant it in part, i.e. to exact 450.000 AMD from the Defendant in favour of Ijevan Mayor's Administration as lawyer's fee. The complaint was rejected in its rest. The Court considered the findings of the Court of General Jurisdiction on the fact of damage to the honour, dignity and professional reputation of the Mayor of Ijevan V. Nersisyan. The Court reasoned that the

information disseminated by the NGO Investigative Journalists, having concerned the Mayor of Ijevan V. Nersisyan as a public official concerned equally the urban community of Ijevan as a legal entity. They also concerned Ijevan Mayor's Administration since the latter in the person of Mayor V. Nersisyan, being in charge of the local self-governance, acted on behalf and in the interest of the community. The Court, referring to the appelant's arguments regarding the reasonable size of the court fee, considered that 450.000 AMD would be reasonable.

By its decision dated 14.04.2011 the RA Cassation Court returned the cassation appeal against the decision of the Appeal Court.

The Legal Analysis of the Judicial Act in the Light of Article 10 of the European Convention on Human Rights and Other International Freedom of Expression Standards

The analysis done by the Court does not contain any reference to the ECtHR case law and the fundamental principles on the protection of freedom of expression stemming from them.

The Issue of Public Interest

The judicial acts passed by the courts failed to examine whether the above publications stemmed from a public interest. Meanwhile, it clearly stems from the ECtHR case law that public interest is of paramount importance in assessing the violations of Article 10 ECHR.

> "Whilst it must not overstep the bounds set, inter alia, in the "interests of national security" or for "maintaining the authority of the judiciary", it is nevertheless incumbent on it to impart information and ideas on matters of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog"" (Observer and Guardian v the UK, 26/11/91, Application No 13585/88, para 59 (b)).

In a number of cases the ECtHR opined on the main issues of public interest, including mismanagement of state resources (Dalban v. Romania, 28/09/1999, Application No 28114/95, para 48), corruption by public officials of the bodies of local self-government (Cumpana v. Romania, 17/12/2004, Application No 33348/96, para 44 (a)), etc.

Therefore, the issue of illicit sand mining from the "White Water" reservoir owned by Ijevan community discussed in the article was clrealy within the scope of the public interest.

The Status of the Plaintiff

In this case, the Plaintiffs are Ijevan Mayor's Administration and the Mayor himself. As regards the status of the Mayor of Ijevan as a chief of community, regard must be had to the following principles established by the ECtHR case law:

> "…The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance" (Lingens v. Austria, 08/07/1986, Application No 9815/82, para 41-42, Incal v. Turkey, 09/06/1998, Application No 22678/93, para 46).

> "...a local council, being an elected political body made up of persons mandated by their constituents, it should be expected to display a high degree of tolerance to criticism." (Lombardo and others v. Malta, 24/04/2007, Application No 7333/06, para 54).

The courts, however, failed to examine the Plaintiff's status and, conditioned by it, the need by the latter to display a higher degree of tolerance to criticism, as well as the fact that Ijevan Mayor's Administration also had the status of a Plaintiff in this case both in the light of the substance of the article and the ECtHR case law.

Facts v. Value Judgments

The courts failed to make a clear distinction between facts and value judgments. The case was examined on the basis of the previous wording of Article 19 of the RA Civil Code, which was as follows:

> "A citizen has a right to demand via court to retract any information damaging to his honour, dignity and professional reputation if the person having disseminated this information fails to prove that it is true."

As regards this regulation, mention should be made of the case of Grinberg v. Russia (21/07/2005, Application No 23472/03, para 28-29), in which the ECtHR stressed the importance of distinguishing between facts and value judgments. In that case the domestic courts came to the conclusion that the applicant had to be held liable since he could not prove the truth of his statements ("Mr Smananov does not have shame or respect"). The Court noted that the RF Civil Code did not distinguish between facts and value judgments since it used the word "statements" («сведения») and assumed that any such statements was susceptible of proof through civil proceedings. Despite the substance of the "statements" a person who has disseminated them must prove in the court that they were true (Decision of the Plenary Composition of the RA Supreme Court). The ECtHR noted that in view of these legislative provisions the domestic courts failed to examine whether the expression challenged by the Plaintiff were value judgments which were not susceptible of proof. Finding that the disputed expressions were value judgments, as well as considering the peculiarities of the case, the ECtHR recognized a violation of Article 10.

Article 19 of the RA Civil Code also had the wording "statements" without distinguishing between facts and value judgments.

The disputed articles contained both value judgments and facts.

In the case of Feldek v. Slovakia, 12/07/2001, Application No 29032/95, para 75-76), the ECtHR stressed:

"While the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof. The requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10 ….

76. Where a statement amounts to a value judgment, the proportionality of an interference may depend on whether there exists a sufficient factual basis for the impugned statement, since even a value judgment without any factual basis to support it may be excessive."

