PUBLIC AD-HOG REPORT

ENSURING RIGHT TO A FAIR TRIAL IN THE REPUBLIC OF ARMENIA

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1.1. Introduction

One of the main goals of judicial reforms underway in the Republic of Armenia is the fundamentally change of the judiciary of the Republic of Armenia, with a special stress on the protection of rights and legitimate interests of a person in accordance with recognized principles and norms of international law. This process gained an increased importance with ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the European Convention") and its Protocols, which should have made the European legal values a key milestone predetermining further development of the judicial system of the Republic of Armenia. Although this process in the field found its reflection in the reforms made to the Constitution of the Republic of Armenia, it became an end in itself, for European standards pertaining to human rights, including those of protection of the right to a fair trial found no proper application in the country.

Bearing this in mind, consistent introduction of European values is turning into a priority in the field of criminal procedure, especially with a view of its objective sensitiveness from the human rights angle. European standards of criminal procedure are the values that may assure the protection of human rights in the democratic society without prejudice to the implementation of state criminal policy in the struggle against crime. These are called to assure proportionality of public and private interests in criminal proceedings so that to uphold confidence of public in the statehood and particularly in the justice.

Together with this, existence of legislation that is in line with the European standards is a necessary but an insufficient condition for ensuring the harmonization of the local criminal procedure with the mentioned

standards. Enforcement thereof is another precondition for meeting the relevant standards, as having an ideal legislation would not render criminal procedure democratic unless the laws are enforced in accordance with the standards. So in this situation examination of realization of the right to fair trial (as guaranteed both by the Constitution of the Republic of Armenia and the European convention) in the criminal procedure of the Republic of Armenia acquires special urgency[1].

Right to fair trial encompasses such elements as are independent and impartial tribunal established by law, public hearing within a reasonable time, right to public trial, equality of parties and adversarial process, presumption of innocence, rights of everyone charged with a criminal offense, etc.

This Report will dwell upon the issue of realization of the principle of equality of parties and adversarial nature of criminal proceedings in the Republic of Armenia as one of most important elements of the right to a fair trial - with an aim to assure its comprehensive and structured analysis. This drive is conditioned by the fact that the apogee of adversarial process between the parties is reached during trial.

From this point of view the Report analyzes the relevant provisions of the European convention, the case law of the European Court of Human Rights (hereinafter referred to as "the European court") with regard to the application of the mentioned provisions, the national legislation of the Republic of Armenia and law enforcement practice in the country under the light of its conformity to the European standards.

1.2. General provisions on equality of parties and adversarial process

The right to a fair trial of everyone is guaranteed in the international treaties ratified by the Republic of Armenia and in the national legislation of the country.

[1] The right to fair trial has also been incorporated in the Universal Declaration of Human Rights and in the International Covenant of Civil and Political Rights.

In particular, according to part one of Article 6 of the European convention “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".

The equality of the parties to proceedings, although not prescribed directly in the convention, is included in the concept of fair trial envisaged by Article 6 of the European convention upon the conclusion of the European court. It is only one of the elements of a broader concept of fair trial, including the fundamental principle of adversarial system of criminal proceedings, which requires each party to be given a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis his opponent. The parties to proceedings shall be justly disadvantaged. The principle of equality of arms brought forward by the European court is directly linked with the mentioned idea. In the course of criminal proceedings where contrary interests collide, the equality of arms is the means that can assure reasonable chance of any of the parties to present his case under conditions that do not place him at a substantial advantage vis-à-vis his opponent (*Judgment on the case of Neumaister v. Austria of 27 June 1968, paragraph 22; Judgment on the case of De Haes and Gijsels v. Belgium of 24 February 1997, paragraph 53*).

Article 19 of the Constitution of the Republic of Armenia lays down that “Everyone shall have a right to restore his violated rights, and to reveal the grounds of the charge brought against him in a fair public hearing under the equal protection of the law and observance of all requirements of justice by an independent and impartial court within a reasonable time”.

In the conclusion of the Constitutional Court of the Republic of Armenia the requirement of the mentioned Article of the Constitution of

the Republic of Armenia is, among other guarantees for fair trial, the conduction of proceedings under conditions of equality of parties[2].

Requirements relating to application of the principle of equality of parties and of adversarial nature of proceedings are also enshrined in the criminal procedure legislation of the Republic of Armenia.

In particular, Article 23 of the Criminal Procedure Code of the Republic of Armenia (hereinafter referred to as "Criminal Procedure Code of the RA") laying down the principle of adversary proceedings contains the following provisions:

1. Criminal proceedings shall be conducted on the basis of the principle of adversarial process.
2. Criminal prosecution, defense, and disposal of a case shall be distinguished and shall be conducted by different bodies and persons.
3. The court shall not support either the prosecution, or defense party, while expressing only the interests of the law.
4. The court hearing the criminal case shall, by observing objectivity and impartiality, provide the prosecution and the defense with conditions necessary for thorough and complete examination of the circumstances of the case (…).
5. Parties participating in criminal proceedings shall, by criminal procedure legislation, be provided with equal opportunities for defending their position. The court shall justify a judgment only by the evidence, examination of which has been made equally accessible for both parties (…)".

Yet, for full compliance with the requirements of the European convention and case law of the European court, it is imperative to assure adherence to and application of the standards in question not only in the

[2] Decision of the Constitution of the Republic of Armenia on the case regarding the conformity to the Constitution of the Republic of Armenia of point 2 of Article 311 and points 1 and 2 of part 1 of Article 414.2 of the Criminal Procedure Code of the RA, based on the application of the citizen Gevorg Gzraryan of 24 July 2007, paragraph (http://concourt.am/armenian/decisions/common/2007/index.htm).

legislation of the Republic of Armenia, but also in the law enforcement practice of courts.

This is the case why the Report aims to indicate not only the conformity of relevant national legal acts to European (Strasburg) standards, but also to shed light on the situation of adherence thereto in the law enforcement practice within Armenia. The examination of the law enforcement practice is based on the results of the activity of the Human Rights Defender (Ombudsperson) of the Republic of Armenia and review of proceedings by the latter's office.

1.3. Participation of the Defense Counsel in court trial

Participation of the Defense Counsel in criminal proceedings is an essential condition for assuring the principle of adversarial process in the criminal proceedings, as required both by the judgments of the European court and current Armenian legislation.

According to the European court: "It is a fundamental aspect of the right to a fair trial that criminal proceedings… should be adversarial and that there should be equality of arms between the prosecution and defense. The right to an adversarial trial means, in a criminal case, that both prosecution and defense must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party" *(Judgment on the case Fitt v. the United Kingdom of 16 February 2000, paragraph 44).* This conclusion determines the merits of equality of parties and adversarial process for parties as an element of the right to a fair trial.

In another case the European court concluded that "no issue arises in relation to the fact that the Investigating Judge (…) heard the witnesses in the absence of the applicant's counsel in the course of the preliminary judicial investigation, since in the course of the subsequent appeal proceedings these witnesses were heard in counsel's presence" (*Judgment on the case Doorson v. the Netherlands of 26 March 1996, paragraph 68).*

In this respect the interpretation of the issue of participation of the Defense Counsel in criminal proceedings is linked to Article 6(3)(c) of the European convention, which guarantees the right of everyone charged with a criminal offense to "defend himself (...) through legal assistance of his own choosing (...)".

The Article attaches special importance to participation of the Defense Counsel in the trial, for the European convention "is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective; this is particularly so of the rights of the defense" (*Judgment on the case of Artico v. Italy of 13 May 1980, paragraph 33*).

Article 23(7) of the Criminal Procedure Code of the RA contains provisions with regard to the mentioned statement: "The court shall ensure the right of the parties to participate in the trial of the case at the court of first instance and the court of appeals". Point 8 of the same Article envisages that "Participation of the parties in the trial of a criminal case shall be mandatory".

Part 2 of Article 20 of the Constitution of the Republic of Armenia guarantees the right of protection of a person charged with an offense: "Everyone shall have a right to legal counsel of his own choosing starting from the moment of his arrest, subjection to a measure of restraint or indictment".

Part 1 of Article 19 of the Criminal Procedure Code of the RA lays down the rights of defense of every defendant[3]. Part 2 of the same Article lays down the obligation of the body conducting the criminal proceedings "to explain to the defendant his rights and provide him with actual possibility to defend themselves against the charges by all means not prohibited by law (a similar requirement is envisaged by the Article 65 of the Criminal Procedure Code of the RA laying down the rights and obligations of the accused person). The legislature also guarantees the right of the defendant to defend themselves against the charges either in person

[3] The guarantees of the Article equally apply to another subject of the criminal procedure, the suspect.

or through a counsel and legal representative (Article 19(4) of the Criminal Procedure Code of the RA).

In this respect Article 304 of the Criminal Procedure Code of the RA on participation of defense counsel in trial and consequences of his failure to appear reads as follows:

"1. When participating in trial, counsel shall enjoy rights equal to those of the prosecuting attorney.

2. In case of default of appearance of counsel and impossibility to substitute him with another counsel at that hearing, examination of the case shall be postponed. Substitution of the counsel failing to appear at court hearing shall be permitted only upon consent of the defendant. When the participation of the counsel invited by the defendant is impossible by reason of default of appearance at three consecutive court hearings or of disease requiring sustained treatment or of impossibility to appear at court hearing by any other ground for a long time, the court shall have the right to propose the defendant to choose another counsel by postponing the trial, and in case of his refusal, to assign a new counsel. When postponing the case, upon resolving the issue of substituting the counsel, the court shall take into account the expediency of such decision. A new counsel participating in the case shall be provided enough time by the court for examination of materials of the case. He shall have the right to solicit for repetition of any operation carried out in the course of trial before his involvement in the case and as a result of which substantial circumstances have been revealed".

The mentioned provisions of the Criminal Procedure Code of the RA are based on the Constitution of the Republic of Armenia and case law of the European court and are an essential guarantee for assuring equality of arms between the prosecution and defense, as well as full realization of the fundamental right of defense of the defendant.

Yet, in practice there are cases where the examination of a criminal case is held in the absence of the defense counsel, thus breaching the above-mentioned requirements.

