



# **American University of Armenia**

## **Masters' thesis:**

### **Defamation and insult: key problems with the wording of the Article 1087.1 in Civil Code of the Republic of Armenia**

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# **Table of Contents**

## **INTRODUCTION 3**

### **CHAPTER 1- Defamation and insult within the scope of human rights 5**

- 1.1. Necessary balance between two rights: freedom of expression and right to reputation.....5
- 1.2. Decriminalization of defamation and insult in the Republic of Armenia..... 12

### **CHAPTER 2- Current regulation of defamation and insult in Civil Code of RA, gaps and shortcomings 17**

- 2.1. Defamation and insult: essential legal elements required for qualifying action as defamation or insult.....17
- 2.2. Exemptions from liability, periods of limitation.....23

### **CHAPTER 3- Compensation for defamation and insult as a compensation for non-pecuniary damages.....26**

## **CONCLUSION28**

## **BIBLIOGRAPHY29**

# INTRODUCTION

In 21<sup>st</sup> century no one questions the fact that both freedom of speech and right to reputation are core values in almost every society of the world. Because of the mere reason that these rights are deemed as inherent to the dignity of all human beings, every individual is provided with the possibility to claim against the State on which territory his/her rights were violated. It is clearly mentioned in the preamble of the Universal Declaration of Human Rights (UDHR) that freedom of speech is one of the weighty aspirations of ordinary people.<sup>1</sup> The utmost importance of freedom of expression is connected with the fact that it gives appropriate ground to everyone to express and discuss viewpoints on various public matters, to disseminate ideas worth to draw attention to and finally realize each individual's right to self-development and fulfillment. According to the European Court of Human Rights "Freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every human being."<sup>2</sup>

Freedom of expression exists independently from anyone and is based on the freedom of thinking. Thus, it is safeguarded as a fundamental human right, which is equally essential for implementation of other rights. Even in that case, the international law permits limited restrictions on the right to freedom of expression in order to protect various interests, one of which is person's reputation and dignity. Going back to French Declaration of Rights of Man 1789, it will become obvious that regardless of its significance, the rights to free speech can be subject to limitations. The Declaration states that citizen shall be responsible for abuses of the freedom of communication of ideas and opinions.<sup>3</sup> This means that in certain situations when it is not possible for the states to comply with its obligation regarding the freedom of speech, they can impose justified restriction in the exercise of this right. In particular, one of the common basics for limitation the right to freedom of expression under international and regional human rights instruments is protection of reputation of others. Indeed, defamatory and libelous expression does not benefit from the protection of freedom of expression. So, within the scope of this paper it is worth to explore different international instruments currently in place and also vast case law in order to achieve fair balance between these two values and further find out

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<sup>1</sup> Preamble, Universal Declaration of Human Rights (UDHR), UN General Assembly Resolution 217A(III), adopted 10 December 1948, available at <http://www.un.org/en/universal-declaration-human-rights/>, [last access: 1 May 2016 at 5:04 pm].

<sup>2</sup> Handyside v. United Kingdom (1976), Application No. 5493/72

<sup>3</sup> Declaration of Rights of Man. Approved by the National Assembly of France, August 26, 1789, available at [http://avalon.law.yale.edu/18th\\_century/rightsof.asp](http://avalon.law.yale.edu/18th_century/rightsof.asp), [last access: 1 May 2016 at 5:41 pm]

whether defamation law can serve as an obstacle for the rights to free speech.

In many countries around the world defamation is still prohibited as a criminal offence.<sup>4</sup> However, there is a growing tendency to substantiate such regulation as an ungrounded restriction and replace it in favor of civil defamation. In comparison to criminal law, the main purpose of the civil law is to provide everyone with proper remedies for defamatory statements having in mind that remedies are exercised to redress the harm done to the plaintiff's reputation, not to punish the defendant.

The decision to research the current regulation of the defamation and insult in RA is based on the reason that the mentioned amendments were the lack of clear mechanisms for implementation, a high degree of discretion was given to the courts, the size of fines considered incommensurate with financial capacities of especially the print and Internet media, and finally, the existing distrust towards the judiciary. Thus, it has a significant importance to thoroughly explore the main drawbacks existing in the current wording of the Article 1087.1 of RA Civil Code with the purpose of further finding effective methods to solve them.

Comparative methods shall be applied for this paper. This study shall compare the jurisprudence developed by ECHR and RA courts. The paper makes references to a vast array of research articles, scholarly papers, as well as books by reputable agencies, authorities and world-acclaimed authors involved in both legal and social fields of disability issues.

The first chapter will outline the international standards with respect to the right to freedom of expression and defamation and insult. It includes an overview of the proposed reform and is designed so that to give an answer whether it was beneficial for the Armenian society to decriminalize the provisions on insult and defamation of the Criminal code, what are the advantages and disadvantages of such reform.

The second chapter will answer the specific question regarding the existing gaps and shortcomings in the current regulation of insult and defamation in the Civil Code of RA.

And finally the third chapter covers the issues of compensation for non-pecuniary damages in case of defamation and insult.

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<sup>4</sup> Defamation maps, available at <http://www.article19.org/advocacy/defamationmap/overview.html> [last access: 1 May 2016 at 8:28]

## CHAPTER 1

### Defamation and insult within the scope of human rights

#### 1.1. Necessary balance between two rights: freedom of expression and right to reputation

Freedom of expression has been described as the “lifeblood of democracy.”<sup>5</sup> It is a keystone of all other democratic rights and freedoms due to which this right is fundamental to the enjoyment and realization of other rights.

