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**ANALYSIS OF THE  
CASE OF TAMMER v. ESTONIA  
JUDGMENT OF THE EUROPEAN COURT OF  
HUMAN RIGHTS  
ISSUED ON 6 FEBRUARY 2001**

**June 2005**

***Legal Guide***

**<<http://www.legalguide.am>>**

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## **Introduction**

This Analysis considers the judgment of 6 February 2001 of the European Court of Human Rights (hereinafter referred to as the “Court”) on the case of *Tammer v. Estonia*. The case concerns to defamation and insult of a former public figure during television interview by a journalist. The Applicant submitted in his application to the Court that his conviction under criminal defamation norms by national authorities amounted to violation of his right of freedom of expression as a journalist under Article 10 of the Convention. The respondent Government disputes that the freedom of expression does not provide the Applicant absolute right of expression and that it can be limited under certain circumstances and conditions under Article 10(2) of the Convention..

This Analysis aims to study the facts of the case, including a thorough examination of the applicant’s complaints and the Estonian Government’s arguments. The Analysis will also provide an overview of the specific approaches of the European Court regarding the interpretation of the rights and freedoms in question. However, the Analysis will not specifically address the issue of just satisfaction. The analysis will be carried out by applying a checklist which the Court uses when examining violations of each ECHR right and freedom. The Analysis will also highlight the significant features of the case which played an important role and became the principal guide to the interpretation of the rights and freedoms guaranteed by the European Convention.

This Analysis is educational in character and is primarily designed to enable legal professionals, including judges, lawyers, advocates, legal service providers and others involved in the protection of human rights - including law students - to identify the criteria and the standards that the Court follows when interpreting the rights and freedoms guaranteed by the Convention

## **ANALYSES OF THE CASE**

### **0.0. Country profile**

Estonia applied for the membership to the Council of Europe in 1993. In noting that the government of Estonia had taken several steps towards democratization of the country, in particular that democratic parliamentary elections were held in Estonia on 20 September 1992, which were monitored by an ad hoc committee of the Parliamentary Assembly, that new constitution approved by a referendum on 28 June 1992 which stipulates the principle of rule of law, that the government was willing to ratify the European Convention and recognized the compulsory jurisdiction of the European Court, the Assembly recommended by its Opinion 170 of (1993) that the Committee of Ministers, at its next meeting invite the Republic of Estonia to become a member of the Council of Europe.

Under Order No.508 Estonia came under monitoring of the Parliamentary Assembly until the full commitment of obligations that the country undertook as the member of the Council of Europe. During the monitoring period, three main problematic areas noted for Estonia's full commitment of its obligations. The first related to the practice of detaining refugees and asylum-seekers, in contravention of Articles 5 and 6 of the European Convention on Human Rights, for lack of asylum-procedures. The second problematic area related to the treatment of the "non-historic" Russian-speaking minority, which has given rise to some concern, especially as far as the granting of residence permits and citizenship (and the language test that has to be passed in order obtain the latter) are concerned. The third area consists of the conditions of custody and detention.

However, In January 30, 1997, in considering that the most important obligations and commitments have been honored by Estonia, the Assembly decided to close the monitoring procedure by its Resolution 1117 (1997)

### **1.2 General principles**

The Article 10 of the European Convention guarantees freedom of expression and information to everyone. Individual, non-government organizations or groups of individuals can invoke the protection of Article 10 of the Convention. The case law of the European Court clearly recognizes the importance of the application of Article 10 of the European Convention towards journalism and the media. According to the Courts' case law, the press is considered to have an important role as a purveyor of information and as a "watch-dog". Journalists are considered to contribute in an important way to public debate which legitimates high standards of protection of their freedom of expression and information.

In that connection the media plays an essential role in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest (see, among many authorities, *Observer and Guardian v. the United Kingdom*, judgment of 26 November 1991, Series A no. 216, p. 29-30, § 59, and *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 59, ECHR 1999-III). Journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation (see *Prager and Oberschlick v. Austria*, judgment of 26 April 1995, Series A no. 313, p. 19, § 38; and *Prisma Press v. France* (dec.), nos. 66910/01 and 71612/01, 1 July 2003).

Article 8 concerns various privacy rights, of which the right to respect for private life is relevant to media law. An individual's right to respect for private life can potentially conflict with the media's right to freedom of expression under Article 10. The protection of private life has to be balanced against the freedom of expression guaranteed by Article 10 of the Convention. In that context the European Court reiterates that the freedom of expression constitutes one of the essential foundations of a democratic society. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society" (see *Handyside v. the United Kingdom*, judgment of 7 December 1976, Series A no. 24, p. 23, § 49).

### ***0.1.0. Criminal Defamation***

The criminal defamation norms are considered as the most restraining norms to the freedom of expression. Numerous non-governmental organizations have taken strong positions against criminal defamation and insult laws. These include the Amnesty International; the Article 19; the Committee to Protect Journalists; national non-governmental Helsinki committees such as the Bulgarian Helsinki Committee, Croatian Helsinki Committee, Greek Helsinki Committee, Romanian Helsinki Committee, and Slovak Helsinki Committee; the International Helsinki Federation; The World Press Freedom Committee; Norwegian Forum for Freedom of Expression; national chapters of PEN; and Reporters Sans Frontières. Moreover, the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, and the Organization of American States Special Rapporteur on Freedom of Expression issued a joint statement in February 2000 which included the following conclusions, based on relevant international norms:

- *"Expression should not be criminalized unless it poses a clear risk of serious harm. [. . . ] Examples of this are laws prohibiting the publication of false news and sedition laws. . . . These laws should be repealed."*
- *"Criminal defamation laws should be abolished."*
- *"Civil defamation laws should respect the following principles: public bodies should not be able to bring defamation actions; truth should always be available as a defense; politicians and public officials should have to tolerate a greater degree of criticism. . . ."*<sup>1</sup>

Finally, the United States Department of State regularly reports on cases where criminal defamation or insult laws have been used in its annual Country Report on Human Rights Practices and, at OSCE meetings, has frequently called for the repeal of such laws in recent years.

The cases of the European Court on Human Rights demonstrate evolving concepts of free speech, including the defamation and insult norms. While the Court has never ruled that a

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<sup>1</sup> See: "Statement Regarding Key Issues and Challenges in Freedom of Expression," agreed by Santiago Canton, OAS Special Rapporteur on Freedom of Expression, Freimut Duve, OSCE Representative on Freedom of the Media, and Abid Hussain, UN Special Rapporteur on Freedom of Opinion and Expression, February 2000, [www.article19.org](http://www.article19.org). See also: "Insult Laws: An Insult to Press Freedom," published by The World Press Freedom Committee, [www.wpfc.org](http://www.wpfc.org).

criminal defamation or insult law is a violation of the European Convention, the actual implementation of such a law runs a substantial risk of being found to violate the Convention. In 2002, for example, France was required to pay 4,096.46 Euros to a plaintiff who had been charged with insulting a foreign head of state (the King of Morocco)<sup>2</sup>. That same year, Finland was required to pay 8,400 Euros to a plaintiff who had been charged with criminal defamation (with 13 percent interest on the pecuniary damages and 11 percent interest on non-pecuniary damages).<sup>3</sup> As a consequence of this judicial trend--and perhaps an increasing understanding of the civil alternatives to criminal prosecution for defamation--such laws are increasingly viewed as anachronisms. In *Castells v. Spain*, the ECHR stated:

*The dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media.*<sup>4</sup>

In the same case, the Court stated that criminal measures should only be adopted where States act "in their capacity as guarantors of public order" and where such measures are, "intended to react appropriately and without excess to defamatory accusations devoid of foundation or formulated in bad faith."<sup>5</sup> It is significant that in that case, which involved a conviction for defamation, the Court referred to the application of criminal measures only as a means of maintaining public order, and not as a means of protecting reputations, the purpose of defamation laws.