According to the results of the investigation into the examination of the criminal case instituted in relation with the events that took place in Yerevan on 1 March 2008 by the representatives of the Human Rights Defender of the Republic of Armenia, the Court of General Jurisdiction of Center and Nork-Marash Communities of Yerevan in its hearing of 16 March 2009 has applied a judicial sanction against the defense counsel H.A. of the defendant S.M. as envisaged by Article 314.1 of the Criminal Procedure Code of the RA by filing an application to the Chamber of Advocates with a request to call the counsel to liability. Thereafter the court decided to continue the examination of the case in the absence of the defense counsel who failed to appear at the hearing. Such a decision was grounded by the fact that the counsel failed to appear in court and that no good reason or circumstance on his default was submitted to court.

In this case the court actually violated the requirements in question, which prohibit the continuation of trail in the absence of defense counsel. In postponing the case hearing on the grounds of default, the court links the continuation of the examination of the case with the mandatory participation of the defense counsel (although new to the case).

1.4. Discussion of motions of the parties and resolution thereof by court

Criminal Procedure legislation of the Republic of Armenia gives a separate regulation to issues relating to discussion and resolution of motions by court.

In particular, Article 331 of the Criminal Procedure Code of the RA is dedicated to filing and resolution of motions. According to the Article, "The presiding judge shall inquire whether the prosecution party and the defense party have motions requiring new evidence and attaching them to the case. The person filing a motion shall be obliged to clarify which particular circumstances require additional evidence.

The court shall be obliged to consider each filed motion, to hear opinions of parties. Where circumstances for discovery of which the motion is filed may be relevant for the case, or where the material, the probative value of which is challenged, has been obtained through a substantial violation of law, the court shall satisfy the motion. The court shall take a reasoned decision about rejecting the motion. Rejection of motion by court shall not restrict the right of the person filing the motion to file the same motion later.

The court shall have the right to take a decision at its own initiative on summoning witnesses, assigning an expert examination, requiring other evidence" (Article 331 of Criminal Procedure Code of the RA).

According to Article 102(3) of the Criminal Procedure Code of the RA the decisions adopted on motions and claims shall be reasoned.

Article 313 of the same Code envisages that the court shall adopt decisions regarding all issues resolved during trial.

In this respect, the review of examinations of criminal cases conducted by the representatives of the Human Rights Defender of the Republic of Armenia come to prove that the institute of filing motions is a widely accepted practice in the law enforcement field of Armenia. In examinations of cases at first instance courts the motions are filed almost in all hearings – mainly by the defense.

A comparably small portion of motions filed in the courts of appeal may be explained by the peculiarities of scope and procedure applied in the appellate proceedings envisaged by the legislation of the Republic of Armenia.

At the same time the review shows that the motions of the defense are largely rejected by courts. Moreover, there are cases where the motions of the defense are not considered by court at all. The review of the trial with regard to the case of A.S. is a bright example of such practice.

Also, review of law enforcement practice indicates that even in the court decisions in frames of judicial oversight over pre-trial proceedings submissions of the defense are accorded no due consideration. For

example, in the decision of the Court of General Jurisdictionof Center and Nork-Marash Communities of Yerevan on the case of A.K. the court mainly dwelt upon the reasoning of motion filed by the criminal prosecution body, whereas reflected upon the arguments submitted by the defense only a few times.

Whereas in the cases of H.M. or A.P. the decisions of the same court contain no arguments brought forward by the defense.

As contrasted to such practice, the examination of the judgments of the European court reveals that the court shall, in the decision of rejecting or granting the motion, examine both the arguments of the party filing the motion and of that objecting to it, and arrive at a relevant conclusion based on the results of proper analysis of both *(Judgment on the case of Georgiadis v. Greece of 29 May 1997, paragraph 43, and Judgment on the case of Hadjianastassiou v. Greece of 16 December 1992, paragraph 33).* The aim of this requirement is to achieve equality for the parties and adversarial process in criminal proceedings.

Whereas in Armenia there are registered cases of courts according differentiated treatment to the prosecution and defense. According to an audio recording on a CD submitted by advocate S.V. to the Human Rights Defender, in examination of the criminal case of G.V. the judge of the Court of General Jurisdiction of Center and Nork-Marash Communities of Yerevan accorded highly differentiated approach in addressing the parties to a case. In particular, while addressing the prosecutor, the judge used the word “honorable” (court hearings of 15 June 2009 and 17 June 2009), and after hearing his opinion and motion, thanked the prosecutor (court hearing of 17 June 2009), whereas he used none of the mentioned expressions while addressing the defense, showing no courtesy at all. In this context it shall be mentioned that during the examination of the criminal case of N.P. at the Court of General Jurisdiction of Center and Nork-Marash Administrative Districts[4] of Yerevan, the prosecutor, without asking a

[4] According to the Law of the Republic of Armenia “On Making Amendments to Judicial Code of the Republic of Armenia” of 19 September 2009, community

permission of the judge presiding the court hearing, read out the concluding part of the indictment while sitting (court hearing of 23 October 2009)[5]. According to the observations of the representatives of the Human Rights Defender of the Republic of Armenia, when the defendant tried to inquire whether he can address the court while sitting, the presiding judge mentioned that he can do so only upon his permission. To the question of N.P. whether the court allowed the prosecutor to address the court while sitting, the latter replied that the prosecutor did not address the court, but read out the concluding part of the indictment.

Such interpretations, indeed, bear artificial nature and in general indicate the discriminatory stance of the court towards the parties. These come to challenge the full realization of the principle of adversarial process and equality of parties in the criminal procedure of the Republic of Armenia and are unacceptable from the point of assuring full legal clarity in the country.

The above-mentioned leads to a conclusion that the courts in the Republic of Armenia have not fully abandoned their previous stance of siding with the criminal prosecution body as envisaged by previous criminal procedure legislation and continue to bear the influence of the prosecutorial system.

1.5. Adversarial process and submission of evidence

The right to a fair trial supposes an adversarial nature of proceedings, which means an opportunity for the parties to have knowledge of and to comment on the observations filed or evidence adduced by the other party *(Judgment on the case of Ruiz-Mateos v. Spain of 23 June 1993, paragraph 63; Judgment on the case of Fitt v. the United Kingdom of 16 February 2000, paragraph 44)*.

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general jurisdiction courts of Yerevan were renamed into administrative district courts of general jurisdiction of Yerevan.

[5] A relevant article on the incident was published in the "Haykakan Zhamanak" ("Armenian Times") daily's issue No 198 (2387) of 23 October 2009.

Adversarial process and equality of parties is one of fundamental principles of criminal procedure. National legislation may assure this requirement via different means, yet the essential outcome of it is the safeguarding of the party's opportunity to have knowledge of the observations filed and to comment on it from his standpoint.

Also, according to the judgment of the European court, the "prosecution authorities (shall) disclose to the defense all material evidence in their possession for or against the accused" *(Judgment on the case of Rowe and Davis v. the United Kingdom of 16 February 2000, paragraph 60)*. Further in this respect, the European Commission held in *Jespers v. Belgium* that "the equality of arms principle (...) imposes an obligation on prosecuting and investigating authorities to disclose any material in their possession, or to which they could gain access, which may assist the accused in exonerating himself or in obtaining a reduction in sentence. This principle extends to material which might undermine the credibility of a prosecution witness." *(European Commission report on Jespers v. Belgium of 14 December 1981, paragraphs 55 and 57)*.

The obligation of the body conducting the criminal prosecution "to undertake all measures prescribed by the Criminal Procedure Code of the RA for a comprehensive, full and objective investigation of the case circumstances, to reveal all the circumstances both convicting and absolving the suspect and the defendant, and also the circumstances reducing and aggravating his responsibility" is envisaged by Article 17 of the Criminal Procedure Code of the RA, which lays down the principle of fair trial.

The defendant or the defense counsel has the right "to acquaint himself, from the moment of completion of preliminary investigation, with the materials of the case, make copies thereof free of charge and to write out any data from the case in any volume (Articles 65(2)(16) and 73(1)(12) of the Criminal Procedure Code of the RA).

It shall be mentioned to this end that in the law enforcement practice of the Republic of Armenia there are still cases where, in violation of the

above-mentioned legal requirements, not all materials possessed by the court are disclosed to the defendant or a defense counsel. This observation is based on the findings of study by the staff of the Human Rights Defender of the Republic of Armenia of the examination of the criminal case instituted in relation to the events that occurred in the city of Yerevan on 1 March 2008. Defense counsels and prosecutors participating in the case frequently announced that not all materials were disclosed to them and that they had filed appropriate motions thereon. For example, the defense counsel of defendant Alexander Arzoumanian announced that the document authorizing the prosecutor participating in the case by the Prosecutor General of the Republic of Armenia to carry out oversight, procedural guidance and defense of charges in the given criminal case was not disclosed to the defense. In response, the court, postponing the examination of the case, confirmed that the defense did not acquaint itself with the mentioned document, for it was submitted only to the court and is not included in the materials of the criminal case. The defense counsel M.A. of the defendant H.H. also announced that the court failed to disclose all materials of the criminal case to the defense.

Issues relating to failure to provide the defendant or the defense counsel participating in a case with the materials of a criminal case were also raised in the complaints submitted to the Human Rights Defender. Member of the Chamber of Advocates of the Republic of Armenia D.G. filed a complaint as to that the Criminal Court of Yerevan does not provide him with the opportunity to get acquainted with the materials of the criminal case and make necessary copies thereof.

Whereas in reality the equality of parties supposes that the defense is the party that should determine whether the observations of the prosecution are worth an answer. So it is not fair when the prosecution submits materials incidental to the criminal case to the court without the knowledge of the defense and without giving the latter a chance to comment on such.

It goes without saying that the conclusions of the prosecution, indirect or formal possibility to comment on materials submitted may not

be equivalent to the right of the defendant to direct examination of such materials and commenting thereon.

For assurance of the principle of equality of parties and examination of evidence under equal conditions the issue of conduction of trial without participation of the witnesses summoned thereto is of utmost importance. According to Article 332 of the Criminal Procedure Code of the RA, "Where one of witnesses, expert, specialist invited to trial fails to appear, the court, hearing opinions of parties, shall take a decision to continue examination of the case or postpone it. Trial may continue unless one of the mentioned persons' failure to appear obstructs comprehensive, complete and impartial examination of circumstances of the case. When taking a decision to postpone examination of the case the court shall have the right to interrogate witnesses, expert, specialist, victim, civil plaintiff, civil respondent and their representatives that appeared in court. Where after being postponed the case is examined by the same composition of court, the mentioned persons shall be summoned for the second time for court hearing only upon necessity."