The importance attached to freedom of expression is not a new idea. Freedom of expression is a key human right, in particular because of its fundamental role in underpinning democracy. Freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every man.<sup>6</sup> The right to openly state your ideas on important issues of public concern without any control or limitation and what is more important without any fear to be punished by authorities plays a crucial role for the purpose to create a healthy society. Therefore, it has a vital significance to entitle every person to form his own opinions and beliefs, which is a main guarantee to develop his personality and achieve liberty.

Moreover, it was stated by various international courts and respective bodies that states obtain positive right towards freedom of speech, which means that governments should refrain from unlawful interference and besides have an obligation to provide with necessary tools for transaction of that right.<sup>7</sup>

The freedom of expression is considered as one of the basic human rights enshrined (reflected) in numerous core international human right documents. Article 19 of the *Universal Declaration on Human Rights* (“UDHR”), a United Nations General Assembly resolution, holds the leading definition of the right to freedom of expression and guarantees it in the following terms:

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<sup>5</sup> Article 10: Freedom of expression. Human rights review, 2012, available at [http://www.equalityhumanrights.com/sites/default/files/documents/humanrights/hrr\\_article\\_10.pdf](http://www.equalityhumanrights.com/sites/default/files/documents/humanrights/hrr_article_10.pdf), [last access: 4 April 2016 at 10:28 am].

<sup>6</sup> *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72, paragraph 49.

<sup>7</sup> *Defamation ABC*, A simple introduction to key concepts of Defamation law, Article 19, London, 2006, available at <https://www.article19.org/data/files/pdfs/tools/defamation-abc.pdf> [last access: 30 April, 2016 at 3:29 PM]

“Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers.”<sup>8</sup>

The International Covenant on Civil and Political Rights (“ICCPR”) <sup>9</sup> ratified by the Republic of Armenia in 1993 elaborates on many of the rights set out in the UDHR, imposing formal legal obligations on State Parties to respect its provisions. Article 19 of the ICCPR guarantees the right to freedom of expression virtually identical to those found in Article 19 of the UDHR, particularly, it states that:

“Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”

At an individual level, freedom of expression has been described as “key to the development, dignity and fulfillment of every person.”<sup>10</sup> It is important for people both to be able to express views and opinions, and to obtain ideas and information from others, and thus to gain a better understanding of the world around them.

Freedom of expression is also protected in the regional human rights systems. Article 10 of the European Convention on Human Rights<sup>11</sup> (ECHR), which was ratified by the Republic of Armenia in 2002, provides in part “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers”. The guarantee of freedom of expression applies to all forms of expression, not only those that fit in with majority viewpoints and perspectives. The European Court of Human Rights (ECtHR) has repeatedly stated: “Freedom of expression . . . is applicable not only to “information” or “ideas” that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there can be no “democratic society.”<sup>12</sup>

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<sup>8</sup> Universal Declaration of Human Rights (UDHR), UN General Assembly Resolution 217A(III), adopted 10 December 1948, available at <http://www.un.org/en/universal-declaration-human-rights/>, [last access: 4 April 2016 at 10:46 am].

<sup>9</sup> International Covenant on Civil and Political Rights, UN General Assembly Resolution 2200A(XXI), (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, available at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>, [last access: 4 April 2016 at 11:07 am].

<sup>10</sup> Defining defamation. Principles on Freedom of Expression and Protection of Reputation, ARTICLE 19, London, June 2000.

<sup>11</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Rome 1950, available at [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf), [last access: 4 April 2016 at 11:50 am].

<sup>12</sup> Handyside v. United Kingdom, 7 December 1976, Application No. 5493/72

But the benefits of freedom of expression are not only in the sphere of politics. The first session of the United Nations General Assembly in 1946 put it thus “Freedom of information is a fundamental human right and... the touchstone of all the freedoms to which the United Nations is concentrated”<sup>13</sup>.

The right to free speech is established by various national constitutions. In particular, the first amendment of the United States Constitution safeguards the right to free speech and free press. The amendment guarantees the free speech by stating that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”<sup>14</sup>

Article 43 of RA Constitution also prescribes the right to freedom of expression which includes everyone’s right both the to openly express ideas and hold opinions as well as to seek, receive and impart information and ideas through any mean of information without any interference by public or local authorities and regardless of frontiers.<sup>15</sup> Even more, the amendments of the Constitution guarantee the freedom of media (press, radio, TV) and particularly operation of independent public television and radio, which offer diversity of educational, informational, cultural and entertainment programs.

The freedom of expression has an outstanding significance for the media whose role in forming and discovering ideas and attitudes in a society cannot be underestimated. As a result of its activities, it allows politicians to indicate and speak about the public concerns and, therefore, makes it possible for every individual to be involved in political discussions which is essential for creating a democratic society.<sup>16</sup> In many decisions the European Court of Human Rights repeatedly recalled the importance and recognized the special role played by journalists and the media in relation to Article 10. In one case, the European Court highlighted the media’s role in making public information and ideas on matters of public interest: “...not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of “public watchdog.”<sup>17</sup>

In a famous judgment on press freedom, the Inter-American Court of Human Rights established: “When freedom of expression is violated... it is not only the right of that individual (journalist) that is being violated, but also the rights of all others to “receive” information and

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<sup>13</sup> General Assembly Resolution 59(I), 14 December 1946.

<sup>14</sup> First Amendment, US Constitution, available at <http://constitutionus.com> [last access: 30 April, 2016, at 5:38 PM].

<sup>15</sup> Constitution of the Republic of Armenia (with amendments) adopted 06.12.2015, available at [http://www.parliament.am/law\\_docs5/Sahmanadrutyun\\_06.12.2015.pdf](http://www.parliament.am/law_docs5/Sahmanadrutyun_06.12.2015.pdf), [last access: 1 May, 2016 at 2:30 PM]

<sup>16</sup> Castells v. Spain, 24 April 1992, Application No. 11798/85, paragraph. 43.