In recognition of the fact that in many countries criminal defamation laws are the primary means of addressing unwarranted attacks on reputation, the ARTICLE 19 recommends to take steps to ensure that any criminal defamation laws still in force conform fully to the following conditions:

*i. no-one should be convicted for criminal defamation unless the party claiming to be defamed proves, beyond a reasonable doubt, the presence of all the elements of the offence, as set out below;*

*ii. the offence of criminal defamation shall not be made out unless it has been proven that the impugned statements are false, that they were made with actual knowledge of falsity, or recklessness as to whether or not they were false, and that they were made with a specific intention to cause harm to the party claiming to be defamed;*

*iii. public authorities, including police and public prosecutors, should take no part in the initiation or prosecution of criminal defamation cases, regardless of the status of the party claiming to have been defamed, even if he or she is a senior public official;*

*iv. prison sentences, suspended prison sentences, suspension of the right to express oneself through any particular form of media, or to practice journalism*

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<sup>2</sup> Colombani and others v. France (25 June 2002)

<sup>3</sup> Nikula V. Finland (21 March 2002)

<sup>4</sup> Castells v. Spain (1992) 14 EHRR 445, par. 46

<sup>5</sup> Ibid.

*or any other profession, excessive fines and other harsh criminal penalties should never be available as a sanction for breach of defamation laws, no matter how egregious or blatant the defamatory statement.*

Thus, under current developments the criminal defamation norms, and in particular the imprisonment are considered inconsistent with ECHR and international norms their use constitutes an infringement on the fundamental right to free speech. As stated by the OSCE Representative on Freedom of the Media Mr. Duve in his letter to the Speaker of Armenian Parliament Mr. Arthur Baghdasaryan, where he expressed concern regarding the criminal defamation norms in newly adopted Armenian Criminal Code,

*The existence of criminal libel legislation and of so-called insult laws in several OSCE participating States has over the years hampered the work of the media, putting undue pressure on those journalists who investigate such issues as corruption, especially involving government officials. Criminal libel laws are also often used to protect high-ranking civil servants and politicians from criticism<sup>6</sup>*

While it is true that many former Soviet countries have failed to repeal their communist-era criminal defamation and insult laws, the clear trend in post-communist Central Europe--where democratic reform is generally more advanced--is to decriminalize defamation and abolish insult laws. This incremental process continues to move in a singular direction: criminal defamation and insult laws have been repealed or struck down (in whole or in part) in Bosnia-Herzegovina, the Czech Republic, Hungary, Poland, and Slovakia. In May 2003, the Romanian Government proposed a new penal code with sweeping and positive changes to the current provisions on insult and defamation. Countries like Germany--longtime members of the Council of Europe--have already had their criminal defamation or insult laws somewhat "neutralized" through the European Court of Human Right's case law.

#### ***0.1.0. Public interest/ freedom of public debate***

Information and ideas are especially given a high level of protection when they are related to political debate. Public speech is accorded a high degree of protection. Whether the intent of the journalist is to initiate public debates on issues of public concern is of very big importance when deciding on cases of defamation or libel. For example, in the case of Thorgeir Thorgeirson the journalist was convicted for defaming police by writing critical article where he was investigating alleged police brutality of the Metropolitan police. The language of the article was made of strong terms which could insult police. However, the Court noted that the intent of the journalist, and the latter brought convincing evidence, was not to damage the reputation of the Reykjavik police, but to urge the Minister of Justice to set up an independent and impartial body to investigate complaints of police brutality. In considering the purpose and intention of the article, the Court was of the opinion that the language used could not be estimated as excessive. Finally, the Court considered that the conviction and sentence were capable of discouraging open discussion of matters of public concern.

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<sup>6</sup> The official letter of Mr. Freimut Duve to the Speaker of Armenian Parliament Mr. Arthur Baghdasarayn of 2 July 2003.

*“The articles bore, as was not in fact disputed, on a matter of serious public concern. It is true that both articles were framed in particularly strong terms. However, having regard to their purpose and the impact which they were designed to have, the Court is of the opinion that the language used cannot be regarded as excessive” (par. 67).*

#### **0.1.0. Level of acceptable criticism**

There are a number of decisions in which the European Court has distinguished between private and public reputations and ruled that the extent to which the public figures may be protected is more limited, particularly if the journalist writes an article on matters of public interest. Consequently, the limits of acceptable criticism against politicians and higher government officers are wider than the ordinary citizens. According to Oberschlick judgment, *“a politician is certainly entitled to have his reputation protected, even when he is not acting in his private capacity but the requirements of that protection have to be weighed against the interest of open discussion of political issues”*.<sup>7</sup> In Lingens case the Court explained why the limits of acceptable criticism are wider against the politician and public figures than ordinary citizens. According to Court, the

*“politician...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”*.<sup>8</sup>

Thus, where the politician or the prominent public figures claim violation of defamation norms by media, the Court considers not only the limits of acceptable criticism against them, but also the extent to which the disputed article was contributing to open public discussion, as well as the level of public interest towards the disputed matter.

#### **0.1.0. Facts and value judgments**

Article 10 of the Convention gives protection to idea as well as to all kinds of information. Not only opinions, philosophical ideas or political speech are protected by Article 10, but also facts and news or even factual data. In the Court’s view, a careful distinction needs to be made between facts and value judgments. As mentioned in Lingen’s judgment (Lingens v Austria, ECHR (1986) 8 HER 407), the existence of facts can be demonstrated, whereas the truth of value judgment is not susceptible of proof, which gives these opinions and value judgments an even larger scope of protection within the framework of Article 10. However, the right to express opinion (value judgment) is not absolute. Where the statement claimed “opinion” lacks factual basis, the Court may refuse to give protection to such statement under “value judgment” concept. In this sense the Court refers to journalistic responsibility defense of “reasonable publication” as one of the defense from possible charges.

#### **0.1.0. Defense of Reasonable publication**

It is widely recognized that in certain circumstances even false, defamatory statements of fact should be protected against liability. A rule of strict liability for all false statements is particularly unfair for the media and journalists, which are under the duty to satisfy the

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<sup>7</sup> Oberschlick v. Austria, ECHR 23 May 1991. See also Oberschlick (2) ECHR 1 July 1997

<sup>8</sup> Lingens v. Austria (1986) 8 EHRR 407, par 42

public's right to know where matters of public concern are involved and often cannot wait until they are sure that every fact alleged is true before they publish or broadcast a story. Even the best journalists make honest mistakes and to leave them open to punishment for every false allegation would be to undermine the public interest in receiving timely information. Therefore the Court established more appropriate balance between the right to freedom of expression and reputations to protect those who have acted reasonably in publishing a statement on a matter of public concern. Under *Colombani* case, the "reasonable publication" is defined as publication made in good faith and in accordance with journalistic ethics.

### **0.1.0.     *The special position of the media***

The journalists and the media enjoy high level of protection by Article 10. This is demonstrated by the recent case law of the European Court. In many instances, where the publication included harsh criticism of public officer or politician, the Court ruled in favor of the applicant journalist or the media entity. As prescribed by Court, "*the press plays an essential role in a democratic society... and it has a duty to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of political interest*" (*Oberschlick* (2) of 1 July 1997). This definition is the basic principle for deciding on necessity of interference by public authorities in cases involving journalists. As indicated above, and mentioned in *Oberschlick* case, the freedom of expression is applicable to information and ideas that offend, shock or disturb the State or any part of the community. And finally, the Court mentioned that not only the journalists have a task to inform public about matters of public concern, but the public also has the right to receive information and ideas on political issues and on other matters of general interest. According to the Court, restrictions on the freedom of journalistic reporting have to be weighted against the interests of open discussion of political issues, since the exceptions to freedom of expression must be interpreted narrowly.