Article 339 of the Criminal Procedure Code of the RA refers to clarification of reasons for the refusal by the witness to testify and warning about the responsibility for refusal or evasion from testimony and for perjury.

"Prior to interrogation, the presiding judge shall ascertain the identity of the witness and clarify about:

1) his or her right to refuse to testify against himself or herself, his or her spouse or close relatives;

2) the liability for refusal or evasion from testimony and for perjury;

The implementation of the mentioned requirements shall be entered in the record of the trial.

A witness under the age of 16 shall not be warned about liability envisaged for refusal or avoidance from testimony and for perjury" (Article 339 of the Criminal Procedure Code of the RA).

Criminal procedure legislation of the Republic of Armenia lays down that "Witnesses shall be interrogated separately and in the absence of witnesses who have not been yet interrogated.

The presiding judge shall find out the relationship of the witness with the defendant, victim, civil plaintiff, civil respondent and other persons participating in the case and shall ask the witness to tell everything known to him about the case. It shall not be allowed to interrupt the witness with questions.

A witness summoned for trial by motion of a party or presented by it, shall be at first interrogated by the person who has filed the motion or introduced the witness, thereafter by other persons from the party concerned, and finally by representatives of the adversary party and court.

A witness summoned at the initiative of court shall be first interrogated by prosecuting party, then by the defense, and finally by the court" (Article 340 of the Criminal Procedure Code of the RA).

Disclosure of testimonies given by a witness in the course of inquest, preliminary investigation or previous trial, as well as reproduction of audio records of his or her testimonies in the course of trial shall be authorized, where the witness is absent from court hearing due to such reasons which rule out his or her possibility to appear at court, where there are essential contradictions between such testimonies and testimonies given by the witness in the court, as well as in other cases envisaged by the Criminal Procedure Code.

Reproduction of audio records of testimonies of the witness shall be possible only after disclosure of protocol of his or her interrogation or the part of record of court hearing containing the testimonies of the witness" (Article 342 of the Criminal Procedure Code of the RA).

Study conducted with regard to conformity of the courts with the mentioned provisions show that there are cases in the law enforcement practice where witnesses on the summons list do not appear in court due to various reasons (illness, etc.). By the way this mainly refers to witnesses of the prosecution. In these cases, unfortunately, the court often resorts to

promulgation of the testimonies of the witnesses (say, instead of issuing a summons or apprehension of witness). In such issues, when it comes to clarifying positions, the courts are more inclined to consider the opinion of the prosecuting party.

Whereas Article 6(3)(d) of the European convention clearly lays down that "Everyone charged with a criminal offence has a right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him".

In this regard the European court has reiterated that "all evidence must normally be produced at a public hearing, in the presence of the defendant, with a view to adversarial argument. There are exceptions to this principle, but they must not infringe the rights of the defense; as a general rule, paragraphs 1 and 3 (d) of Article 6 (art. 6-1, art. 6-3-d) require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statements or at a later stage" *(Judgment on the case of Van Mechelen and Others v. the Netherlands of 23 April 1997, paragraph 51)*.

Also there are abundant cases where the witnesses are posed with leading questions (mainly by the prosecutors) in violation of the requirements of the European convention and the legislation of the Republic of Armenia. To note, such behavior was particularly notable in the frames of the examination of the criminal case instigated in relation to the events that took place in the city of Yerevan on 1 March 2008, which is evidenced in the study of relevant court hearings by the staff of the Human Rights Defender of the Republic of Armenia. A bright example of such violations was the interrogation of witness B.E., during which the prosecutor posed merely leading questions. Moreover, when defendants A.A. and S.S. put questions to the witness, the prosecutor kept on interfering in the interrogation and ended up with shouting on the two defendants and labeling them "criminals".

Apart from this worrisome regularity the mentioned phenomena come to prove that there is a room for improving not only the legislating of the Republic of Armenia, but also the law enforcement practice and the drive of conformity with the European standards.

1.6. Determination of the manner of examining evidence at trail

Trial is the key stage of litigation, where the court, under direct participation of parties to litigation, examines all evidence of the case under court procedure for revealing the circumstances of the crime.

In this respect, for assuring equality of parties in the trial and their right to equal conditions for examination of evidence, of special importance is the provision laid down in Article 335 of the Criminal Procedure Code of the RA, which states that "The court shall decide the manner of examination of evidence upon hearing the opinions of parties".

The findings of the monitoring conducted by the Open Society Institute Assistance Foundation and Armenian Institute for Development on realization of the right to a fair trial once again prove that Armenian courts are inclined to conduct criminal prosecution. The statistics derived from the findings of the monitoring revealed that in 75.6 % of cases the court sided with the stance of the prosecution, despite the fact that in 80.4 % of cases the courts adhered to the requirement of Armenian legislation as to that the court determines the manner of examining evidence upon hearing the opinions of both parties (Article 335 of the Criminal Procedure Code of the RA).

In this context it is not surprising that, in violation of the principle of adversarial process and of other relevant provisions of the current Criminal Procedure Code of the RA guaranteeing fair trial, there are cases in the judicial practice where the judges promulgate the concluding part of the indictment[6].

[6] Realization of the right to a fair trial in the judiciary of the Republic of Armenia (Findings of Monitoring), Yerevan, 2009, pages 154-155.

This may be referred to as a "legacy" of Soviet era resting in the psychology of a certain number of judges, which may be uprooted not only through legislation-backed judicial reforms, but also via full, clear and accurate explanatory work with the law enforcement authorities.

1.7. Proper assessment in the judgment of evidence examined in the case

In the endeavor to assure the application of European standards on equality of parties, the right to a fair trial and provisions of the legislation of the Republic of Armenia, of utmost importance is the court's proper assessment in its judgment of all evidence examined during the case and of all arguments (or at least the major ones) put forward by parties on inadmissibility of the evidence, as well as comprehensive analysis of such.

This standpoint follows from the case law of the European court regarding reasoning of judicial acts (this particularly refers to judicial acts on the merits of a case).

The legislation of the Republic of Armenia also contains provisions on reasoned judgment. In particular, Article 371 of the Criminal Procedure Code of the RA lays down that the "Descriptive and reasoning part of the judgment shall indicate the following:

1) content of the charge;
2) conclusions of the court on circumstances of the case, the charge being proven and defendant's guilt;
3) evidence, on which conclusions of the court are based on;
4) norms of the law, by which the court was guided when taking a decision".

As opposed to the mentioned provisions, there are frequent cases in Armenia when the defense raises issues related to the admissibility of evidence grounding the indictment, or disputes separate proofs, yet the court does not give any assessment on such in its judgment and ends up reflecting to those in general wording.

Examination of the law enforcement practice shows that in most cases the judgment contains no reference to the issues raised by the defense at all. A bright example of such is the judgment made with respect to defendants A.A. and S.S. by the Court of General Jurisdictionof Center and Nork-Marash Communities of Yerevan as a result of examination of the criminal case instituted in connection with the events that occurred on 1 March 2008 in the city of Yerevan.

In examination of the case the defense counsels of the defendants disputed the admissibility of protocols on site search of the events, a number of decisions on recognizing certain material evidence as such, conclusions of assigned and received expert examinations, as well as of protocols of interrogation of certain witnesses. Arguments of defense counsels in this regard were made in motions filed to court and in the speech for the defense.

Meanwhile in its judgment the court made no proper reference to the arguments of the defense party and failed to analyze such. Instead, the court gave the following general wording: “Upon discussing the motions of the defense party on inadmissibility of certain evidence obtained within the frames of the case, the court resolves that these are ungrounded and shall be rejected, for evidence mentioned in motions was obtained and recognized as such in accordance with the procedure laid down by law".

Such positions of courts naturally undermine the equality of parties during litigation and provisions on equality, thus endangering the establishment of the very idea of the right to a fair trial in the judicial system of the Republic of Armenia. This results in transformation of the guarantees laid down by law into illusionary and formal requirements that are impossible to enforce in practice.

1.8. Equality in relation to liability for contempt of court

Another important aspect of assuring equality of parties, and consequently fair trial of a case is equality of parties to trial in their liability for contempt of court.

The national legislation of the Republic of Armenia contains optional norms vis-à-vis parties for contempt of court.

Article 314.1 of the Criminal Procedure Code of the RA lays down the judicial sanctions for conduct that constitutes contempt of court. Part 1 of the mentioned Article reads as follows: "In cases of expressing contempt of the court, obstructing the regular course of hearing, availing of their procedural rights in bad faith or failing to fulfill procedural obligations without good reason or improper fulfillment thereof, the court shall have a right to impose the following judicial sanctions on the participants of proceedings, persons participating in criminal proceedings and other persons present at court hearing:

1) warning;
2) removal from the courtroom;
3) judicial fine; or
4) filing a request with the Prosecutor General or the Chamber of Advocates, respectively, for subjecting them to liability".

For a conduct that constituted contempt of court the criminal procedure legislation of the Republic of Armenia envisages criminal liability. In particular, Article 343(1) of the Criminal Code of the Republic of Armenia lays down that "Contempt of court expressed by malicious evasion to attend the court by a witness or a victim or a defense counsel or by not following instructions of the judge or by violating the procedure of court session or by performing other actions and proving obvious contempt of court and of procedure of court session shall be punished by a fine in the maximum amount of 100-fold of the minimum salary or by detention for a maximum term of one month".

As seen in the provision, the legislature considers that only the witness, the victim and the defense counsel are subjects of conduct that constitutes contempt of court. Other persons participating in the criminal proceedings are not considered subject of corpus delicti. That is, malicious evasion of attending the court or not following instructions of the judge or violation of the procedure of court session or performance of other actions that would

prove an obvious contempt of court and of the procedure of court session by others shall not constitute a contempt and result in corpus delicti under the Criminal Code of the Republic of Armenia.

So the mentioned Article of the Criminal Code of the Republic of Armenia places the defense counsel in an unequal position vis-à-vis other participants of the trial, and especially the prosecuting attorney, for the counsel may be subjected to criminal prosecution, while the prosecutor and others may not. Moreover, this restricts the possibility of court to undertake measures envisaged by law for holding the prosecuting attorney and others expressing contempt of court criminally liable.