<sup>17</sup> Thorgeirson v. Iceland, Judgment of 25 June 1992, Application No. 13778/88, paragraph 63.

ideas.”<sup>18</sup>

In the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE<sup>19</sup> the OSCE participating states reaffirmed that: “Everyone will have the right to freedom of expression.... This right will include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. The exercise of this right may be subject only to such restrictions as are prescribed by law and are consistent with international standards.”<sup>20</sup>

While various international documents (including above mentioned) enable very broad protections for expression, however, freedom of speech is not an absolute right and is subject to number of limitations. The exercise of the rights regarding freedom of expression carries "special duties and responsibilities" and therefore "... be subject to certain restrictions."<sup>21</sup> International instruments such as International Covenant on Civil and Political Rights (ICCPR) (under Article 19(2) and regional instrument such as European Convention on Human Rights (ECHR) (under Article 10(2) has stated possible parameters where right to freedom of expression can be limited. It is stipulated in the Article 19 of the ICCPR that right to freedom of speech can be restricted either "for respect of the rights or reputations of others or for the protection of national security or of public order or of public health or morals. The American Convention on Human Rights (ACHR) has also envisaged restriction on freedom of expression and includes respects for the rights and reputation of others as one of the basis. The convention says that such restriction shall be expressly established by law to the extent necessary to ensure the respect and reputation.<sup>22</sup> Similarly, Article 10(2) of the ECHR lays down the benchmark, stating:

“The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for

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<sup>18</sup> Compulsory membership in an Association prescribed by Law for the practice of Journalism, Advisory opinion OC-5/85, November 13, 1985, Inter-Am. Ct. H.R. (Series A) No. 5 (1985), paragraph 30, available at [https://www1.umn.edu/humanrts/iachr/b\\_11\\_4e.htm](https://www1.umn.edu/humanrts/iachr/b_11_4e.htm), [last access: 4 April 2016 at 12:38 pm].

<sup>19</sup> Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Organization for Security and Co-operation in Europe, 29 June, 1990, available at <http://www.osce.org/odihr/elections/14304>, [last access: 4 April 2016 at 01:10 pm].

<sup>20</sup> Ibid., paragraph 9.1

<sup>21</sup> Article 19(3), ICCPR, available at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> [last access: 1 May, 2016 at 3:46]

<sup>22</sup> Article 13, American Convention on human Rights, 1969. Available at [https://www.oas.org/dil/treaties\\_B-32\\_American\\_Convention\\_on\\_Human\\_Rights.pdf](https://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.pdf) [last access: 1 May, 2016 at 3:50 pm]



the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

In accordance with the provision 10(2) of the Convention, the ECtHR has developed its jurisprudence relating to three-part test regarding the restriction on freedom of expression cases. Firstly, the Court highlighted that any action undertaken with the purpose of limiting this right should be “prescribed by law”. And there is logic in this standard, which ban the power of public authorities to interfere in the exercise of this right just because of its whim and consequently “only restrictions which have been officially and formally recognized by those entrusted with law-making capacity can be legitimate.”<sup>23</sup> In *Busuioc against Moldova*<sup>24</sup> decision, in particular, the European Court found that one of the requirements flowing from the expression “prescribed by law” is the predictability of the measure concerned.

The second requirement is that any restriction must fulfill one of the legitimate aims listed in the second clause of Article 10 of ECHR or Article 19(3) of the ICCPR. And the final part of the test holds that a restriction on freedom of expression must be indeed necessary<sup>25</sup> for the achievement of its aim and what is more important that the measures used by appropriate bodies should be proportional with the final goal. To be able to substantiate the imposed restrictions as necessary, it is very important that they should not be arbitrary, unfair or based on irrational considerations and should limit freedom of expression as little as possible.<sup>26</sup> As a justified ground for such kind of limitation can serve a “pressing social need”. Overall, as it is mentioned by ECtHR “the reasons given by the State to justify the restriction must be “relevant and sufficient” and the restriction must be proportionate to the aim pursued.”<sup>27</sup>

The European Court has repeatedly stated: “Freedom of expression, as enshrined in Article 10, is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.”<sup>28</sup>

International law permits limited restrictions on the right to freedom of expression in favor of another important interests. Especially person’s reputation and dignity are deemed as essential value and it stated “no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the

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<sup>23</sup> *Dalban v. Romania*, Application No. 28114/95

<sup>24</sup> *Busuioc v. Moldova* decision dated December 21, 2004

<sup>25</sup> *Laptevich v. Belarus*, 20 March 2000, Communication No. 780/1997, *Goodwin v. the United Kingdom*, 27 March 1996, Application No. 17488/90.

<sup>26</sup> *The Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, paragraph 49.

<sup>27</sup> *Lingens v. Austria*, Application No. 9815/82, Judgment of 8 July 1986, paragraphs. 39-40

<sup>28</sup> *Thorgeirson v. Iceland*, Application No. 13778/88, Judgment of 25 June 1992, paragraph. 63.

right to the protection of the law against such interference or attacks.”<sup>29</sup> Therefore, reputation and dignity are among limitations on the freedom of expression and similar regulation is stated in the third part of Article 43 of RA Constitution.

There is a borderline between the freedom of expression on one side and right for reputation and dignity on the other side and everyone, especially public bodies are bound to refrain from illegal actions against the reputation of citizens. It is obvious that each country should have appropriate legislation, which enables citizens to take legal action when State authorities or officials blemish their reputation.