The principle of "narrow interpretation" is explained clearly in *Sunday Times* (1) judgment. According to the Court, it is not sufficient that the interference belong to one of the exceptions mentioned in Article 10 par2 of the Convention. It is also not sufficient that the interference occurred because the content of the legal provision appeared within the outlines of the legal norm framed by general and absolute legal terms. The Court must be convinced that the interference was necessary in considering all facts and circumstances of the case. So the purpose of the requirement that the exceptions must be "narrowly construed" requires the State to refrain from exercising arbitrariness in its actions and decision by wide interpretation of the legitimate aims mentioned in Article 10(2).

### **0.1. The Article 10 of the Convention**

The Article 10 of the European Convention differs from the First Amendment of the US Constitution in that it expressly provides the exhausting list for limitation of the freedom of speech. In this sense, the First Amendment provides the freedom of speech in absolutist form: "The Congress shall make no law...or prohibiting the free exercise thereof, or abridging the freedom of speech...", while the Article 10, in contrast to the First Amendment, contains concrete criteria and guidelines for the process of balancing free speech and process of freedom against other compelling interests or other human rights.

As indicated above, this article provides the freedom to receive and impart information to “everyone”; individuals, non-government organizations or groups of individuals, i.e. political parties. Although the word “secure” is not expressly mentioned in the first part of the article, the ECHR case law established that the freedom of access of information is also covered by this article.<sup>9</sup>

The second part of the article stipulates that since the exercise of the freedom of expression and information carries with it duties and responsibilities, it may be subject to some kind of interference by public authorities. The formalities, condition, restrictions or penalties are only legitimate if they are compatible with the exceptions set forth in paragraph 2 of the Article 10. The list of exceptions is exhausting.

According to Article 10, three conditions must be cumulatively fulfilled: the so called “triple test”. If one of these conditions is violated, the restricting measure used by domestic authorities will be considered violating the Article 10 of the Convention.

First, the interference must be “prescribed by law”. It means that any restriction (action) or restricting rule (legislation) must meet the criteria of *precision* and *accessibility*. These criteria were established by *Sunday Times v. United Kingdom* judgment of the Court in 1979, according to which, firstly, the law must be adequately accessible: the citizens must be able to have an adequate indication of the legal rules applicable to a given case. Secondly, any restricting norm must be formulated with sufficient precision so that the citizen is able, if need be with appropriate advice, to foresee the consequences which a given action may entail to a degree that is reasonable in the circumstances. Not only written statutes, but also rules of common or other customary law may provide a sufficient legal basis. The mere fact that the legislative provision may give rise to problems of interpretation does not mean that is so vague and imprecise as to lack the quality of law. But, if the legal code shows no criteria for the application of the law, this restriction will not achieve the status of “law” within the meaning of the Article 10 of the Convention.

Secondly, any restriction must pursue at least one of the following legitimate aims expressly provided by paragraph 2 of the Article 10

- the protection of national security, territorial integrity and public safety
- the maintenance of the authority and impartiality of the judiciary
- the prevention of the disclosure of information received in confidence
- the prevention of disorder or crime
- the protection of health and morals
- the protection of the reputation or rights of others.

Under ECHR case law, some of the mentioned legitimate aims may be interpreted wider. For example, under “rights of others”, the right to privacy may be invoked (Article 8 of the Convention). Or, the purpose of “*maintaining the authority and impartiality of the judiciary*” can involve Article 6 issues, i.e. court reporting by media.

Any other reason out of the scope mentioned above brought by domestic authorities for interference or limitation of the rights of individuals is considered violation of the Article 10.

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<sup>9</sup> *Gaskin v U.K.* (1990) 12 EHRR 36

Thirdly, any interference must be “necessary to democratic society”. This expression, or the “necessity test” is interpreted by ECHR case-law to mean that the interference is considered necessary if 1) there is “pressing social need” for such interference 2) the measures take by domestic authorities for limitation of the right (criminal/civil liability, prohibition, injunction, administrative fine etc.) are proportional to the legitimate aim mentioned above, 3) the interference is “relevant” and “sufficient”. In practice, this has been the hardest test for respondent governments to overcome in ECHR proceedings. The “necessity” test cannot be applied in absolute form, rather it depends on many factors such as the nature of the restriction in question, the degree of interference, the political context of the impugned statement, the persons involved etc. Therefore, as stated by the Court many times, it never makes judgment in abstract, rather based only on the facts and special characteristics of each case. Thus, the Court supervises the application of Article 10 by domestic authorities by examining this criterion carefully and by evaluating the pertinent and proportionate character of the restrictions in question.

In evaluating the proportionality, the Court takes into consideration the degree of interference in the applicant’s right with regard to the effect a restriction has on the exercise of hi/her freedom of expression. If a restriction has only a short application, or if sufficient alternative ways exist to participate in free public debate or to impart or receive the relevant information, the Court may take this into consideration. In fact, this fact played decisive role in making many judgments under Article 10.

#### **1.4. Margin of Appreciation**

Under norms of international law, for the purpose of assessment of the facts, the European Court is subsidiary to national courts. It is first of all the duty of the national courts to determine whether the certain interference violates the Convention, whether the interference is “necessary” or 'proportional' and whether there is “pressing social need' for such interference. Thus, the European Court exercises only the supervisory role in order to establish whether the interference amounts to violation of the Convention. In doing this, the Court has always avoided to replace its assessment of the facts and arguments of the case with those of national courts. In addition, the Court gives the national courts some latitude on the basis that the national authorities are in a better position than the international courts to assess the facts and necessity of interference Thus, the Court gives discretionary power to national courts for assessing the need for interference. As mentioned in Handyside case

*“ state authorities are in principle in a better position that the international judge to give an opinion on the...necessity of a restriction or penalty...it is for the national authorities to make the initial assessment of the reality of the pressing social need...thus, domestic margin of appreciation goes hand in hand with European supervision, which involves both the law underlying the decision and the decision itself”<sup>10</sup>*

Since the domestic margin of appreciation and the European supervision go hand in hand, it is necessary to underline that the Court’s supervisory role is wider where the facts of the case are about freedom of expression of journalists and media outlets and when the media publication concerns to matters of significant public interest.

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<sup>10</sup> Handyside v. UK, para 47

## 1.5. Analysis of the facts and the arguments of the case

The Court's assessment of the facts and the arguments of the parties are done based on application of the above mentioned triple test on the case, namely, whether the initiation of criminal proceedings against the Applicant and the imposition of the fine was prescribed by Estonian domestic law, whether the criminal proceedings were initiated and the fine imposed was following one of the legitimate aims under Article 10(2) and whether such limitation of the rights of the journalist to impart information was "necessary in democratic society", in particular, whether there was a "pressing social need" for subjecting Mr. Tammer to criminal penalty, whether the penalty was a "proportionate" measure in pursuit of the legitimate aim and whether it was "relevant" and "sufficient" measure.

The analyses of Court's finding and parties submissions are done in comparison with defamation principles worked out by ARTICLE 19. In July 2002 the ARTILCE 19 published *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*, setting out the appropriate balance between these two important social values. The Principles are based mainly on domestic norms of Council of Europe member states, on principles developed by the case law of the European Court and on the standards worked out by international organizations such as the United Nation, Council of Europe and the OSCE.