The provision in question places the prosecuting and defense parties of trial in an unequal position – thus resulting in discriminatory legal treatment of such. This norm of the Criminal Code of the Republic of Armenia is therefore in contradiction of the European standards on equality and adversarial process, as well as of the provisions of the Constitution of the Republic of Armenia on equality of everyone before law, right to legal counsel and equality of arms of parties.

This issue gained special relevance in the law enforcement practice of the Republic of Armenia when leaving by four advocates (M.Sh., A.Z., A.G. and D.G.) of the court room was viewed by the court as contempt of court and criminal cases were instituted against them. By the way, relevant announcements on the issue were published in the www.court.am website.

It shall also be mentioned that before 16 December 2005 Article 206^{1} of the Code of Administrative Offenses of the Republic of Armenia also envisaged liability for contempt of court. Yet, the defense counsel (or an advocate in general) was not listed as a subject to be held administratively liable for the mentioned deed.

Such regulation of the matter in the Criminal Code of the Republic of Armenia aggravates the equality of parties to criminal proceedings. This leads to a logical question of what is the reasoning of criminalization of the contempt of court and recognizing the defense counsel as a subject of such

crime. The issue of what reasons led to considering the application of the said norm as expedient shall also be clarified.

Anyway, based on the above considerations, the Human Rights Defender of the Republic of Armenia filed on 18 June 2009 an application with the Constitutional Court requesting to determine the conformity of Article 343(1) of the Criminal Code of the Republic of Armenia with the Constitution.

1. 9. Conclusion

Summing up the findings of the Report, it may be concluded that:

1. Violations of the right to a fair trial in the law enforcement practice in Armenia are conditioned by the fact that the courts in the Republic of Armenia have not fully abandoned their previous stance of siding with the criminal prosecution body as envisaged by previous criminal procedure legislation and continue to bear the influence of the prosecutorial system.

2. This in turn leads to unfair distortion of the role and significance of courts as a proper forum for just settlement of legal disputes, leading to loss of confidence in it by public.

3. For eliminating the violations revealed in this Report the legal mentality of those vested with judicial powers in Armenia shall be modified in root for assuring a renewed perception of what would constitute a full realization of international standards of the right to a fair trial and provisions of the national legislation of the Republic of Armenia thereon in law enforcement practice.

4. Judicial system of Armenia shall adopt a path of self-purification and self-management for assuring its actual independence vis-à-vis any external influence.

5. Violations of the law enforcement practice also owe to the gaps of Armenian legislation and incomplete regulation of certain issues. So the legislation shall be enshrined with safeguards that would neutralize such violations and would promote the principle of legal clarity.

Section 2. Ensuring fair trial in examining property disputes

2.1. Introduction

The principle of fair trial of a case first of all presupposes a right of access to fair trial. In this respect Article 18 of the Constitution of the Republic of Armenia lays down that "*Everyone shall have a right to an effective legal remedy of his rights and freedoms before judicial, as well as other national authorities"*. This constitutional principle has also been incorporated in Article 2 of Civil Procedure Code of the Republic of Armenia, according to which: "*The interested person is entitled to apply to court, in accordance with the procedure established in this Code, for the protection of his rights, freedoms and legal interests stipulated and envisaged in the Constitution of the Republic of Armenia, laws and other legal acts or agreements"*.

Based on the necessity of efficient management of justice, the legislature of the Republic of Armenia envisages a certain court procedure of examination of cases. But rules of procedure shall not deny or impede the right of a person to legal remedy. In this respect the report will dwell upon issues relating to return of statements of claim/applications, rejection of such, as well as issues relating to the return of appeal of a person that is not a participant of the case. Gaps/violations in the procedure of accepting statements of claims by the court impeded, and in certain cases denied the right of a person to legal remedy.

Armenian courts frequently misapprehend the issue of correlation of criminal and civil proceedings, which initially results in ungrounded suspension of civil proceedings thus depriving a person from legal remedy within a reasonable term. Moreover, due to peculiarities of examination of a civil claim in the course of criminal proceedings, especially with a view that civil claims examined in frames of a criminal case may not be remedied later through civil procedure, a confusion arises from the point of view of examining and rejecting concomitant but not the same civil claims.

So cases of misperception of correlation of the two proceedings lead to denial of a person of his right to legal remedy in the frames of civil proceedings or creation of artificial barriers by courts, thus denying his right to realize legal remedies within reasonable time.

Since 2001 cases instituted by owners of property expropriated in the public and national interest, as well as by state non-commercial organizations against the former constitute a large number in the series of disputes regarding the right to ownership[7]. Bearing in mind the large number of such cases and adoption of two decisions thereupon by the Constitutional Court of the Republic of Armenia[8], which confirmed the non-conformity of certain provisions of laws to the Constitution of the Republic of Armenia, as well as the fact of dozens of cases regarding the issue of expropriation of property pending before the European Court of Human Rights, this report will cover issues of freedom of contract, quasi-civil form of "contracts", quasi-public nature of independent authorities involved and misperception of burden of proof.

[7] Decisions of the Government of the Republic of Armenia No 1151-N of 1 August 2002, No 1025-N of 15 July 2004, No 950 of 5 October 2001, No 57-N of 29 January 2004.

[8] Decision (27 February 1998) of the Constitutional Court of the Republic of Armenia on the case regarding the conformity to Articles 8 and 28 of the Constitution of the Republic of Armenia of second, third, fourth and fifth parts of Article 22 of the Law of the Republic of Armenia on Real Estate adopted by the National Assembly on 27 December 1995.

Decision of the Constitutional Court of the Republic of Armenia "on the Case concerning the Determination of the Issue regarding the Conformity of Article 218 of the Civil Code of the Republic of Armenia, Articles 104, 106 and 108 of the Land Code of the Republic of Armenia, Decision of the Government of the Republic of Armenia N-1151 of 1 August 2002, "on the Activities of Implementation of Development Programmes whithin the Administrative Borders of "Kentron" Community of Yerevan"" of 18 April 2006.

2.2. Impeding access to justice

Returning of statement of claim/application

According to Article 3 of the Civil Procedure Code of the Republic of Armenia: "*The court shall initiate a civil case only based on a civil claim or application*". By returning the statement of claim or application the court actually postpones the institution of a civil case for a certain period, but does not deny a person the right to legal remedy. In this case the person is given a time to eliminate mainly technical deficiencies in the application. Yet, the study of cases of returning the statements of claim/applications reveals that indicated deficiencies in returned applications may actually exclude the possibility to reinstate a civil case within a reasonable time frame.

The legislature clearly lays down the cases/reasons when a judge is entitled to decide on returning the statement of claim. By the way, such decision shall flow from the interest of justice management, which may include the following aspects: the court doesn't have jurisdiction over a case, or there is a case pending between same persons relating to the same matter and same grounds in another court or arbitration tribunal, there was a default to pay a state fee, a statement of claim was not signed, one statement of claim covers claims against one or more defendants that are not interrelated, etc. Study of judicial acts showed that judges sometimes make unreasonable decisions on returning statements of claim by putting forward requirements not envisaged by Article 92 of Civil Procedure Code of the Republic of Armenia. For example, a statement of claim was filed with the Court of First Instance of Arabkir and Qanaqer-Zeytun Communities of Yerevan on 5 September 2007 containing claims on separation of a property under shared ownership into 6 parts and assigning shares therefrom to the plaintiffs. The court decided to return the statement of claim with a reasoning that the "*plaintiffs did not attach the technical conclusion issued by the relevant subdivision of the State Cadastre of Real Estate under the Government of the Republic of Armenia on the possibility*

of separating shares from within the apartment". Such a requirement set forward by the court would naturally render the reinstatement of the civil case impossible for a lengthy period. In this case the court misconstrued Articles 97, 88 and 92 of the Civil Procedure Code of the Republic of Armenia. Article 88 of the Code clearly states that "*evidence grounding the claims may be attached to the statement of claim*". In another words, submission of evidence in this stage of litigation bears a dispositive nature, and a demand to submit such while submitting a statement of claim or considering such as a ground for returning the statement of claim is a grave violation of the constitutional right of a person to legal remedy. Moreover, according to Article 49(2) of the Civil Procedure Code of the Republic of Armenia: "*The person participating in the case who has no possibility to obtain evidence on his own from other person participating or not participating in the case who possesses the evidence, shall be entitled to make a motion to court demanding such evidence*".

The plaintiff of the case, after receiving the decision on returning of the statement of claim, appealed to the Civil Court of Appeal within a three-day period and abolished the decision of the first instance court. The court ruled that artificial barriers were created for the party, and a reference to Article 49 of the Civil Procedure Code was made, which entitled a party to a case to apply to court for obtaining evidence. To recap, the decision of the Civil Court of Appeal reaffirmed that submission of evidence may not be of imperative nature in the given stage of litigation.

Study of judicial practice reveals that courts frequently require submission of conclusions of expert examinations, which delay the institution of civil cases and in a long run, renders a legal remedy impossible due to impracticability of securing civil action.

Negative consequences of the institute of returning the statements of claim are not properly apprehended by the judges and the Council of Justice of the Republic of Armenia. The party to the above-mentioned case, together with appealing the decision of the first instance court, requested to institute disciplinary proceedings, bearing in mind that the first instance

court created artificial barriers for legal remedy of his rights within reasonable terms. As a result the disciplinary proceedings were initiated, but the Council of Justice decided that incorrect application of the institute of returning the statements of claim does not result in irreparable violation of rights of a person, so the latter has a right to again apply to court with a claim to institute civil action, as a result of which the disciplinary proceedings were stayed. This is to mean that even where a judge returns a statements of claim in violation of law, such violation would not entail disciplinary proceedings against him.

Suspension of civil proceedings

Suspension of civil proceedings shall be justified by thorough, complete and impartial examination of a case. Suspension of proceedings shall also be conditioned by effective management of justice, for this approach enables to save efforts and avoid from adoption of contradictory acts. It shall be mentioned that suspension of civil proceedings for an indefinite term, ungrounded postponement thereof may have apparent negative consequences for person(s) participating in the case. The review of the judicial practice in the field shows that there were cases when, following a suspension decision, the parties waited for reinstatement of a civil action, while the courts did not pursue and did not assure, within a reasonable time, the enforcement of their decisions by administrative bodies. Bright examples of such cases are proceedings suspended for the purpose of carrying out expert examinations or cadastre measurements, for these require long periods to receive replies from competent authorities.