In virtually all defamation cases before international courts, the “protection of the reputation or rights of others” has been invoked to justify defamation laws. Thus, it should be borne in mind that any laws that penalize ‘insult’ or ‘giving offence’ without linking this to the honor and dignity of the offended party would fail the ‘legitimate aim’ test.

Generally, it is clear from the text of the first Amendment of the US Constitution that Congress cannot adopt any law which restricts the freedom of speech or freedom of the press, however the US Supreme Court has expounded a number of principles and set some circumstances how these rights can be regulated and certain types of speech can be prohibited. It is explicitly mentioned in the case of *New York Times v. Sullivan* that “false statements that damage a person’s reputations can lead to civil liability (and even to criminal punishment), especially when the speaker deliberately lied or said things they knew were likely false.”<sup>30</sup>

Reputation plays an integral role in how others see us and how we see ourselves in the world. It is also extremely important to the proper functioning of our social and economic systems. Reputation allows us to make assessments about individuals and entities that we cannot directly observe.<sup>31</sup> Article 3 of Constitution of the Republic of Armenia prescribes, “The inalienable dignity of the human being shall be the integral basis of his rights and freedoms.” Moreover, it is set in Article 23 that “Human dignity is inviolable.”<sup>32</sup> Generally, reputation is understood as the perception of an individual held by others or the esteem in which he or she is

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<sup>29</sup> Universal Declaration of Human Rights (UDHR), UN General Assembly Resolution 217A(III), adopted 10 December 194, available at <http://www.un.org/en/universal-declaration-human-rights/>, [last access: 1 May 2016 at 9:38 pm].

<sup>30</sup> *New York Times v. Sullivan*, 376 U.S. 254 (1964)

<sup>31</sup> Ardia S. David, Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law, 2012, *Harvard Civil Rights-Civil Liberties Law Review*, Vol. 45, p. 261, 2010, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1689865](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1689865), [last access: 1 May 2016 at 9:59 pm].

<sup>32</sup> Constitution of the Republic of Armenia (with amendments) adopted 06.12.2015.

held in society<sup>33</sup>. In a number of decisions, the Constitutional Court of the Republic of Armenia touched upon the issue of recognizing the constitutional legal contents of human dignity as highest value (SDVo-834, SDVo-913, etc.), emphasizing that this right is of utmost importance for free, non-restricted and guaranteed implementation of all fundamental rights and freedoms of an individual and a citizen, which also assumes implementation of certain activity and expression of will, as well as relevant obligation of the State to protect them.<sup>34</sup>

Protection of reputation is only directly referred to in Article 10 of the Convention as a possible ground for restricting the right to freedom of expression. Nevertheless, in certain circumstances the European Court of Human Rights has relied on a right to protection of reputation to find a violation of Article 8 of the Convention, which guarantees the right to respect for “private life”.

There exists a continuous debate on a following question: how to balance the freedom of expression and the right to protection of one’s reputation in certain situations. What is more important to consider in this case is that there is no priority or hierarchy between these two internationally recognized rights and under each specific circumstance special criteria should be set and implemented to secure both of them. However, defamation has been used as a tool to quell the right to free speech around the world. And especially, it is very urgent issue that media should deal with throughout the world. That is why it is there is a great need to achieve proper balance between these fundamental values. The European Court of Human Rights first identified the existence of a conflict between the freedom of expression and the right to protection of reputation in defamation cases, and particularly in *Chauvy v. France*<sup>35</sup> case after having established that the right to protection of one’s reputation is protected by article 8 ECHR. The Court later confirmed the existence of a right to protection of reputation under the European Convention on Human Rights in the article 8 case *Pfeifer v. Austria*.<sup>36</sup> The ECHtR defamation case law clearly suggests a solution regarding the conflict between freedom of expression and the right to reputation and according to it neither right can be granted absolute preference. Thus, the Court propose to find a middle ground between both rights because the freedom of expression does not grant an unlimited right to make statements that influence another’s reputation, and because the right to reputation does not warrant an entire protection against all critical

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<sup>33</sup> Dean Spielmann and Leto Cariolou, The right to Protection of Reputation under the European Convention on Human Rights, available at [https://www.academia.edu/8897653/The\\_right\\_to\\_Protection\\_of\\_Reputation\\_under\\_the\\_European\\_Convention\\_on\\_Human\\_Rights](https://www.academia.edu/8897653/The_right_to_Protection_of_Reputation_under_the_European_Convention_on_Human_Rights), [last access: 4 April 2016 at 03:10 pm].

<sup>34</sup> RA Constitutional Court decision SDVo-834, 2009 available at <http://www.arlis.am/DocumentView.aspx?docid=54372>, [last access: 4 April 2016 at 03:10 pm].

<sup>35</sup> *Chauvy v. France*, Application No. 64915/01, 29 June 2004.

<sup>36</sup> *Pfeifer v. Austria*, Application No. 12556/03, 25 November 2007.

statements.<sup>37</sup> In *Axel Springer AG v. Germany*, ECHR once again emphasized that protection of reputation might be covered by Article 8 of the Convention as an integral part of the respect of private life. “Nevertheless, in order to apply Article 8 an attack on a person’s reputation must attain a certain level of seriousness and in a manner causing prejudice to personal enjoyment of the right to respect for private life ...The Court underlined that “while examining the necessity of an interference for protection of reputation public bodies should guaranty fair balance of two values set in the Convention, namely, on the one hand, freedom of expression protected by Article 10 and, on the other, the right to respect for private life enshrined in Article 8.”<sup>38</sup>

One of the important directions of development of modern legal systems is the protection of the rights and freedoms of human beings and citizens and among them personal non-property rights have a unique importance. That is why all individuals, including public officials, have a legitimate right to protect their reputations if untruthful statements have been made about them or if their honor and dignity have been offended.