### 0.4.0. Prescribed by law

As indicated above, the principle "prescribed by law" requires the existence of two factors; that the legal provision in question be "accessible" to the citizens, and that it be formulated with sufficient "clarity" so that it would enable the citizens to predict with reasonable certainty in advance the legality of a particular action and thus regulate their conduct in order to avoid violation of the law. These two standards together form the notion of the "quality of law". The Applicant in this case claimed that the Article 130 of the Criminal Code was formulated with wide and vague terms, so that the journalists would not be able to foresee to the extent it possible all possible consequences of the statements made in their capacity as the journalists. The government disputed this standing of the Applicant by arguing that the disputed article was formulated with sufficient clarity in order to realize that the impugned statement and the two words used could amount to defamation and insult. It is important to mention that the domestic courts, namely, the Supreme Court of Estonia had already answered to this question of the Applicant by stressing that the term "improper form" used in the wording of the Article 130 of the Criminal Code "*does not only include the use of vulgar or indecent word, but also the use of negative and defamatory figurative expressions*". In addition, the Supreme Court ruled that the term may include also "non-verbal" actions, for example a caricature. Based on the domestic expert opinion, as well as on the findings of both the City Court and the Court of Appeal, the Supreme Court finally decided that the two words had truly defamatory meaning, therefore, they amount to expressions of "improper form". Thus, the domestic courts were of the opinion, that even though the term "improper form" was general in nature, however, every individual living in Estonian society could reasonably conclude that the impugned expressions were defamatory and insulting in nature. Therefore, the Applicant was in position to foresee and therefore to regulate his actions in order to avoid "improper terms" and consequently, violation of the law.

The Court's ruling on this argument was based on the principle of "margin of appreciation" mentioned above. The Court was of the opinion that the Article 130 of the Criminal Code was indeed formed in general terms. Suffice it to say that the whole text of the article was

comprised of one sentence. However, the Court was of the opinion that it could not be considered that the Article 130 lacked the “quality of law”. Further, it left on domestic authorities to decide the issue of interpretation and application of domestic norms. In this sense, the Court accorded to domestic courts with wide margin of appreciation and, accordingly, narrowed the supervisory role of the European Court.

In general, the Court’s does not demonstrate an absolutist approach to the requirement of the ‘prescribed by law’. First, in talking about the issue whether the citizen is able to foresee his/her actions under circumstances where the legal norms are not clearly construed, the Court indicates also the possibility of using an appropriate advice – including legal consultations – as one of the ways the citizens may refer to in order to regulate their actions. Thus, its not yet sufficient to merely demonstrate that the disputed legal provision lacks clarity, but also to convince the Court that even the “appropriate advice” would not be able to clarify the consequences that the given action may entail. In addition, according to Court, those consequences need not be foreseeable with absolute certainty because this is impossible in practice. From the wording of the Court, where it defines the expression “prescribed by law”, it appears that the Court yet accepts the idea that the legal provisions sometimes could appear with “excessive rigidity” in order to be able “to keep pace with changing circumstances”. However, the central point of the Court is that the legal codes are constructed in the manner to eliminate arbitrariness by public authorities. In this sense, if the disputed legal norm or provision does not show criteria of application of the law, or if the restrictions on the freedom of expression and information do not offer the minimum degree of protection against arbitrariness required by the rule of law, such kind of restriction will not be regarded as “prescribed by law”.

In considering the above, the Court appears to have accepted the position of the Government, in particular that despite the content of the article 130 of the Criminal Code was very short and the language was formed in general terms, its wording provides at least a “criteria” – the expression “improper form” -- which offers minimum degree of protection against arbitrariness and provides sufficient guideline to the citizens, including journalists, to avoid making defamatory and insulting statements. Therefore, under circumstances of the present case the Court was of the opinion that Mr. Tammer could “reasonably foreseen” that the use of words '*rongaema*' and '*abielulõhkuja*' could result in degradation of Mrs. Laanaru’s dignity in an “improper form”, which is a necessary component of the Article 130 of the Criminal Code of Estonia.

#### ***0.4.0. Legitimate aim***

The states have a positive obligation to ensure the effective protection of the right to respect for private life. The Court has stated that the positive obligation will extend to requiring action to protect and individual from the acts of other private parties. In *X and Y v Netherlands* the Court stated even though the 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 obligation, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.

In following to these principles, the Government stressed it was following the aim of the “protection of reputation or rights of Ms. Laanaru in initiating criminal proceedings against

Mr. Tammer. The cited Article 130 of the Criminal Code clearly shows that the intent of the Government was the protection of the reputation rather than to prevent open public debate and legitimate criticism of wrongdoing of public officials. In this the Government was following the Principle 2 of ARTICLE 19, which states that the defamation laws cannot be justified unless their genuine purpose and demonstrable effect is to protect the reputations of individuals of entities with the right to sue and be sued against injury. Further, it states that the defamation laws cannot be justified if their purpose or effect is to prevent legitimate criticism of officials or the exposure of official wrongdoing or corruption. Thus, the only legitimate purpose of defamation laws must be the protection of reputations.

Based on the facts of the case and submissions of the Government, the Court fell quite convinced in genuineness of the actions of domestic authorities and found unnecessary to go further in assessments of the actions of domestic authorities in order to establish whether the second component of the triple test was in place. It is necessary to mention though that the wording of relevant provisions of domestic legislation of Estonia provide the similar legitimate aims for restricting the freedom of expression of the citizens as the European Convention. For example, the Article 45 of the Constitution of Estonia provides that the freedom of speech, including the freedom of the press may be restricted for the protection of “the rights and freedoms of other person”, “honor and good name”. Further, according to section 23(1) of the Law on General Principles of the Civil Code, a person has the right to apply for a court order to stop to the besmirching of his or her honor. Thus, both domestic and ECHR norms provide sufficient basis for domestic authorities for limitation of the freedom of expression of Mr. Tammer.

#### ***0.4.0. Necessary to Democratic Society***

In assessing the submissions of the parties, the Court took into consideration all factors that play important role in defamation cases involving freedom of expression/journalistic reporting from the one side and the right to privacy/family life and the limits of acceptable criticism in respect of public figures from the other side. Among such factors, in recalling its previous judgments, the Court mentioned the types of expression protected under Article 10 (paragraph 59), the supervisory role of the Court in final assessment of the measures of interference (paragraphs 60 - 61), the special role of the press in imparting information on issues of public concern and the level of permissible criticism depending on the facts of the case (paragraph 62), and finally about the role of the Court in the subject proceedings (paragraph 63).

##### **0) Pressing Social Need**

As indicated above, the existence of the pressing social need as the reason for interference is the first component of the “necessary to democratic society” test. However, the parties did not invoke this principle in their submissions. They apparently found that there was no need to refer to this test based on the facts of the case. Accordingly, the Court also did not make any reference to the relevance of parties actions to this test. The main debate of the parties and Court’s assessment were made in connection with the second component, the “proportionality” test.

##### **2) Proportionality of the interference**

In considering its role as the organ of reviewing under Article 10 the decisions that domestic authorities took in pursuant to their power of discretion, the European Court admitted the

founding of domestic courts that the use of the words *abielulõhkuja*” and *“rongaema*” justified the measures taken by State to protect the reputation and rights of Mrs. Laanaru. It therefore acted strictly within the limits of its jurisdiction by not questioning the issue whether the above words were defamatory or insulting both in their ordinary meaning and in their context. Accordingly, the Court stated in paragraph 65 that the main issue that it was going to decide and on which the decision would be founded was whether the State acted in accordance with the principles of Article 10 by striking fair balance between the protection it rendered to Mrs. Laanaru and the right of Mr. Tammer as a journalist whose duty is to impart information to the public (in other words, the principle issue involves the conflict of the Article 10 and Article 8 of the Convention). Accordingly, the main issue involved the proportionality test for the Government. In this context the factors such as chilling effect, journalistic ethics, public interest, measure of punishment play important role in deciding the proportionality of the measures taken by domestic authorities for the above protection.

The “definition” of the proportionality test in the context of the conflict between freedom of expression and defamation involving media reporting is best described in Principle 1.3 of the ARTICLE 19, which provides that restriction cannot be justified if

- . *less restrictive, accessible means exist by which the legitimate reputation interest can be protected in the circumstances, or*
- . *taking into account all the circumstances, the restriction fails a proportionality test because the benefits in terms of protecting reputations do not significantly outweigh the harm to freedom of expression*

0. *Level of acceptable criticism/Public interest*

The Principle 8 of the ARTICLE 19 provides that under no circumstances should defamation laws provide special protection for public officials, whatever their rank or status. This principle is included on the basis that there is already substantial number of case-law and established international norms that such officials should tolerate more, rather than less, criticism.