Civil Procedure Code of the RA lays down compulsory and optional grounds for suspension of civil proceedings. In the first case the court shall implicitly suspend the proceedings. Under these grounds, as a rule, there are few disputable issues except for the first ground laid down by law, which is: hearing of a case is impossible before a judgment is made on a different case or issue heard under civil, criminal or administrative procedure, for in this case as well the judge shall assess whether the

circumstances being examined with regard to pending parallel proceedings are essential for the civil proceedings. Among cases of suspension of proceedings at the discretion of the court (assignment of expert examination, the defendant is being searched for, a legal person participating in the case is being reorganized, the court applies to the Constitutional Court of the Republic of Armenia when finding that the enforceable law is in contradiction to the Constitution of the Republic of Armenia) of utmost confusion was the suspension of proceedings due to the fact that the defendant was searched for, which means that there is an issue of correlation of civil and criminal proceedings. To clarify, Z.E. and others purchased apartments in the building located at the address of 15 G. street from "M." LLC. According to the pre-selling contract the mentioned LLC received a sum equal to 30% of the sale price of the apartment. At the moment of concluding the pre-selling contract the applicants were informed that the director of the LLC embezzled the sums and escaped. Based on the claim filed by the plaintiffs, law enforcement authorities instituted a criminal case. They demanded from "M" LLC to return the advance payment, while demanding from the real owner of the building, "N" LLC, to conclude the prime contracts. Bearing in mind that the director of "M" LLC is in hiding, the preliminary investigation of the criminal case was suspended; the civil action based on the claim of the plaintiffs regarding levy of execution of the sums against "M" LLC was also being suspended by courts (including the Civil Court of Appeal) with a reasoning that the director of the "M" LLC is in hiding. The issue lingered until the Court of Cassation ruled on 26 March 2008 that "*the Civil Court of Appeals, upholding the decision of the court to suspend the proceedings of the case, failed to indicate the circumstances that are essential for the civil action being suspended and that could not have been proved in the course of the proceedings of this case. Moreover, civil action was suspended on grounds that the director of the company is in hiding, whereas the claim was brought against the company, not the director*".

With this decision the Court of Cassation actually declared the independence of legal personality of a legal person and its director as a natural person; this is to mean that in this case the criminal case was launched against the director, whereas the civil action was brought against the company. The mentioned decision also obliges courts, in suspending proceedings, to indicate the circumstances grounding the necessity of optional suspension of proceedings.

2.3. Denial of justice

Rejection of statement of claim/application

A judge is obliged to accept a statement of claim submitted in accordance with the requirements of the Civil Procedure Code for proceedings. Article 90(3) of the Code lays down that: "*a judge shall, in case of not rejecting the acceptance of the statement of claim or not returning it within a three-day period from the day of receiving the statement of claim in the manner prescribed by Article 144(2) of the Code, adopt a decision on accepting thereof, in which the date and place of hearing of the case shall be indicated*". While returning of the statement of claim delays initiation of proceedings but gives a person a chance to reinstate the civil proceedings upon remedying deficiencies in the application, the rejection to accept the statement of claim/application actually denies a person the chance to legal remedy of his rights and lawful interests.

Article 91 of the Civil Procedure Code clearly lays down the grounds for rejecting the acceptance of the statement of claim (which are: *the dispute is not subject to consideration in court; there is a court judgment having entered into legal force concerning the dispute between the same persons, over the same matter and on the same grounds; in another court or arbitration tribunal, a case is pending concerning the dispute between the same persons, over the same matter and on the same*

grounds; there is a judgment of an arbitration tribunal or a decision of the Financial System Mediator concerning the dispute between the same persons, over the same matter and on the same grounds, except for cases where the court refuses to issue a writ of execution for enforcement of a judgment of an arbitration tribunal or a decision of the Financial System Mediator). Such grounds may usually emerge where there is an act resolving the issue or where relevant proceedings are pending. In this respect there is a necessity to consider the cases of rejecting a statement of claim/application which actually deny a further examination of the dispute through court procedure.

Under a civil case, V.A., born in 1912, still a minor (aged 17) in 1929 was in the care of his elder brother Kh.V. and a member of the latter's family. In 1929 Kh.V., together with his family, was subjected to criminal liability through an extrajudicial procedure and was exiled from the then Kyalagarkh (currently Shenavan village of Armavir marz) village. All members of the family were deprived of the right to vote, which was reinstated only through amnesty of 1941.

The power to declare a person as repressed in the Republic of Armenia rested with the general Prosecutor's Office of the Republic of Armenia, which, according to the heirs of the V.A. was guided by one principle: if there is a concrete criminal case, a status of a repressed person will be declared. The Prosecutor's Office disregarded the fact that the given person was subjected to criminal liability via extrajudicial procedure, which serves as a ground for recognition of the status of a repressed person according to the Law of the Republic of Armenia on Repressed Persons of 1994, as well as the fact of V.A. being a family member of a repressed person[9]. The given case is referred in the report with a view that heirs of a

[9] According to the Law of the Republic of Armenia on Repressed Persons: "*a repressed person shall be deemed to be a former citizen of the USSR, stateless person or a foreign national permanently residing in the Republic of Armenia, who, during the soviet regime was subjected to criminal liability through extrajudicial procedure, was subjected to* coercive *measure of medical nature in*

repressed person should be allocated a land parcel, loans and granted other rights in rem in the manner prescribed by law.

Heirs of V.A., applying to the General Prosecutor's Office of the Republic of Armenia, indicated that the judgment of the Court of First Instance of Kentron and Nork-Marash Communities of Yerevan of 27 December 2004 having entered into legal force confirmed the fact of V.A. being a member of his brother's family at the time of the latter's exile from Shenavan village back in 1929. Irrespective of the fact, the Prosecutor's Office refused to recognize the rights of the heirs in its reasonings of 4 April and 2 June, 2005, stating that "*there are no required archival data and grounds for declaring V.A. as a repressed person and issuing a relevant statement*"; in other words, there is no criminal case with regard to the person concerned. The heirs/successors of V.A applied to the Court of First Instance of Kentron and Nork-Marash Communities of Yerevan on 20 October 2005 with a claim to recognize the fact of their father V.A. being a repressed person. The first instance court rejected the application in its 26 October 2005 decision, grounding that such cases are not subject to court hearing. The court, citing Article 189 of the Civil Procedure Code of the Republic of Armenia entitled "*Cases concerning the establishment of legally relevant facts examined by court*", which lists the cases in regard to which the court may establish legal facts, ruled that "*the fact of declaring a person as repressed is not listed herein, whereas according to the Law on Repressed Persons the resolution of such issues is vested with the General Prosecutor's Office*". Heirs of V.A appealed the decision within a three-day period to the Court of Cassation, which upheld the decision of the first instance court with its decision of 18 November 2005.

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the territory of former USSR, was exiled from the territory of the USSR or was deprived of citizenship, was exiled or banished as a member of a family of a repressed person or was convicted under several Articles of the Criminal Code of the USSR".

It shall be mentioned that the Law of Repressed Persons was adopted in 1994, prior to adoption of the Constitution of the Republic of Armenia, which lays down the right of legal remedy of a person's rights. So an exhaustive list of facts laid down in the Civil Procedure Code of the Republic of Armenia deprives a person of his right to legal remedy of his rights and lawful interests. With this, the courts abstained from direct enforcement of the Constitution by not instituting proceedings on the case.

Rejection of the claim of person that is not a participant of the case

For assuring the right to fair trial in disputes arising with regard to civil rights and obligations, the European Court of Human Rights distinguishes and interprets in its case-law the essence of important elements of fair trial, namely the requirements of equality of parties and adversarial proceedings. Any of the parties shall be assured a reasonable chance to present his case (including evidence) under conditions that do not place him at a substantial advantage vis-à-vis his opponent. In the sphere of justice management, as a rule, the legislature envisages as grounds for reversing judgments the filing of appeal by a person that was not a participant of a case, where a judicial act on the merits of the case with regard to his rights and obligations was made. By the way, again with a view of justice management, the judicial authorities lay down certain terms, during which a person has a right to file such appeals. Article 207(5) of the Civil Procedure Code of the Republic of Armenia lays down that "*persons that are not participants of a case, with regard to the rights and obligations of which a judicial act on the merits of the case was made, shall have a right to appeal within three months from the day on which they became aware or could have been aware of the making of such judicial act, except for cases where twenty years lapsed after entry of such judicial act into legal force"*.

So a person simply has to prove that he did not default on the terms prescribed, that is - learnt of the judicial act within three months after the

act was made. Failing this, he shall, together with the appeal, submit a motion for remedying the default. In this respect a case heard in 2008 by the Civil Court of Appeal shall be distinguished, the judgment on which was later reversed by the Court of Cassation, whereas it should have entailed disciplinary proceedings for judges. In this case, the owner of a territory in Yerevan's Davitashen 4 district named A.M applied to the district's territorial subdivision of the State Cadastre Committee for obtaining a statement that the property (land parcel) owned by him is not attached or pledged. On 12 March 2008 the citizen received a rejection letter from the Cadastre Committee together with a judgment of first instance court of 2005. He was informed that based on the fact that another person possessed the mentioned property for a period of 4 years, the court recognized the ownership right of the other person (H.) over the parcel. The judgment of the court served as a ground for the mentioned subdivision of State Cadastre Committee to issue to H. a certificate of right to ownership over the territory. By the way, the case materials claimed that A.M did not live in the Republic of Armenia, so he was not properly notified of the court hearing on examining the fact of possession (with a right to ownership) of the territory actually belonging to A.M by another person.

As a person that did not participate in the case where a judicial act with regard to his rights and obligations was made, thus depriving him from realization of his procedural rights and obligations as laid down by Articles 27-29, 48 and 49 of the Civil Procedure Code of the Republic of Armenia, A.M. filed an appeal with the Civil Court of Appeal. The Court of Appeal returned the appeal reasoning that it was filed after the expiry of the term prescribed for brining appeals, whilst A.M. did not file a motion on remedying the default. On the other hand, Civil Court of Appeal mentioned in its decision that the "*appeal was brought by a person that is not entitled to appeal a judicial act of a subordinate court"*. In other words, the situation presupposed that as far as the judicial act was based on an application on recognition of the fact of possession with a right to ownership of one person, no other person may have acted as one that is

interested in the outcome of the case. So the court of appeal failed to correctly calculate that the judgment in writing was submitted to A.M. only in March 2008, and the appeal was brought in April of the same year, which means that the term of three months as prescribed by law was observed. On the other hand, the judicial act of the first instance court that served as basis for stripping the citizen of his right to ownership, was perceived by the Court of Appeal as not relating to the rights and lawful interests of the plaintiff.