## **1.2. Decriminalization of defamation and insult in the Republic of Armenia**

Protection of reputation is the main objective of the defamation law and the primary dispute between defamation and freedom of speech is how to realize the objective of defamation with the purposes of free speech. Defamation laws take an important role as they can have dual effect. Defamation law is an attempt to balance at least two often-conflicting values: right to reputation and freedom of speech. Thus, defamation law serves to penalize those people who make untrue, inaccurate assaults on a person’s reputation. Likewise, organizations working in a sphere of promotion of freedom of expression often claim that in many situations defamation laws often represent needless and unjustifiably broad restrictions on freedom of expression.<sup>39</sup>

The notion of the defamation law is that it be designed in such a way that it justly serve keeping people's dignity and reputation but not violate freedom of expression and not become a tool in the hands of many authorities and governments to abuse their power and restrict and ban the criticism of journalists.

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<sup>37</sup> Freedom of expression and right to reputation: Human rights in conflict. American University International Law Review 26 no. 1, 2010, available at <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1700&context=auilr>, [last access: 1 May 2016 at 11:06 pm].

<sup>38</sup> *Axel Springer AG v. Germany*, Judgment of 7 February 2012, paragraphs 83-84, available at <http://194.242.234.211/documents/10160/2055471/EHCR+-+CASE+OF+AXEL+SPRINGER+AG+v.+GERMANY.pdf>, [last access: 4 April 2016 at 02:58 pm].

<sup>39</sup> Defamation ABC, Article19, November 2006, p. 3, available at <https://www.article19.org/data/files/pdfs/tools/defamation-abc.pdf>, [last access: 2 May, 2016, at 9:11am]

There is an international consensus that criminal defamation is unnecessary for protection of reputation and must be abolished in view of its chilling effect on free expression. Specifically, in General Comment No. 34 concerning Article 19 of the International Covenant on Civil and Political Rights (ICCPR), the UN Human Rights Committee stated: “States parties should consider the decriminalization of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty.”<sup>40</sup>

The three special international mandates for promoting freedom of expression, that are the UN Special Rapporteur, the OSCE Representative on Freedom of the Media and the OAS (Organization of American States) Special Rapporteur on Freedom of Expression – have met each year since 1999 and each year they issue a joint Declaration addressing various freedom of expression issues. In their Joint Declarations of November 1999, and again in December 2002, they called on States to repeal their criminal defamation laws. The 2002 statement read: “Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.” Moreover, according to that Declaration “civil sanctions for defamation should not be so large as to exert a chilling effect on freedom of expression” and should be designed “to restore the reputation harmed, not to compensate the plaintiff or to punish the defendant.”<sup>41</sup>

In February 2010 a declaration was adopted on “Ten Key Threats to Freedom of Expression” and according to this declaration criminal defamation law is one of the threats to freedom of expression in the coming decade<sup>42</sup>. However, it is necessary to note that besides criminal defamation, the civil regulation of it also can cause problems in regard of freedom of expression, In the case of *Tolstoy Miloslavsky v. the United Kingdom* made by ECtHR, the Court found a link between “the imposition of excessive sanctions and a chilling effect on freedom of expression” and made a conclusion that “redundant damages for defamation violates Article 10 of ECHR.”<sup>43</sup>

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<sup>40</sup> General Comment No. 34, adopted on 29 June 2011, CCPR/C/GC/34, available at <http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>, [last access: 4 April 2016 at 04:35 pm].

<sup>41</sup> Joint Declaration By The UN Special Rapporteur On Freedom Of Opinion And Expression, The OSCE Representative On Freedom Of The Media And The OAS Special Rapporteur On Freedom Of Expression, 10 December 2002, available at <http://www.osce.org/fom/99558?download=true>, [last access: 4 April 2016 at 04:53 pm].

<sup>42</sup> Tenth Anniversary Joint Declaration: Ten Key Challenges to Freedom of Expression in the Next Decade, available at [http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.23.Add.2\\_en.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.23.Add.2_en.pdf) [last access: 1 May, 2016 at 9:47 pm]

<sup>43</sup> *Tolstoy Miloslavsky v. the United Kingdom*, Application No. 18139/91

The expressed suggestions on the necessity to decriminalize the defamation laws do not mean that a person can be defamed without having redress and possibility to bring a claim in order to punish the defamer. The main question is whether the redress for violation of right to reputation should be criminal or civil. The European Court has repeatedly criticized the imposition of criminal sanctions for defamation holding that the sanction of criminal nature has itself a chilling effect, which is evident.<sup>44</sup> In this case the ECtHR found a violation of Article 10 because it concluded that the imposition of prison sentences and/or a prohibition on exercising the profession might inhibit journalists from reporting on matters of general interest. The Court stated:

“Although sentencing is in principle a matter for the national courts, the Court considers that the imposition of a prison sentence for a press offence will be compatible with journalists’ freedom of expression as guaranteed by Article 10 of the Convention only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence”.

The Recommendation of the Parliamentary Assembly 1506 adopted in 2001 stated that “Governments continue to use provisions in legislation, such as defamation, and regulations pertaining to territorial integrity, national security or public order, in order to harass undesired critics. Prison sentence for defamation is still practiced in several former communist countries and in Greece, and also features in the criminal codes of other western legislations, although no longer applied there”.<sup>45</sup>

Despite all the mentioned obligations, the defamation and insult laws were criminalized and were regulated in Articles 135 and 136 of Criminal Code of RA adopted in 18 April, 2003. Article 135 stated:

“1. Defamation-dissemination of evidently false information humiliating the person’s good reputation, dignity and honor, is punished with a fine in the amount of 100 to 500 minimal salaries.