In addition, as mentioned above, the issue whether the journalistic reporting refers to the issue of public interest or not is important in deciding the limits of critical speech. In addition, the fact whether the defamed person is politician or public figure is also a decisive factor in defamation cases under ECHR jurisprudence. Knowing this, the Applicant claimed from the beginning that Mrs. Laanaru was a well-known public figure and therefore, the aspects of her private life was of public interest (her personal relations with the former Minister of Interior and her ties with the story of the scandalous video tapes). These contentions of the Applicant was his number one defense as he clearly understood that the limits of acceptable criticism are wider in respect of public figures. His second defense was that he claimed he was reporting on the issues of public interest in considering the special role that Mrs. Laanaru played in the political life of Estonia. And his third defense was his reference to his special role as the journalist in that the duty to impart information is not justified only by the special role of the media, but also by the public’s right to receive information. Based on these three contentions, the Applicant asserted that

*“he had not exceeded the limits of acceptable criticism and that his journalistic freedom outweighed Mrs. Laanaru’s right to respect for her private and family life” (par. 45-48).*

The Government did not dispute the above principles in general. It simply attacked the *public interest* arguments of the Applicant by questioning whether the private relations of Mrs. Laanaru, and her personality were still an issue of public interest. The Government brought the Court's attention to the fact that in the period in question she had already resigned and had gone from the politics. Mrs. Laanaru resigned in 1995, while the statement was made in 1996. Next, the Government claimed that during the period in question Mrs. Laanaru was no longer acting in her official capacity. This fact significantly changes the whole aspect of the case. Under Lingens judgment, the protection extends to politicians even when they are not acting in their private capacity, i.e. including their actions in their official capacity. In the subject case Mrs. Laanaru was acting 1) in her private capacity, 2) she was no longer holding higher government position, therefore, her activities could not in any way effect the public at large and therefore there is no genuine interest by public to be aware about her "ideas" and "position" on matters that concern the public. All above three circumstances together convincingly establish that during the period in question there was no genuine public interest to her personality and activities

Second, the limits of privacy right lessen where the defamed person contributes by his/her conduct to more publicity of his/her personality and thus lessens the limits of the privacy. This principle is accepted by many Council of Europe member states domestic jurisprudence<sup>11</sup>, though the ECHR has not made a ruling on this specific issue yet. The Applicant pointed on the fact that Ms. Laanaru had herself made the comment about interference into another person's first marriage, including her relations with her child as a mother, thus contributing to the publicity of her story. Consequently, she couldn't have expected much privacy as she herself made her story public. The Court did not accept this argument. It decided first of all to establish the context that caused the utterance of impugned words, and second, their value to the general public. The Court did not examine whether the two words were indeed insulting in the modern society of Estonians. It simply accepted the findings of domestic courts based on margin of appreciation. Further, the Court noted that the context that caused the Applicant to utter the words was that he wanted to express negative opinion. The Court does not dispute the right of the journalist to express negative opinion in his reporting. However, by obviously having the journalistic ethics in its mind, the Court declared that the journalist could have expressed the negative opinion by using other words rather than the words that have clearly offensive meaning in Estonian society (see about this argument in more details below). Finally, the Court did not state but it clearly follows from its previous finding, that the fact of utterance of offensive words during television interview by journalist had clearly negative value to the general public.

In conclusion, by reviewing Mr. Tammer's words and statements against the background of the claims about public interest, the Court ruled that the Applicant failed to establish the existence of serious public interest.

#### 0. Journalistic ethics/good faith

Under Colombani judgment the Court established that in order to enjoy Article 10 protection journalists had to act in good faith on an accurate factual basis and to provide reliable and precise information in accordance with the ethics of journalism. The element of "good faith" is of key importance for demonstrating journalistic ethics in defamation proceedings.

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<sup>11</sup> Douglas v. Hello!(2001) The Times, 16 January

Under ARTICLE 19, the only exception for applying criminal defamation norms should be if the defamed party proves, beyond reasonable doubt, that the defamatory statements are false, or that the statement was made “with malicious intent”, “with actual knowledge of falsity of the facts of the statement and with the intent to harm the party claiming to be defamed. These standards are provided in domestic legislation of many countries, including Armenia. In the regional conference on Defamation and Freedom of Expression organized by Council of Europe in Strasbourg between 17-18 October 2002 within the framework of the Stability Pact for South-Eastern Europe, the participants made declarative statement by providing several recommendations addressed to journalists and member states governments. One of the recommendations concerned to the “fair comment” principle providing “*that there should be a defense of truth. There should also be a defense of fair comment where journalists have acted reasonably and in good faith*”.<sup>12</sup>

In the subject case, the main argument of the Government was that the Applicant did not act in good faith and in observance of basic rules of journalistic ethics. Namely, the Government claimed that the Applicant could have expressed the same opinion by using other words. Its quite understandable why the Applicant was not required to prove the truth of the statement both in domestic courts and in submission to the European Court as it was widely asserted by Applicant that the statement that he made was not the factual statement but the “value judgment”, i.e. expression of opinion protected under Article 10(1) of the Convention. In this connection the Government stressed that if the Applicant expressed the same opinion (that Mrs. Laanaru caused the divorce, that she broke someone’s marriage and that she did not care of her child), this would not have constituted an insult and consequently no criminal prosecution would be initiated against him. The Government specifically pointed that the domestic courts made the same conclusion in deciding whether the Applicant had acted in good faith.

As mentioned above, even where the statement of the fact on a matter of public concern has been shown to be false, defendants should benefit from a defense of reasonable publication. The traditional approach to the false statements, where the burden of proof is put on the defendant, is particularly unfair for the media, which are under duty to satisfy the publics’ right to know and often cannot wait until they are sure that every fact alleged is true before they publish or broadcast a story. In this sense, some experts conclude that the information is like the product which will spoiled if not delivered quickly. Similarly, some information need to be imparted urgently, otherwise it will use its value and the purpose and while acting urgently mistakes as to the truthfulness of all aspects of the information is impossible to check within the limited time period. Therefore, it has been defined that the defense is established if it is reasonable in all the circumstances for a person in the position of the defendant to have disseminated the material in the manner and form he or she did, in other words, the defendant should prove that any other person would disseminate the same information under same circumstances in the same manner as he/she did.

Under the subject case the Court was not convinced that the Applicant indeed acted in good faith by using the two expressions. It joined to the opinion of the Government that the Applicant could have expressed the same opinion by using other words rather than those that are considered by Estonian society as rather degrading and insulting. The Court took into

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<sup>12</sup> The text of the declaration is available at [www.coe.media.int](http://www.coe.media.int)

consideration the founding of domestic courts that even though the words amounted to value judgment “couched with offensive language”, “it was not necessary to refer to them “in order to express a negative opinion” (par 67). It finally referred to its finding in Constantinescu judgment in that Mr. Tammer could have formulated his criticism without using such insulting expressions.

#### *0. Chilling effect of criminal proceedings*

One of the main arguments of the Applicant was that by initiating criminal proceedings against the person acting in his capacity as a journalist, the national authorities violated the established free speech norms (see paragraph 44). Under Principle 1.3 of the ARTICLE 19, the restriction cannot be justified if less restrictive, accessible means exist by which the legitimate reputation interest can be protected in the circumstances, or, the restriction fails a proportionality test because the benefits in terms of protecting reputations do not significantly outweigh the harm to freedom of expression. In this context, the Applicant referred to the finding of the Supreme Court of 1 December 1997 that civil law provided remedies to protect a person’s honor, thus, the domestic authorities had alternative measure of bringing civil proceedings rather than criminal proceedings against him and thus sentence him as a criminal. The Government argued that criminal proceedings against the Applicant were initiated by Mrs. Laanaru who brought the case through the order of the private prosecution rather than civil proceedings and that the Government in this sense took no part in initiating prosecution through the public prosecutor.