The Court of Cassation naturally abolished the obviously illegal act of the Court of Appeal. In its decision dated 27 June 2008 it underlined that "A.M. did not participate in the case, and the case contains no evidence that he was notified of the judicial act. The Civil Court of Appeal did not consider the reasoning of A.M. as specified in the appeal that he was informed of the disputed judicial act from the statement issued by Cadastre Committee on 13 July 2008, and that he appealed against the mentioned act as a person that did not participate in the case within the term prescribed by Article 207(5) of the Civil Procedure Code of the Republic of Armenia, whilst the legislation does not require lodging of a motion for remedying the default in case the appeal is brought within the mentioned term (Article 207(6) of the Civil Procedure Code of the Republic of Armenia). At the same time, according to the Court of Cassation, the Court of Appeal disregarded the fact that, as the statement of State Cadastre Committee reads, and as the statements submitted together with the appeal prove, A.M. had a right to ownership (registered rights) over the disputed area, which were abolished by the disputed judicial act of the first instance court made on rights and obligations of A.M., whilst the latter did not participate in the hearing of the case. On these grounds the Court of Cassation abolished the decision of the Civil Court of Appeal.

In contrast of the case mentioned above, where a Court of Cassation abolished an obviously illegal judicial act, there are cases in the judicial practice when the decision of a subordinate court made on cases related to recognition or termination of the right to ownership in the

absence of the owner is not reversed. For example, A. was the owner of the apartment situated on street A. of Yerevan. In 2005 M. applied to court with a claim to terminate A.'s right to ownership over the apartment at the mentioned address. The First Instance Court of Malatia and Sebastia Communities of Yerevan satisfied the claim. Defendant A. was not summoned to court hearing during the civil proceedings, nor was he communicated the judgment. According to the court, his place of residence was unknown. A court sent a letter to the district municipality of Malatia and Sebastia communities with a view to learn the place of residence of A., and, without awaiting the reply, held a hearing and made a judgment on the following day. The court enforced Articles 187 and 280 of the Civil Code of the Republic of Armenia and based on these provisions recognized the right to ownership of M., while the latter presented only receipts of public utility payments for three years and a statement from the relevant Condominium confirming that he resided in the mentioned address since 1994 and had paid public utility fees.

The Court of Appeal ruled in 2008 to reject the appeal of the successors of A. The Court of Appeal actually disregarded the violations that took place, namely the fact that the defendant was not notified of the court hearing and did not have a chance to participate in the trial. Meanwhile the Court of Cassation, vested with the power to assure uniform application of law, frequently reiterated that the obligation of the court to notify the participants of the proceedings about the time and place of the hearing as envisaged by Article 78 of the Civil Procedure Code of the Republic of Armenia is directly interlinked with the universal principle of equality of all parties to a case as guaranteed by the Constitution of the Republic of Armenia and with the principle of equality and adversarial process flowing from the former.

"Immunity" of apparently ungrounded judgments

The criminal prosecution policy in cases of improper and negligent performance of duties and "abuse of position" by the judge is very

controversial. The legislation of the Republic of Armenia envisages two types of liability in such cases – disciplinary and criminal. According to Article 153 of the Judicial Code of the Republic of Armenia: "Grounds for subjecting a judge to a disciplinary liability shall be an obvious and grave violation of a provision of substantive and/or procedural law, grave and regular violations by a judge of the Code of Conduct, etc". In cases where a judge adopts an obviously unjust judicial act for mercenary purposes or by other personal motivation, Article 352 of the Criminal Code of the Republic of Armenia envisages criminal liability for the judge. A judicial act is considered unjust where it obviously does not conform to the current legislation (legal criteria) or apparently contradicts the factual circumstances of the case. In cases of subjecting judges having made obviously unjust judicial acts to criminal liability, a necessity to reverse the acts arises. Such issues are usually resolved through the institute of reinstatement of proceedings based on newly emerged circumstances. The legislation of the Republic of Armenia, precisely Article 204^{11}(1)(3) of the Civil procedure Code, lays down that a newly emerged circumstance for reviewing of proceedings shall be the "*judgment having entered into legal force establishing the fact that persons participating in the case or their representatives or a judge committed an offense in relation with the examination of the case*".

Another controversial issue is the provision laid down in Article 13(6) of the Judicial Code of the Republic of Armenia guaranteeing the independence of judges: "*Criminal prosecution may not be initiated against a judge with regard to the fact of his making an obviously unjust judgment on criminal or civil matters, or other judicial act by mercenary or other personal motivation, unless the act has been reversed by a superior court*". The mentioned provision laid down in the legislation of the Republic of Armenia actually upholds the impunity of judges, as for reversing an obviously unjust judicial act, firstly a court judgment having entered into legal force with regard to a judge is required, and secondly, a judge may be held criminally liable for making an obviously unjust judicial

act only where the latter is reversed by a superior court. This deadlocks the situation, rendering the mentioned Article of the Criminal Code self-inapplicable, whilst the citizen is thus deprived of his right to justice through elimination of consequences of obviously unjust judicial acts. A review of a relevant case would be the civil action of G.H. who was the owner of the house with a space of 18.9 sq.m. at 1/2 Abovian street of Yerevan, and who had a right of use over a parcel with a surface of 19.3 sq.m. His son H.P. who was conscripted into the armed forces of the Republic of Armenia on 6 June 2002, was registered at the mentioned address. The head of Kentron community of Yerevan, acting on behalf of Municipality of Yerevan, entered into a sales contract with G.H. by selling the house for construction of the Northern Avenue. The plaintiffs, bearing in mind that the right of use over the residential premises of H.P was disregarded and that the latter received on compensation for realization of the right, as well as based on the Decision of the Government of the Republic of Armenia No 950 of 5 October 200, according to which "'*the seller shall be obliged to conclude a contract on acquisition of sold real estate and compensation thereagainst with the persons possessing or using a real estate or a land parcel",* applied to the Court of First Instance of Kentron and Nork-Marash communities of Yerevan with a claim to oblige the Municipality of Yerevan to compensate H.P. accordingly. With a judgment of 27 January 2004 the first instance court dismissed the claim[10], although Article 59 of the then Housing Code of the Republic of Armenia (repealed in 2005) and Article 39 of the Law of the Republic of Armenia on Social Security of Military Servicemen and their Families laid down that "*conscripts shall, during the term of army service, maintain the rights over their residential space irrespective of the form of ownership or agency subordination*". In the existence of the contract concluded between the parties and its bearing a notary certification, as well as in view of the performance of the requirements stipulated therein, the Court of Cassation

[10] With a judgment of 16 November 2004 the Civil Court of Appeals dismissed the claim.

ruled the reasonings of the cassation appeal concerning the violation of substantial and procedural rights as ungrounded. In its 20 January 2005 decision the Court of Cassation disallowed the cassation appeal of the civil plaintiffs.

In an answer to the application of the plaintiffs addressed to the Ministry of Justice of the Republic of Armenia, the Head of the Supervision Department of the Ministry wrote in his letter of 16 February 2009 that: "In the exercise of justice the judges of the Court of First Instance of Kentron and Nork-Marash communities of Yerevan on 27 January 2004, of the Civil Court of Appeals of the Republic of Armenia on 16 November 2004 and of Civil and Economic Chamber of the Court of Cassation of the Republic of Armenia on 20 January 2005 have violated norms of substantial law. Yet, no disciplinary proceedings may be instituted against the defaulting judges, for the maximum term for subjecting a judge to disciplinary liability as prescribed by Article 153(2)(1) of the Judicial Code of the Republic of Armenia has expired"[11].

Applying to the Cassation Court H.P. and G.P. informed that the compensation sum was miscalculated and the right of use of H.P. (who was registered in the given address) over the residential space was not compensated, and lodged a claim with the Cassation Court to review the judgment of Civil Court of Appeal of 16 November 2004 and the decision of the Civil and Economic Chamber of the Court of Cassation of the Republic of Armenia of 20 January 2005 - based on the newly emerged circumstances. The decision of the Court of Cassation of 2009 cited Article 204[11](1)(1) of the Civil Procedure Code, according to which "*newly emerged circumstances shall serve as a ground for review of a judicial act where a claimant proves that these circumstances were not known or could not have been known to the persons participating in the case, or that these*

[11] In a similar case the Court of First Instance of Kentron and Norl-Marash communities of Yerevan satisfied the claim with its judgment of 24 June 2003 and obliged a conscript serving his term in the army to compensate for the right over his residential space.

circumstances were known to the latter, but were not submitted to court due to reasons beyond their control, and that these circumstances are essential for disposal of the case". Persons that filed a cassation appeal submitted the conclusion of the Ministry of Justice of 16 February 2009 and the attached report as newly emerged circumstances. The mentioned conclusion and the report attached dwelt upon the "*violations of courts in the course of proceedings*". The Court of Cassation ruled the conclusion as having no relation to the disposal of the case. It found that the conclusion of the Ministry of Justice of 16 February 2009 and an attached report of 12 February 2009 are not essential for disposal of the case of reviewing the judgment of Civil Court of Appeal of 16 November 2004 and the decision of the Civil and Economic Chamber of the Court of Cassation of the Republic of Armenia of 20 January 2005 and are not newly emerged circumstances. With this reasoning the Court of Cassation naturally decided to return the cassation appeal.

Anyway these processes gave rise to a situation where the citizens were deprived of the chance to "remedy" the obviously erroneous/unjust judicial acts, which actually violates the right of a person to legal remedy and to access of justice. A resolution of the issue may be the abolition of the discussed provision of the Judicial Code, or replacement thereof by another guarantee, say a requirement to obtain the positive opinion of the Council of Justice for instituting criminal prosecution against judges.

Non-Perception of Correlation Between Criminal and Civil Proceedings

Misunderstanding of correlation between criminal and civil proceedings may deny a person the right to claim justice within the framework of claiming for damages in criminal or related civil proceedings (not necessarily linked with the crime).