2. Actions envisaged in parts 1 of this Article, if repeated are punished with a fine in the amount of 300 to 1000 minimal salaries or by maximum one-year imprisonment”.

And according to the Article 135, “1. Insult was the improper humiliation of another person's honor and dignity and is punishable by a fine in the amount of up to 100 times the minimum salary, or correctional labor for up to six months.

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<sup>44</sup> Cumpănă and Mazăre v. Romania, Application No. 33348/96 Judgment of 17 December 2004, paragraph 114

<sup>45</sup> Recommendation 1506(2001) and of the Parliamentary Assembly, available at <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16888&lang=en>, [last access: 4 April 2016 at 06:06 pm].

2. Insult manifested in public speeches, in publicly demonstrated works or by mass media, is punishable by a fine in the amount of 50 to 200 times the minimum salary, or correctional work for up to one year.”

In 2007 the Parliamentary Assembly of Council of Europe invited states to repeal or amend criminal defamation provisions.<sup>46</sup> As it is prescribed, “the Assembly accordingly calls on the member states to abolish prison sentences for defamation without delay, to guarantee that there is no misuse of criminal prosecutions for defamation and safeguard the independence of prosecutors in these cases”. This means that The Parliamentary Assembly of Council of Europe also invited states to ensure that in the future defamatory acts will no longer be punishable by imprisonment.

After adoption of this Resolution, number of European Council member states, among them Republic of Armenia, initiated relevant legislative amendments directed towards decriminalization of defamation. As a member of Council of Europe<sup>47</sup>, Armenia undertook certain obligations, one of which was to make progress in a sphere of freedom of expression, pluralism and free functioning of the media<sup>48</sup>. Besides, On July 19, 2007 the RA Government decision N927 provides that “pursuant to Armenia’s obligations, it takes the obligation to discuss the possibility of decriminalization of Defamation law in Armenia”.<sup>49</sup>

Furthermore, in May 2010, and in accordance with the Council of Europe resolution “Towards decriminalization of defamation” the Republic of Armenia decriminalized defamation and libel<sup>50</sup> abolishing criminal liability for defamatory statements.

Simultaneously, according to the Amendments in Armenian Civil Code a new paragraph was implemented that was entitled §2.1 “The Order and Terms of Compensation for Harm Caused to the Honor, Dignity and Business Reputation.”<sup>51</sup>

A 2012 study on defamation legislation the Council of Europe member states established that while there are still countries where defamation continues to be a criminal offence, there is “a clear trend towards abolition of sentences restricting freedom of expression and a lightening

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<sup>46</sup> Recommendation 1814 (2007) and Resolution 1577 (2007) of the Parliamentary Assembly “Towards decriminalization of defamation”, available at <http://www.assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=11684&Lang=EN>, [last access: 4 April 2016 at 06:07 pm].

<sup>47</sup> Armenia became the 42<sup>nd</sup> Member State of Council of Europe on 25 January 2001, available at <http://www.coe.int/en/web/portal/47-members-states>, [last access: 4 April 2016 at 07:29 pm].

<sup>48</sup> Honoring of obligations and commitments by Armenia, Report, 13 September 2002, Doc. 9542, available at <http://www.assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=9833&lang=en>, [last access: 4 April 2016 at 07:37 pm].

<sup>49</sup> RA Government decision N927, adopted on July 19, 2007.

<sup>50</sup> The Republic of Armenia Law on Making Amendments to the Republic of Armenia Criminal Code, adopted on 18 May, 2010, available at <http://www.arlis.am>, [last access: 4 April 2016 at 07:57 pm].

<sup>51</sup> The Republic of Armenia Law on Making Amendments to the Republic of Armenia Civil Code, adopted on 18 May, 2010, available at <http://www.arlis.am>, [last access: 4 April 2016 at 08:44 pm].

of the sentences in general”<sup>52</sup> 14 OSCE participating States have partially or fully decriminalized defamation: Armenia, Bosnia and Herzegovina, Cyprus, Estonia, Georgia, Ireland, Kyrgyzstan, Moldova, Montenegro, Romania, Tajikistan, Ukraine, the United Kingdom and the United States<sup>53</sup>. The steps of RA legislator were broadly welcomed by international organizations, particularly, it was stated that “by decriminalizing defamation, Armenia will join the group of progressive states where fair balance between the right to freedom of expression and the right to reputation is sought without recourse to criminal sanctions”<sup>54</sup> Nevertheless, despite the fact that journalists would be the primary beneficiaries, the amendments raised concerns among media professionals who feared the authorities were trying to use progressive legislation to tighten control over media.

Main concerns expressed by Article 19 were the lack of clear mechanisms for implementation, a high degree of discretion given to the courts, the size of fines considered incommensurate with financial capacities of especially the print and Internet media, and finally distrust towards the judiciary. ARTICLE 19 also expressed its serious concerns with regard to the high pecuniary awards for damages, the lack of adequate and effective safeguards against disproportionate awards, the regulation of liability for insult and the failure to recognize a comprehensive system of defenses that can be invoked against defamation claims<sup>55</sup>. However, there is a question whether it was appropriate to undertake such an action, and decriminalize defamation. There are lawyers, who insist that that decriminalization of slander and insult may not be admissible unequivocally<sup>56</sup>. According to his statement “in the cases of unlawful abuse of freedom of speech legislative prescription of material and non- material compensation cannot serve as an effective guarantee for protection of the dignity of a person. That is why defamation shall be envisaged as a criminally liable action and fine or imprisonment for a certain term shall be imposed as means of punishment.” There are also other group of scholars who believe that

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<sup>52</sup> Study on the alignment of laws and practices concerning defamation with the relevant case-law of the European Court of Human Rights on freedom of expression, particularly with regard to the principle of proportionality, Council of Europe, Information Society Department, CDMSI(2012) Misc 11Rev.