The Applicant’s arguments are convincing in comparing them with the Principle 4 of the ARTICLE 19. The Principle 4 and its interpretation provide two principles:

- 0) the criminal prosecution is not “proportionate” or «legitimate» measure for protection of reputation and the rights of others, especially in respect of journalists, therefore, such measures are not “necessary in democratic society”,*
- 0) imprisonment as a measure of punishment shall be applied under no circumstances in defamation cases.*

Principle 4(a) of *Defining Defamation* states:

*All criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws. Steps should be taken in those States which still have criminal defamation laws in place, to progressively implement this Principle.*

Civil defamation laws are the only means used to protect reputations in many countries, either because criminal laws do not exist or because they have fallen into disuse. The experience in these countries shows that the criminal law is not necessary to provide effective protection to reputations. Since the criminal laws exerts a greater chilling effect n freedom of expression, it cannot be justified as a means to protect reputations. The criminalization of particular activity implies a clear State interest in controlling the activity and imparts a certain social stigma to it. In recognition of this, international courts have stressed the need for

governments to exercise restraint in applying criminal remedies when restricting fundamental rights.

In this case, even though it is true that the Article 130 of the Criminal Code provides both detention and fine as measure of punishment and that the authorities chose the minimal measure of punishment; the fine, with respect to the statement made in an “improper form”, however, the fact that the penalty was qualified as criminal in nature under domestic legislation and the fact that the authorities could use detention as well for the same offense, serves as a warning to other journalists and writers. Thus, the mere existence of the Article 130 of the Criminal Code already has chilling effect on freedom of expression of the press. In this context, the domestic legislation of Estonia contradicts international standards. However, for some reason the Applicant did not strongly dispute this issue before the European Court. In addition, in 69 of the judgment the Court found it unnecessary to address this issue in its depth on the basis of wide margin of appreciation accorded to domestic authorities in this context.. The reason appears to be that even though the imposed measures were criminal in nature, however, the minimum amount of fine was imposed and the Applicant was spared prison. This brings us to the other issue of quantum of pecuniary awards.

#### 0. Chilling effect of quantum of pecuniary awards

Unduly harsh sanctions, even for statements to be defamatory, breach the guarantee of freedom of expression. This means the sanctions must be strictly proportionate to the harm done (see Principle 15(b) of the *Defining Defamation*). One aspect of the requirement that sanctions be proportionate is that any remedies already provided, for example on a voluntary or self-regulatory basis, be taken into account in assessing court-awarded damages. To the extent that remedies already provided have mitigated the harm done, this should result in a corresponding lessening of any pecuniary damages. As Principle 15(b) of *Defining Defamation* states:

*In assessing the quantum of pecuniary awards, the potential chilling effect of the award on freedom of expression should, among other things, be taken into account. Pecuniary awards should never be disproportionate to the harm done, and should take into account any non-pecuniary remedies and the level of compensation awarded for other civil wrongs.*

This Principle recommends that sanctions in defamation cases should be strictly proportionate to the harm caused and, to ensure this, should take into account any remedies already provided, including voluntary and self-regulatory remedies.

According to the Parliamentary Assembly Document 9640 reporting on the monitoring results of the Freedom of Expression in the media in Europe, “*other forms of legal harassment, such as defamation suits or disproportionately high fines that bring media outlets to the bank of extinction, continue to proliferate in several countries*” According to the report, the “*astronomic fines*” that the media outlets are forced to pay, are the feature characteristic of most countries of the Commonwealth of Independent States (CIS), which includes Armenia.

The Government pointed on two circumstances to demonstrate that it followed the proportionality in seeking redress for damages. . First, an alternative remedy was provided to the Applicant during domestic proceedings in Tallinn City Court by offering to settle the case by way of apologizing to Ms Laanaru. However, the Applicant refused to accept the proposal

of the Court about settlement by means of apology. Thus, the Government noted that the domestic courts "took account non-pecuniary remedy", thus respecting the above principle, while the Applicant refused the offer.

Second, as indicated in paragraph 69, the nature and severity of penalty are also factors to be taken into account in deciding the proportionality of the measures used. The Government imposed truly minimal penalty on the Applicant. This move of the member stated was highly appreciated by the European Court. The Article 130 of the Criminal Code provided the measure of punishment from fine to detention. The Article 28 of the Criminal Code defined the fine as a penalty which the court can impose up to a limit of nine hundred times a person's daily income. The Applicant was imposed to limited amount of fine in the amount of 220 kronas, which is an amount ten times the minimum daily salary. Thus, the national authorities imposed the minimum amount in considering the whole scale of penalty ranging from fine to detention. The most important factor is that the Applicant was not subjected to deprivation of liberty since the developing international norms prohibit imprisonment as the measure of punishment for journalists in defamation cases. The use of minimum measure of punishment is clearly a positive factor for the State for assessing the nature and severity of the penalty.

In *Tolstoy Miloslavsky v United Kingdom* (1995) 20 EHRR 442, the Court considered the record amount of libel damages of one and half million pounds made by the High Court of Britain against Applicant and in favor of Lord Aldington. The award was three times more than had ever been awarded before in a defamation case. In addition, the High Court also granted an injunction restraining further publication of the defamatory statements. The European Court ruled that the sheer amount of the award gave rise to a violation of Article 10 of the ECHR because it did not bear the required "reasonable relationship to the injury to reputation suffered. The Court is of the opinion that rulings on unjustifiably high amount of award may have chilling effect on the freedom of expression of media outlets. Similarly, the Court is concerned in general that disproportionate amount of fines imposed on journalists for defamatory statements may have adverse effect on journalistic freedom to write critical articles about issues of public interest.

The domestic courts of Estonia thus followed the ECHR principle of "proportionality" by imposing the minimal amount of fine, whereas the law actually permitted to impose fine in the amount of 900 times of daily salary. Such approach of the Government is probably the main reason why the Government won in this case. Had the domestic courts imposed much higher fine so that it could potentially have the chilling effect on the freedom of expression of the media and the journalists, the ECHR judgment could have been different.

In the context of proportionality, the *Tammer* case is very similar with the case of *Cumpana and Mazare v. Romania* (no 33348/96) where Court found no violation of Article 10. In this case the Court noted that the applicants had been convicted of criminal libel as a result of allegations by media articles published by Applicants that the city judge did not know the law and that he took a bribe. Like domestic courts, the Court found that the article was damaging the public image of the defamed public officer and that the article did not in any way contribute to a debate on a matter of general interest. Furthermore, relevant reasons had been given for the applicant's conviction for the publication of the cartoon, namely the need to protect the defamed person's reputation and the authority of the judiciary. The cartoon was capable of interfering with the judge's private and family life and overstepped the bounds of acceptable criticism. Lastly, the Court noted that while the sentence was admittedly, harsh,

the applicants had been spared prison as a result of the pardon. It was also apparent that they had not in fact been prevented from continuing their professional activity in the result of the ban on their working as journalists. Under given circumstances, the Court considered the interference with the applicant's freedom of expression was not disproportionate to the legitimate aims pursued, namely the protection of the rights of others and of the authority of the judiciary.