Pursuant to Article 155(1) of the Criminal Procedure Code of the Republic of Armenia "*the court decision on the same civil claim entered*

into legal force, the court decision on accepting the withdrawal of the claim by a civil plaintiff or approving a reconciliation agreement, as well as the availability of the court judgment entered into force, which dismisses the claim or awards the claim in whole or in part, shall exclude the initiation of a civil claim".

In 2007, attorney B., in regard to one of the examined case, acting on behalf of his clients, concluded a reconciliation agreement and receives money. He did not inform his clients about it and transferred the money to his colleague A. The letter embezzled the sum and was condemned for fraud. The judgment also dwelled upon the civil claim of clients (victims) against A. Then, the victims brought civil claim against attorney B through judicial procedure claiming for the damage caused by his negligence.

The Court should have clarified what civil claim has been examined in the criminal case, which is no longer subject to examination based on a new civil claim. The fact that there existed evil conspiracy between attorney B and his partner A has to be proved in the criminal proceeding. Since the judge hearing the criminal case held that there is no evil conspiracy between these two persons, consequently he did not have any right and did not dwelled upon the damage caused by the negligence in regard to the fulfillment of his civil duties by the attorney. Thus, in October 2007, the client addressed "the judge hearing the civil case" in order to claim for the damage caused by improper fulfillment of duties by his authorized person, i.e. attorney B. The latter, concluding the contract, not only failed to inform the client about the transaction but also, not being authorized by him, transferred the share of the client to his colleague. This proves improper fulfillment of his duties which is subject to consideration within the framework of civil procedure.

The judge hearing the civil case misconceived the difference between the subjects of these two proceedings, confused the objects of the circumstances of criminal and civil proceedings. He held that the issue of the civil claim has already been resolved by calling the colleague to

criminal liability. A logical question arises: which civil case? Definitely, the civil case of victims against A. was resolved, which is based on his committed crime; however the client may file a claim with the Civil Court in regard to the contractual (representative) legal relationships against his representative attorney B, of which he was deprived by the court of first instance and later also the Civil Court of Appeal.

It is necessary to conduct a relevant training for being able to differentiate the subject-matters of criminal and civil proceedings, clarify their relationships, to illustrate in examples the nature of claims in criminal proceedings (against whom, by whom, based on which), cases of bringing possible related claims. In other cases, the civil claims, which seem to be considered within the framework of the criminal procedure, are rejected to be considered as a matter of civil proceeding thus depriving the person from his constitutional right to claim justice.

2.4. Confusion of Civil/Administrative Institutions in the Process of "Expropriation of the Property"

Judicial Interpretation of "Expropriation Agreements"

According to Decision of the Constitutional Court of the Republic of Armenia No SDO-630 of 18 April 2006, all norms provided for in the Civil and Land Codes of the Republic of Armenia, which so far served as a basis for taking away the land parcels in "Kentron" Community in Yerevan and the real estate located on them from the owners for state needs, were declared as a violation of the Constitution. Based on the mentioned decision of the Constitutional Court of the Republic of Armenia, the former owners of the expropriated property referred the matter to courts to revoke the real estate purchase and sales contracts concluded with the "Yerevan Land Development and Investment Project Implementation Unit" SNCO. All similar statements of claim were dismissed on different grounds.

In the environment of legislative gaps the majority of contracts were concluded through judicial procedure. Moreover, the courts, instead of declaring the property of the owners as expropriated, enforced the owners to conclude real estate expropriation contracts based on Article 461 of the Civil Code, which states that "*where the party, who is obliged to conclude a contract in accordance with law, avoids of concluding it, the other party shall be entitled to file a claim with the court on enforcing the conclusion of the contract*"[12]. In other words, while expropriating the property for public and state needs through judicial procedure the courts applied the norms of the Civil Code governing the contractual relationships, thus enforcing the owners to conclude an expropriation agreement. Thus, J. and J.A. - the owners of House No 5 on Lalayants street in Yerevan, applied to the court with a claim to revoke the real estate sales contract concluded with the "Yerevan Land Development and Investment Project Implementation Unit" SNCO on 21 February. The claim was dismissed by the judgment of the Civil Court of Yerevan of 5 September 2008[13]. In regard to this case, the cassation appeal was returned by the decision of 3 June 2009 with the following reasoning: "*The Court of Cassation, based on Article 125(1) of the Civil Code of the Republic of Armenia, according to which the Republic of Armenia and its communities act in the relationships regulated by the civil legislation and other legal acts on the equal grounds as the other participants - citizens and legal entities - in these relationships, held that the State (public authorities acting on behalf of the State) may also participate in civil relationships and conclude relevant transactions"*. The Court of Cassation, elaborating on the position of the appeal, which says that disputable relationships in this case were based on the activities of the administrative authorities in the field of public law aimed at taking away the land parcel for state needs, held that the conclusion of a disputable

[12] Judgment of Civil Court of Appeal of the Republic of Armenia on the Case No 05-3257 (2005).

[13] Similarly, the Civil Court of Appeal dismissed the cassation appeal by its decision of 26 December 2008.

contract in this case, which is based on the circumstance specified by the claimant, does not yet imply that the relationships pertaining to the conclusion of the contract ceased to be of civil nature". **Should such relationships, including contractual relations, be considered as civil?**[14] The analysis of the Chapter 28 of the Civil Code shows that a civil contract contains an important condition, i.e. freedom of contract, in the absence of which the contract will lose its legal sense and will no longer stand for a contract. One of the essential principles of the civil law is *the principle of autonomy of personal will*, which is specified by the principle of freedom of contract in the contract law. The principle of autonomy of personal will is the manifestation of **autonomous**, i.e. free and independent will. Each entity of private law enters into private legal relationships by his personal will and independently chooses the relevant form of behaving. This principle and the regulation method of the private law are first of all characterized by the fact that the entities in private legal relationships are equal: are independent from each other, enjoy the same rights irrespective of the fact whether they act together as legally equal or obliged persons. Thus, the entities of civil law are considered as independent and legally equal entities before the law.

Pursuant of Article 437 of the Civil Code of Armenia individuals and legal persons are free to enter into a contract. The principle of freedom of contract contains the freedom to choose the subject matter, party, form, price of the contract, including the freedom to enter into general contractual relationships. The compulsion to conclusion of a contract is not allowed, except for cases when the obligation to conclude a contract is envisaged by the Civil Code or a voluntary obligation. The freedom to conclude a contract first of all means that it is not allowed to enforce somebody to conclude a contract except when the obligation to conclude a contract is provided for in the Civil Code. Consequently, if the parties fail to arrive at

[14] The contract is a classic instrument for establishing legal relations with private persons. A contract is an agreement between two or more persons, which is aimed at determining, altering or terminating civil rights and duties.

an agreement on the major conditions of sales contract in accordance with a procedure for concluding a civil contract, the party may not enforce the other party to conclude a contract through judicial procedure.

Many court cases prove that the parties after getting familiarized with the terms of the contract have refused to conclude the offered contracts. Thus, based on the appeal brought by the defendants against the judgment of the Court of First Instance of Kentron and Nork-Marash Communities of 10 March 2005, the Court of Appeal hearing the civil case in accordance with the claim of "Yerevan Land Development and Investment Project Implementation Unit" SNCO v S.B. and T.Z. in regard to the claim on compulsion to conclude a contract on expropriation of land parcel and the real estate located on it for state needs and expelling the latter from the occupied territory, as a result of civil trial found out that "According to Article 451 of the Civil Code of the Republic of Armenia and the procedure established by the decisions of the Government of the Republic of Armenia, in regard to taking away the property, the claimant S.B. was submitted a price bid for concluding a contract with relevant compensation conditions on 24 October 2004. … The defendants announced that the bidding conditions are not acceptable for them. ... The defendant declared that 3 applications addressed to the claimant remained unanswered, the copies of property evaluation reports were not provided, the owned property was evaluated in gross violations and the fact that it is a private house with a basement and land was not taken into account". However, the Civil Court of Cassation decided to award the claim.

Taking into account the specifications of the expropriation process and analyzing the judicial acts on expropriation, it may be stated that the owners of the property located in the expropriation zones have not had any will at all to sell their property, have not had a possibility to choose the subject matter and party of a contract; moreover- lacked the freedom to determine the contract price. Moreover, the contracts were concluded without negotiations (the applicants claimed that the procurers refused to consider the objections of the owners and negotiate with them). The

company for market valuation of real estate was chosen not by the owner but the procurer. Although the Armenian legislation does not prohibit the owner to consult with another licensed independent evaluator and obtain its report, however other companies refused to evaluate the buildings/land parcels located in the expropriation zones of Yerevan, citing the internal order that prohibits to carry out evaluation activities in those zones. As a result, this freedom practically turned into a fiction, whereas arbitrary approaches were observed in the evaluation process.

In regard to the primary public interest, the expropriation of private ownership is a public legal process. Consideration of these relationships by courts as "expropriation" civil contracts, seems to be concealment of illegal actions and arbitrariness by public authorities based on the principle of non-intervening in legal relationships. Thus, the decisions of the Government of the Republic of Armenia on recognizing as a primary public interest should be targeted not at the owners of the property located in the expropriation zone, but relevant public authorities to initiate and conduct negotiations on conclusion of a contract in compliance with the principle of freedom of contract. Thus, in case of expropriation of private ownership the State should act not as a subject of ownership right, but as an institution exercising public authority. That is why, Chapters 28-31 of the current Civil Code are not applicable to these legal relationships, although they are applied in judicial practice and applied unduly.

Judicial Review of Compensation Process

The Annual Reports (2006, 2007 and 2008) of the Human Rights Defender has elaborated on the issues relating to the expropriation process for public (state) needs and protection of ownership right (including legal remedy) in regard to the land development programs of Yerevan. The majority of complaints filed to the Defender relate to the *compensation issues*. The applicants claimed that the procurers refused to consider their concerns and negotiate an amount of compensation since the procurers said

that they were simply representing a development company. In this regard, the Defender's Report of 2008 already stated that the right of the owners of an expropriated property and the rights of others who have property rights over the expropriated property may not be properly protected if the party signing an expropriation contract is not the State. It is necessary that the Government of the Republic of Armenia, prior to recognizing any territory of the city of Yerevan as a primary public interest, and the Mayor of Yerevan, prior to offering them for auction/bid, require from all companies participating in bids to submit information on their financial capacities or funds (assets), and later the winner of the bid, submits a report on its financial capacities or funds to the population residing in the expropriated territory, which may serve as a guarantee for the inhabitants and inspire confidence in them. Moreover, legal relationships contain a risk, whereas public legal relationships should completely exclude it. The expropriation of property for public and state needs should be considered as exclusively public law relationship; otherwise the owners of the property being expropriated would be deprived of guarantees of proper fulfillment of obligations in regard to them as a result of expropriation of the property. Thus, if the expropriation process of the property is authorized to a private company, and the insurance field in Armenia is underdeveloped, the owners of the property being expropriated are not guaranteed and insured against inaction, unfair actions of the developer, or let us say bankruptcy of the company.