<sup>53</sup> Legal Analysis Of Law No. 925 Of 17 October 2013 Concerning The Defamation Legislation In Italy, Commissioned by the Office of the OSCE Representative on Freedom of the Media from Boyko Boev, Senior Legal Officer, ARTICLE 19 Global Campaign For Free Expression, November 2013, available at <http://www.osce.org/fom/108108?download=true>, [last access: 4 April 2016 at 08:05 pm].

<sup>54</sup> Analysis of the Draft Laws Amending the Defamation Legislation in the Republic of Armenia, commissioned by the Office of the OSCE Representative on Freedom of the Media and prepared by Boyko Boev, Legal Officer, ARTICLE 19, London, April, 2010, available at <http://www.refworld.org/pdfid/4c513fa02.pdf>, [last access: 4 April 2016 at 08:56 pm].

<sup>55</sup> Ibid., [last access: 4 April 2016 at 09:08pm].

<sup>56</sup> The Issue Of Improvement Of Some Structures Of Legal Protection Of Individual's Honor, Dignity And Business Reputation In The Republic Of Armenia, Edgar Shatiryan, Candidate of Legal Sciences, Docent of the Chair of Constitutional Law of the Yerevan State University, available at [http://www.y-su.am/files/Edga\\_%20Shatiryan.pdf](http://www.y-su.am/files/Edga_%20Shatiryan.pdf), [last access: 5 April 2016 at 12:41am]



even there was need to abolish criminal liability for defamation and insult, however, the wording and mechanisms in the current regulation is a step back in the protection of reputation and human dignity and the institute of the protection of personal non-property rights needs substantial improvement in the civil legislation.<sup>57</sup> Although it is obvious that in case of criminal liability for defamation and insult the restrictive effect was higher, we believe that the legislative changes are essential and significant not only for protection of the freedom of speech but also have led to the introduction of more effective means to protect one's dignity or reputation. This means that civil action of these categories prescribes various measures of legal protection, such as denial, public apology or compensation, which are more democratic method of protection. One of the advantages of the decriminalization of defamation law is a rapid and coherent development of judicial practice regarding this sphere. What is more important, is that not only Cassation Court of RA has made a lot of decisions in this regard but also Courts of First Instance became more professional and experienced in this particular field that led to the establishment of such an important principle as the predictability.

## **CHAPTER 2**

### **Current regulation of defamation and insult in Civil Code of RA, gaps and shortcomings**

#### **2.1. Defamation and insult: essential legal elements required for qualifying action as defamation or insult**

Before May 2010 the Republic of Armenia legislation prescribed both civil and criminal regulation for the protection of honor and dignity. The amendments to the country's Criminal Code abolished criminal liability for defamatory statements and later pecuniary compensation for victims of defamation (libel) and insult was set.

After the adoption of this Resolution about ten Council of Europe member countries,

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<sup>57</sup> Տարիել Բարսեղյան, Անձի պատվի, արժանապատվության և գործարար համբավի փառաբացիախրավական պաշտպանությունը, available at [http://www.yసు.am/files/01T\\_Barseghyan-1359637445-.pdf](http://www.yసు.am/files/01T_Barseghyan-1359637445-.pdf), [last access: 5 April 2016 at 12:41am].

including Armenia, initiated corresponding legislative reform towards the decriminalization of insult and defamation.<sup>58</sup> The Republic of Armenia decriminalized libel and insult laws in an attempt to regulate relations between the media and public officials and as a result of that the issue is regulated exclusively in a framework of civil law. Particularly Article 19 (1) of the Civil Code provides that "The honor, dignity and business reputation of a person should be protected from the publicly pronounced insult and defamation by another person in cases and order prescribed by this Code and other statutes." And provisions prescribed in Article 1087.1 of the Civil Code regulate procedures and terms of compensation to damage caused to the person's honor, dignity or business reputation as it gives the possibility to The person whose honor, dignity or business reputation has been abused by means of insult or defamation to file a lawsuit against the person who has insulted or defamed.

The new wording of Article 1087.1 of the Civil Code defines insult and defamation.

According to the Article 1087.1 part 2 Insult is defined "a public expression by means of speech, picture, voice, sign or by any other form of publicity with the intention of causing harm to honor, dignity and business reputation".

Based on the second part of the discussed Article public statement may not be deemed as an insult in the given situation and by virtue of its content where it is based on accurate facts (except for congenital disorders). The provisions further elaborate that the statement can not be deemed to have been made with the purpose of discrediting a person if that statement in the given situation and content is made due to an "overweighing public interest".<sup>59</sup>

It follows from Part 3, Article 1087.1 of the RA Civil Code, that **"defamation" is deemed to be public dissemination of such statement of facts in regard to a person, which do not correspond to the reality and abuse his/her honor, dignity or business reputation.**

Firstly, there were many doubts expressed by different lawyers regarding the provisions and terms of the above mentioned Article, which were not clearly defined and therefore could be differently commented by different courts. Particularly, former RA Human Rights Defender Karen Andreasyan applied to Constitutional Court on the issue of anti-constitutional provisions for defamation and insult. During the hearing of 15 November 2011 he stressed, "The article 1087.1 of the RA Civil Code contains points, which give the courts wide margin of appreciation"<sup>60</sup> Besides, according to HRD, the courts when making decision about the amount