#### *0. Value judgment*

The Court stated in Lingens case that the existence of facts can be demonstrated, whereas the truth of value judgments is not susceptible of proof. The Applicant claimed the impugned expressions were value judgment rather than factual statements. In this connection, he contended that the disputed words were uttered in the form of the question rather than the statement in order to provoke and receive a reaction from Mr. Russak to his question rather than stating his own opinion. The Article 10 protects not only the substance of the ideas and information expressed, but also the form of presentation of the information (see, for example, *Jersild v Denmark* (1994) 19 EHRR 1, at para. 31). Thus, by pointing on the manner of expression he intended to get under the defense of the value judgment in a sense that during the interview he used a journalistic style of expression (his comment was made in the form of question to provoke Mr. Russak to answer to the question) for which he claimed he could not be liable because the style of expression is also under protection of Article 10. It appears the Applicant disputed the protection of the form of expression also before the Appeal Court by stating that the courts do not have the right to prescribe which style a journalist was to use when writing a newspaper article. This contention of the Applicant was dismissed by Cassation in declaring that such form of expression is protected under free speech as long as the journalistic style does not offend or degrade human dignity.

The Court did not address the argument of the Applicant about value judgment. In fact, it admitted that the impugned statement was value judgment, but containing words which are offensive as proved by domestic courts. The Court didn't find it necessary to continue the assessment of the claimed value judgment. However, the Courts position in general to this issue is that the freedom to express opinion is also not absolute and that it could be deemed excessive in case of absence of factual basis under expressed opinion (see, for example, *De Haes v Belgium*, par.47). In following this preposition, it appears that the statements of the Applicant in fact had factual basis, however, the issue here is not whether the statement made was excessive in nature but that it contained clearly insulting words. In this sense, the strategy of the Government in building its argument was correct as it never disputed the factual basis under this statement rather than disputing improper wording used in the statement.

#### *0. The manner of handling the case by domestic courts*

Important factor in this case is the manner in which the case was handled by all three domestic courts. All courts applied Convention norms widely in their judgment. This is something which is seen to be done rarely in domestic level. The European Court was satisfied by the way domestic courts balanced the "various interests involved in the case". It raises trust and confidence of the European Court to the national bodies in that they act in full compliance with ECHR and international norms.

The basic notion in this respect is that the international courts are subsidiary to domestic courts in the application of Convention norms. In this case we see how this principle was in

fact applied in practice. If we examine the judgment of the Supreme Court of 26 August 1997, we see that this Court considered the case in the manner very similar to the European Court. It applied all important Convention principles and standards and in general managed to find a proper balance between the privacy right of Mrs. Laanaru and the right of journalistic reporting of Mr. Tammer. That was the reason why the Court based majority of its findings on the findings of domestic courts. In considering also the margin of appreciation usually accorded by Court to domestic authorities, the chances of the Government were even increased.

#### *0. effective remedy*

Under Principle 19 of ARTICLE 19, the defendants should have an effective remedy where plaintiffs bring clearly unsubstantiated cases with a view to exerting a chilling effect on freedom of expression, rather than vindicating their reputations. According to the interpretation of this principle, this is important in order to eliminate the wide-spread practice of institutions of defamation claims by wealthy or politically powerful individuals and corporations where its true meaning is to suppress free speech rather than obtaining just satisfaction of their claim. Defendants should have some legal means at their disposal to address this type of behavior.

According to the section 23(1) of the Law on General Principles of the Civil Code of Estonia, a person gets the right to apply for a court order to stop to the degrading of his or her honor only provided that the person defaming him or her fails to prove the truthfulness of the material. Thus, a person, according to the judgment of the Supreme Court of 26 August 1997, can seek protection through a civil procedure only if the person feels that his or her honor has been degraded with a statement of facts. Consequently, the person in Estonia has in fact no possibility of protecting his or her honor through civil-law remedies if being defamed by means of value judgment. It follows that in those cases the person can invoke protection only from criminal law remedies by initiating a private prosecution under Article 130 of the Criminal Code, which has very general and vague language, which was confirmed by Court. That was the reason why Ms. Laanaru applied to criminal law procedures for claiming violation by means of value judgment.

The above is a serious omission of Estonian domestic legislation in a sense that the journalists face always criminal proceedings once somebody feels that his/her reputation was damaged by means journalistic reporting where the author expressed opinion through value judgment. Unfortunately, the European Court did not take this facts into consideration. It is important to recall that the Convention is violated both by certain actions and by incompatibility of domestic legislation and practice to Convention norms. The mere existence of such practice in Estonia significantly jeopardizes the freedom of expression of the media and the journalists. Maybe the Applicant did not dispute this fact stronger enough or clearly enough in his claim. It is clear that he disputed this matter before the First Instance Court by attesting that his action could not be qualified as a crime on the grounds that he lacked a criminal intent. From the statement in paragraph 44 it appears that after final ruling of August 26, 1997 the Supreme Court reversed its position by holding that civil law in fact provided remedies to protect a person's honor. However, the fact remains that this argument of the Applicant was not addressed by the Court, which focused mostly on the actions of the Applicant rather than on insufficient remedies by domestic legislation.

Further, according to the judgment of the Appeal Court (para 27), in private prosecution cases the examination of the merits of the case is limited to the claims put forward by the

offended party. It means that in addition to the above limitation, the journalists face further limitation by being deprived of the right to argue the case in full before the Appeal Court. In this case it appeared that the Appeal Court examined the case on the basis of the citation from the whole text of the interview, while the Applicant kept demanding to add the whole text of the interview to the case materials and make the judgment in consideration of the context (the full text) of the interview. It appears that the Court of Appeal denied this request since it clearly stated the examination of the case was limited to the claims of Ms. Laanaru., even though it decided for some reason (perhaps under pressure of Mr. Tammer) to add the text of the full interview to the case file. Thus, it appears that the Applicant was deprived of the privilege to be sued in the civil court under civil law procedures and, in addition, he was deprived of the privilege of bringing such arguments that are out of the outlines of the claim brought by the claimant. It obviously put the defendant in significant disadvantage, which could raise Article 6 violation of the Convention, if the Applicant decided to include in his claim arguments about violation of fair trial principle.

In comparing this situation with the Principle 19 above, it obviously provides a wide avenue for “*wealthy or politically powerful individuals and corporations*” (malicious plaintiffs) in building up criminal cases against journalists, in considering that the domestic laws do not provide possibility for bringing claims through civil law procedures. In addition, this situation contradicts to the object and purpose of the Principle 4 of ARTICLE 19, according which all criminal defamation laws should be abolished and replaced with appropriate civil defamation laws. The concern of the ARTICLE 19 by recommending to have the civil laws as primary means for protection of reputation is that “*there is always the potential for abuse of criminal defamation laws even in countries where in general they are applied in a moderate fashion*”.

### **1.6. Armenian legislation and practice of defamation norms**

There have been many instances where the criminal defamation or insult laws have been used by public leaders against their critics. In 2000, for example, Nikol Pashinyan, editor-in-chief of the one of the leading opposition newspapers *Aykakan Zhamanak* was charged with insult and given a suspended sentence. Charges were brought against poet Dzanik Adamyan in 2002 as well as against Dzhema Saakyan (who reportedly typed the poems on a typewriter), but the charges were dropped after Adamyan spent two months in prison and Saakyan spent a few days in the custody of police. Pashinyan was charged again with insult in April 2002; those charges were eventually dropped.

On April 18, 2003, the National Assembly adopted Armenia's first post-Soviet penal code. That bill was signed into law by the president on April 30, 2003. Unfortunately, the new penal code effectively renumbered, but did not repeal, those articles criminalizing defamation and insult.

The articles of the Armenian penal code are the following:

Article 135. Libel.

1. *Dissemination of false information humiliating a person's good reputation, dignity and honor, is punishable by a fine in the amount of 50 to 150 times the minimum salary, or correctional labor for up to one year.*

2. *Libel through public speeches, publicly demonstrated works or through mass media, is punishable by a fine in the amount of 100 to 200 times the minimum salary, or correctional labor for one to two years, or with arrest for up to two months.*
0. *Actions envisaged in parts 1 or 2 of this Article, accompanied with accusation of the person committing grave or particularly grave crime, are punishable by correctional labor for up to two years, or with arrest for the term of one to two months, or with imprisonment for up to three years.*

Article 136. Insult.