As regards demaging statements, the ECtHR's approach has been as follows:

"…the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism" (Bladet Tromsø and Stensaas v. Norway, 20/05/1999, Application No 21980/93, para 65, Prager and Oberschlick v. Austria, 26/04/1995, Application No 15974/90, para 37.

"the exercise of this freedom carries with it "duties and responsibilities", which also apply to the press. These "duties and responsibilities" are liable to assume significance when, as in the present case, there is question of attacking the reputation of private individuals and undermining the "rights of others"." (Bladet Tromsø and Stensaas v. Norway, 20/05/1999, Application No 21980/93, para 65)."

"…the more serious the allegation is, the more solid the factual basis should be" (Europapress Holding D.O.O. v. Croatia, 22/10/2009, Application No 25333/06, para 66).

"...special grounds are required before the media can be dispensed from their ordinary obligation to verify factual statements that are defamatory of private individuals. Whether such grounds exist depends in particular on the nature and degree of the defamation in question and the extent to which the media can reasonably regard their sources as reliable with respect to the allegations" (Pedersen and Baadsgaard v. Denmark, 17/12/2004, Application No 49017/99, para 78, Bladet Tromsø and Stensaas v. Norway, 20/03/1999, Application No 21980/93, para 65, McVICAR v. the United Kingdom, 07/05/2002, Application No 46311/99, para 84).

It should also be noted that the reasonable publication defence established by the ECtHR implies that when a journalist or a publication has a legitimate aim, concerns a matter of public interest and reasonable efforts have been made by the journalist to verify the facts, the mass media outlet must not be held liable even if it is proved that the relevant facts were not true.

In the light of these principles the courts should have paid a special attention to the following circumstances: the fact of illicit sand mining from the "White Water" reservoir, which could not have been challenged by the Plaintiff, the fact of protection of value judgments found in the artices, the inquiries made by the author to a number of state bodies prior to the publication of the article, including Mayor V. Nersisyan to find out if any person or organization had a right to use the sand from the reservoir and whether taxes were levied to the state budget as a result of sand mining, the fact of failure by V. Nersisyan to respond to the inquiry in due time, the continuous nature of sand mining, the driver's testimony, the fact that illicit sand mining was an issue of public interest, as well as taking by the Defendant of reasonable

efforts to find out if the relevant activity was controlled by V. Nersisyan.

The Issue of Proprotionality of Interference

The issue of exaction of 450.000 AMD from the Defendant in favour of the Plaintiff to compensate for his lawyer's fee is also problematic in the light of the aforementioned circumstances. A number of ECtHR cases have firmly established the requirement of proportionality of interference and emphasized that excessive damages awards lead to a violation of Article 10 ECtHR (Romanenko and others v. Russia, 08/10/2009, Application No 11751/03, para 48). This requirement was also prescribed by the 12 February 2004 Declaration on Freedom of Political Debate in the Media. Although in this case we are talking of the lawyer's fee, they too placed a disproportional burden on the Defendant in view of the latter's limited resources.

RECOMMENDATIONS

In summary, it is worth noting that in order to improve the knowledge and application of the principles and standards prescribed by international law, including the ECtHR case law in the Republic of Armenia, it is necessary that:

- Journalists, legal counsel and judges continue to enhance their knowledge in the areas of the ECtHR case law;
- When applying the fundamental principles and standards set by the ECtHR cases, the Courts engage in necessary analyses and draw correct conclusions, manifesting willingness to truly understand and properly apply these principles and standards rather than resort to a formal approach;
- Judges subject the factual circumstances of the ECtHR cases to a closer scrutiny and verify if various wordings reflected in the parties" submissions are indeed taken from the ECtHR cases and if they indeed conform with the wordings of these cases;
- Journalists are able to word clearly the factual statements and value judgments rather than present value judgments as factual statements since this may create problems when a need for substantiating them arises;
- Journalists are able in their publications to ensure an appropriate distance between themselves and their sources and avoid adopting the sources" information and ideas;
- The requirements of the reasonable and good faith publication are more than important to journalists in order for them to be able to invoke the reasonable defence publication when publishing materials that have not been fully verified;
- Journalists have a clear understanding of the issues of public interest since this is an essential component of the defences available to them. Having a clear understanding of the scope of the issues of public interest is likewise important to legal counsel in order for them to be able to argue correctly, as well as for judges so that they are able to provide correct reasoning to their judicial acts;

- When complaints against the mass media are dismissed, it is necessary that the legal counsel representing the media pursue the protection of the right to freedom of expression until the end, including by filing complaints against plaintiffs for compensation against the caused damages;
- A team of lawyers possessing excellent knowledge of English or French works on the correct formulation of the most important principles of the ECtHR case law so that both legal counsel and judges use these wordings and avoid a situation in which due to different translations one and the same principle may appear in one and the same text twice as two different principles.