The examination of draft contracts and already concluded contracts on expropriation of property for public and state needs submitted to the inhabitants of Yerevan allows us to insist that they are not in the interest of the owners of real estate being expropriated and those who hold other property rights. The contracts together with their provisions did not have social nature. They are only in the interest of the procurer and the developer, whereas their content provides for obligations for the owners rather than for the procurers; moreover, they do not derive from the requirements of the current legislation of the Republic of Armenia.

The procurers do not provide all owners with the reports on the market valuation of the real estate, whereas they are obliged to do so without any discrimination. The owners are informed of the market value of their ownership while concluding a preliminary contract or verbally by the procurer, which deprive them of the opportunity to refer the matter to court in a specified period in case of disputes.

Moreover, different procurers in the expropriation zones in Yerevan treated the owners and other property right holders differently and unequally, offering them unfavorable conditions, particularly compensation amount for the real estate was incomparably lower than its market value (e.g. the apartment No 16, P. Byuzandi street, Yerevan, with 55,7 square meters of space was evaluated USD 23080 expressed in AMD, including taxes[15]): According to the European Court the protection of ownership rights guaranteed by Article 1 of the First Protocol to the Convention on Human Rights and Fundamental Freedoms would be illusory and ineffective, if there was not equal principle in place. Certainly, the condition of providing compensation for the expropriation of the property is a material factor in the assessment of the balance between different interests and consequences inflicted on the owner due to the expropriation of the property. Failure to provide preliminary, fair compensation for the expropriation of the property violates the balance between the private and public interests.

The results of the monitoring of judicial acts and reports16 of non-governmental organizations shows that the owners were compensated in the amount significantly lower than the market value, leaving the tax burden on the owners.17

15 Judgment of the Court of First Instance of Kentron and Nork-Marash communities on the case of "Yerevan Land Development and Investment Project Implementation Unit" SNCO v S. and T.

16 See Report on "Execution of the Exclusive Public Interests in the City of Yerevan" prepared by S. Baghdasaryan, Chairman of the "Victims of State Needs" NGO

The European Court of Human Rights many times emphasized that the discriminatory treatment will not contradict the requirements of Article 14 of the Convention, if it is completely and objectively justified by common interests. However, the scope of discretion that the states may allow in determination of the necessity of discriminatory treatment is much narrower than in the case of Article 1 of Protocol 1. Article 14 of the Convention does not provide exhaustive grounds based on which the discrimination is prohibited. Discrimination deriving from the property status within the public law domain is more than apparent. Moreover, the courts also held that *arbitrary treatment by the administrative bodies has been permitted prior to the adoption of the Law of the Republic of Armenia on Administrative Basics and Administrative Proceedings.*18

Involvement of Public Quasi-Independent Institutions

The general picture of the expropriation process reflected in the judicial acts shows that as a rule the reasoning parts of the judicial acts emphasize civil legal personality of the State and the right of the latter to act in civil law relationships on the equal playing grounds, and sometimes the performance of state non-commercial organizations as independent subjects of private law.

"Subject of Law" concept as a whole includes two characteristics, i.e. opportunity to participate in different legal relationships and real participation. The crucial condition for acting as an independent subject of law is the character of autonomous will-formation and declaration of intent. Article 3 of the Law of the Republic of Armenia on State Non Commercial Organizations establishes that "*a State organization is a non-profit non-commercial organization with a status of a legal entity, which is*

17 It is worth mentioning that the amount was refunded following the legislative reforms.

18 Judgment of the Civil Court of Appeal of the Republic of Armenia (23 November 2008) on Case No EK-0462/02.

established for implementation of activities only in the spheres of culture, health, social issues, sport, education, science, environmental issues and other non-commercial spheres". The Founder of a state organization may be only the Republic of Armenia represented by the Government. The management, consequently the possession of the property is implemented by the Founder (the Republic of Armenia), its authorized state authority, executive body, which is appointed and dismissed by an authorized state authority, unless otherwise provided for by the decision of the Founder or the Charter of the state organization (Articles 12, 14, 15). Moreover, the Founder has the right to finalize any issue related to the activity and management of the state organization (Article 13).

V.H. lodged a claim with the Civil Court against the SNCO on invalidating the sale of real estate and application of the consequences of invalidity. The Civil Court dismissed the claim by a judgment No EKD of 27 August 2008. On 27 August 2008 V.H. filed a claim requesting to cancel the judgment of the Civil Court with the following reasoning: *"...the reasoning of the Civil Court is groundless which says that the Law of the Republic of Armenia on Administrative Basics and Administrative Proceedings, including its Article 7, is not applicable to the legal relationships concerned, since:*

a/ "Yerevan Land Development and Investment PIU" SNCO is not an administrative body;

b/ the mentioned law was adopted after the disputable transaction."

Although "Yerevan Land Development and Investment PIU" SNCO and the claimant concluded a sales contract on 20 February 2004, however it has been proven that the conclusion of the given contract was declared as contradicting to the Constitution of the Republic of Armenia by the Decision of the Constitutional Court of the Republic of Armenia No SDO-620 of 18 April 2006.

According to Article 2 of the Law of the Republic of Armenia on Administrative Basics and Administrative Proceeding the parts of points 1 and 8 of that Law apply to any activity implemented by administrative

bodies in the field of public law. In this case, the intervention in regard to the ownership of the claimant which led to the conclusion of the disputable contract, has been based on the functions performed by the Republic of Armenia and Municipality of Yerevan in the field of public law with the application of legal acts that were later declared as contradicting the Constitution, whereas "Yerevan Land Development and Investment PIU" SNCO was established for implementation of those functions by the decisions of the Government of the Republic of Armenia No 1025-A of 16 July 2001. Consequently, it is more than obvious that the given legal relationship was based on "*the actions aimed at taking away the land parcel for "state needs" by administrative bodies in the field of public law*".

The Court of Appeal, while examining the appeal, held that the latter should be dismissed with the following reasoning: "*the Court of Appeal considers as groundless the position of the claimant in refutation of interpretation of the provisions referred to in Article 7 of the Law of the Republic of Armenia on Administrative Basics and Administrative Proceedings by the first instance court and the conclusion thereupon stating that the defendant is an administrative body. The Court of Appeal considers the conclusion of the Civil Court of the Defendant not being an administrative body as justified. The Court of Appeal arrived to such a conclusion as a result of comparative interpretation of norms enshrined in Article 3 of the Law of the Republic of Armenia on State Non Commercial Organizations and the Law of the Republic of Armenia on Administrative Basics and Administrative Proceedings. The Court of Appeal also considers as justified the position of the Civil Court that the relationship under dispute in this case shall be considered and characterized as civil law relationship. State authorities may also participate in civil law relationships and conclude relevant transactions. The legal base of this conclusion is enshrined by Article 128(1) of the Civil Code of the Republic of Armenia, according to which the Republic of Armenia and communities enter into relations regulated by civil legislation and other legal acts with*

other participants of these relationships -citizens and legal persons - on equal principles. In regard to the position of the complaints that the legal relationships under dispute of this case were based on the activity directed at taking away the land parcel for "state needs" by administrative bodies in the field of public law, the Court of Appeal finds it appropriate to mention that the conclusion of a disputable contract in this case on the basis of the circumstances specified by the claimant does not mean that the relationships in regard to the conclusion of a contract (the parties to which are the claimant and the state, respectively) ceased to be civil."

The national law of the Republic of Armenia does not contain the term of *legal person of public law*. However, in this case, considering also Article 128 of the Civil Code, one phenomenon is incomprehensible: if the public authorities can also participate in civil relationships and conclude relevant transactions, then what is the reason for considering SNCOs as entities of public law. Moreover, the fact that the State has a negative obligation to abstain in using its command, legal and business instruments while acting in civil relationships as a public law entity on equal playing grounds is being neglected. To ensure that the State acts in such relationships on transparent and non-discriminatory grounds, specific laws provide for special detailed rules for the state authorities to enter into civil relationships.

The analysis of judicial practice shows that the courts indirectly acknowledged the immediate link of the SNCO with the state and at the same time declared them as the subject of private law. Thus, on 23 October 2008 the Court of Appeal passed a judgment on Case No EKD-0462-02 dismissing the appeal by claimant A.KH. against the judgment of Civil Court of Yerevan of 30 July 2008, which dismissed his claim against "Yerevan Land Development and Investments Project Implementation Unit" SNCO on invalidation of the real estate sales contract entered into with the latter. The Court of Appeal acknowledged the allegation of the claimant that the "Yerevan Land Development and Investment PIU" SNCO

acts on behalf of the State, but refused to consider the SNCO as an administrative body. As the attorneys of the claimant stated a determining factor for the Court of Appeal to classify the legal relationships as public or private has been not the essence of the legal relationship but its formal aspect, i.e. "Yerevan Land Development and Investment PIU" SNCO is a legal entity and separately is not an administrative body. In such conditions, administrative bodies, on behalf of the SNCOs established by them, at any time may avoid the application of provisions of the Law of the Republic of Armenia on Administrative Basics and Administrative Proceedings that are unfavorable for them by delegating or authorizing the administrative proceeding to a legal entity.

Thus, when the contracting party is the State (and the very essence of the transaction, including the contract, is the declaration of intent) and both the *de facto* and the *de jure* disposal of the separated property is carried out by the Republic of Armenia, the introduction of quasi-independent entity of public law is not a necessity and, in fact, is aimed at artificial transfer of the developing relationships from public legal framework into private legal domain. The courts, recognizing the right of the State to act in civil law relationships and that SNCOs are state organizations, at the same time considered the existing relationships to be civil.

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