0. *Insult is the improper humiliation of another person's honor and dignity and is punishable by a fine in the amount of up to 100 times the minimum salary, or correctional labor for up to six months.*
0. *Insult manifested in public speeches, in publicly demonstrated works or by mass media, is punishable by a fine in the amount of 50 to 200 times the minimum salary, or correctional work for up to one year.*

Article 318. Insulting a Representative of the Authorities.

0. *Publicly insulting a representative of authorities, in relation to the duties carried out by him, is punishable by a fine in the amount of 100 to 200 times the minimum salary, or correctional labor for six months to one year.*
2. *The same act expressed in public speeches, in publicly demonstrated works, or by mass media, is punished with a fine in the amount of 200 to 400 times the minimum salary, or with arrest for a term of one to three months, or with imprisonment for a term of up to two years.*

It is important to mention that in June 9, 2004 some positive amendments were made in Articles 315 and 316 by removing imprisonment as a measure of punishment from the articles. The expression “correctional labor for six months to one year” was removed from the articles, while the amount of fine was increased from 100 to 500 times of minimum salary. In addition, the imprisonment term in paragraph 2 was replaced by “for a term of up to one year”. However, the amount of fine was increased from 300 to 1000 times of minimum salary.

From Article 136 the term of correctional labor for up to six months was replaced by fine, which was increased from 100 to 400 times of minimum salary. In addition, the term of imprisonment from paragraph 2 was replaced with fine, which was increased to 200 to 800 times of minimum salary.

On June 19, 2003, Ambassador Roy Reeve, Head of the OSCE Office in Yerevan, sent an open letter to Artur Bagdasaryan, the newly elected Speaker of the National Assembly of Armenia. (The letter was also signed by members of the informal Media Legislation Working Group including representatives of the Embassies of the United Kingdom, Germany, the United States, Italy, Romania, Poland and ten representatives of non-governmental organizations.<sup>13</sup> The writers called for the decriminalization of defamation and insult and

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<sup>13</sup> The non-governmental organizations were: the Eurasia Foundation, the Open Society Institute Assistance Foundation-Armenia, the London-based Article 19, ABA/CEELI, the Yerevan Press Club; the Association of

further criticized the fact that the code envisions greater penalties for insult of government officials than for ordinary citizens. According to the regular report to the OSCE Permanent Council submitted on July 31, 2003, by Freimut Duve, the OSCE Representative on Freedom of the Media, Duve also wrote to the Armenian Foreign Minister expressing concern regarding this matter. This letter was written in response to Armenia's strong efforts to put criminal defamation strong norms in the soon to be adopted Criminal Code and the resistance of the government to the calls of international community for decriminalization of those norms. In this letter, Mr. Duve mentioned about his awareness of expert's survey that the Speaker of Armenian Parliament conducted on criminal defamation norms of OSCE member countries and the findings of the experts that the criminal libel was still in existence in several OSCE participating states. However, Mr. Duve reiterated the position of OSCE *that "libel should be decriminalized and dealt with under the civil code of the country concerned"*.

The views of OSCE officials, non-governmental organizations, and members of Yerevan's diplomatic community have met with mixed reactions. On the one hand, Parliamentary Speaker Artur Bagdasaryan pledged that parliament would review the criminal code. On the other hand, Parliament Deputy Speaker Tigran Torosian initially rejected these views as *"interference in Armenia's internal affairs."*<sup>14</sup> In fact, the 1991 OSCE Moscow Document, accepted by Armenia when it joined the OSCE in 1992, explicitly states that the OSCE participating States *"categorically and irrevocably declare that the commitments undertaken in the field of the human dimension of the [OSCE] are matters of direct and legitimate concern to all participating States and do not belong exclusively to the internal affairs of the State concerned."* Meanwhile, Manvel Grigorian, one of the drafters of the new penal code, responded by arguing that defamation is a criminal offense in all other member states of the Commonwealth of Independent States (i.e., those countries which, like Armenia, inherited a communist penal code) as well as some countries like Germany.

In 2004 the Parliamentary Assembly of the Council of Europe, which is monitoring Armenia's commitment of obligations as the member state of Council of Europe, finally expressed concern by its documents over the criminal defamation norms. Despite the Assembly considered during the Parliamentary debates of September 2004<sup>15</sup> that *"on 1 July 2004 the Armenian President signed the amendments to the Criminal Code partially decriminalising insult and defamation"*, it however stated that the Council of Europe and the OSCE have expressed reservations with regard to the new provisions, which still give civil servants an undue advantage in relation to ordinary citizens. In addition, in the PACE Resolution 1405, that was drafted on the basis of the above Parliamentary debates, an express recommendation was made to the Armenian government

*"to revise, in co-operation with the Council of Europe's experts and with due regard to the recommendations already made and those yet to be made, Articles 135, 136 and 318 of the Criminal Code in order to remove any possibility of making insult and defamation subject to a prison sentence"*<sup>16</sup>

There are several provisions of the above articles that came under heavy attack by international community, as mentioned above. First, the provisions provide with wide range

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Investigative Journalists, Internews, ProMedia, Media Law Institute, and Caucasus Media Institute. The full text of the letter is at: [http://www.osce.org/news/generate\\_pf.php3?news\\_id=3358](http://www.osce.org/news/generate_pf.php3?news_id=3358)

<sup>14</sup> Radio Free Europe/Radio Liberty Newslines, 23 June 2003 ([www.rferl.org](http://www.rferl.org)).

<sup>15</sup> PACE Document 10286 of 20 September 2004 about Implementing of Resolutions 1361 (2004) and 1374 (2004) on the Honoring of Obligations and Commitments by Armenia, par. 32

<sup>16</sup> PACE Resolution 1405 of October 2004, paragraph 10(iv)

of measures of punishment from fine to imprisonment for the period of up to two years. Second the articles provide different level of protection to public officials and ordinary citizens. Third, the texts of the articles are drafted with wide terms and with wider protection given to public officers. The mere existence of Article 318 already has potential chilling effect on freedom of speech in respect of critical remarks to the address of “representatives of authorities made not only by journalists, but also by political activists during any public event, such as demonstrations or rallies. During the mass arrests of political activists between April-June 2004, the Prosecutor General of Armenia brought up charges against the opposition “Justice” block, which involved nine opposition parties, under Article 318 of the Criminal Code mentioned above on the basis of “insulting remarks by the members of the Justice block and persons adhering to the block” to the address of public officers during the speeches made in public demonstrations organized by them. Thus, the Article 318 was used for bringing charges against the block of opposition parties rather than individuals. However, under Article 318 many opposition activists were detained, while some of them were convicted for up to one and half year of imprisonment.<sup>17</sup> The use of defamation and insult norms to suppress the opposition during the Presidential and Parliamentary elections of 2003 and during the public protest of March – June 2004 was highly criticized by international organizations.<sup>18</sup> In its extensive research of the use of defamation and insult norms, the Human Rights Watch recommended the Armenian government to “*repeal the criminal defamation provisions in the Criminal Code and drop all current charges against opposition members for criminal defamation*”.<sup>19</sup>

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<sup>17</sup> Jhora Sapeyan v. Republic of Armenia, ECHR application No. 35738/03. .

<sup>18</sup> Human Rights Watch Briefing Paper, May 23 2003: “An Imitation of Law: The Use of Administrative Detention in the 2003 Armenian Presidential Election” Human Rights Watch Briefing Paper, May 23 2003: “An Imitation of Law: The Use of Administrative Detention in the 2003 Armenian Presidential Election”.

<sup>19</sup> ‘Cycle of Repression: Human Rights Violations in Armenia,’ Human Rights Watch Briefing Paper, 04/05/04, pg. 20.