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<sup>58</sup> According to the Law HO-98-N adopted on May 18, 2010, Articles 135 and 136 of the RA Criminal Code were recognized void, and according to the Law HO-97-N adopted on the same date the RA Civil Code was supplemented by the Article 1087.1, available at <http://www.arlis.am> [last access: 1 May, 2016 at 11:37 am]

<sup>59</sup> Civil Code of RA, adopted on 5 May, 1998, available at <http://www.arlis.am> [last access: 1 May, 2016 at 11:31 am]

<sup>60</sup> Available at <http://www.hra.am/en/point-of-view/2011/11/15/conscourt>, [last access: 5 April 2016 at 11:18am].

of compensation, do not take into consideration the capacity of the media and the principles of ECHR, according to which the amount of compensation should not prevent the future activities of the media or lead it to bankruptcy.

However, shortly after the Constitutional Court and the Cassation Court adopted a number of decisions where important legal interpretations and definitions were given to the content and application of substantive rules of defamation and insult<sup>61</sup>. The Constitutional Court finds, that “revealing of constitutional legal content of concepts “defamation” and “insult” has a basic importance for examination of the case”. Specific criteria were set where each of them is necessary and all together are mandatory to qualify the action as an insult or defamation.

Based on above-mentioned legal regulation of the concepts, the Court emanates that the features, specific to defamation, are:

- They are **statements of facts**,
- They **do not correspond to the reality**,
- **Have been submitted publicly**,
- They **defame** one’s honor, dignity, business reputation,
- They **do not concern only statement of facts, presented via media**.<sup>62</sup>

In order to evaluate the concrete expression as an insult the simultaneous presence of the following requisites are required:

- to **defame** one’s honor, dignity, business reputation,
- with the intention to abuse the honor, dignity or business reputation.”
- public expression.

The main difference of evaluations of words “insult” and “defamation” in international legal practice, is that in case of defamation it refers to defaming one’s dignity through intentional dissemination of false facts, statement of facts which are not in accord with reality, accusing one’s of a crime or delinquency on the basis of facts not in accord with reality, and insult deems intentional and premeditated derogation of a person.

#### **a. Opinion-Facts**

The Cassation Court of RA emphasized in its decision that “in case of defamation it refers to a fact, some concrete data, which cannot be abstract, hypothetical and has concrete

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<sup>61</sup> Decision DCC-997 of the Constitutional Court of the Republic of Armenia of November 15, 2011, Decision LD/0749/02/10 of RA Court of Cassation of 27 April, 2012

<sup>62</sup> YeKD 0807/02/11 of the Cassation Court of the Republic of Armenia of July 04, 2013, SDVo-997 of the Constitutional Court of RA

subjective expression. The facts are considered accurate when they are substantiated by evidence at the time of the publication of the information or are well-known facts (not demanding proof).”<sup>63</sup> In case of absence of such statement of facts “defamation”- as it is, does not exist in the sense of the article under consideration.

Principle 10 of the Article 19 prescribes that:

(a) No one should be liable under defamation law for the expression of an opinion.

(b) An opinion is defined as a statement which either:

i. does not contain a factual connotation which could be proved to be false; or

ii. cannot reasonably be interpreted as stating actual facts given all the circumstances, including the language used (such as rhetoric, hyperbole, satire or jest)<sup>64</sup>.

The ECtHR has a long established doctrine that distinguishes between facts and value judgments:” A careful distinction needs to be made between facts and value-judgments. The existence of facts can be demonstrated, whereas the truth of value -judgments is not susceptible of proof. ... As regards value judgments this requirement to prove their truth is impossible of fulfillment and it infringes freedom of opinion itself...”<sup>65</sup>

Concerning the need to separate the value judgments and the facts the European Court in a number of its judgments presented the requirement that **a clear distinction should be made between statement of facts and value judgments**. This was especially underlined by the Venice Commission of the Council of Europe while submitting expert conclusions on a number of legislative amendments done by a number of countries. In particular, while reviewing the RA Draft Law on Article 1087.1 of the RA Civil Code the Commission in its Interim Report CDL-AD (2009) 037, June 23, 2009 has expressed an opinion that the application of the terms “insult” and “defamation” used in Article in practice by Armenian courts will have to take into account the Case-law established by the European Court of Human Rights in relation to the right to freedom of expression, in particular, the requirement that there should be a distinction between statement of facts and value judgments.<sup>66</sup> Statements of opinion, which do not contain factual allegations, cannot be proven true or false, the law should not decide which opinions are correct and which are not, but should allow citizens to make up their own minds. The Court has held that requiring defendants to prove the truth of value judgments is illegitimate. This is because the

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<sup>63</sup> Decisions of the Cassation Court of the Republic of Armenia adopted April 27, 2012

<sup>64</sup> Defining defamation. Principles on Freedom of Expression and Protection of Reputation, ARTICLE 19, London, June 2000.

<sup>65</sup> Lingens v. Austria, Application No. 9815/82, Judgment of 8 July 1986, paragraph 46.

<sup>66</sup> European Commission for democracy through law (Venice Commission), Opinion no. 533/2009, Strasburg, 13 May, 2009, available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL\(2009\)062-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(2009)062-e), [last access: 5 April 2016 at 12:59pm].

existence of facts can be demonstrated, whereas the truth of a value judgment is not susceptible of proof: “The requirement to prove the truth of a value judgment is impossible to fulfill and infringes freedom of opinion itself, which is a fundamental part of the right to [freedom of expression].”<sup>67</sup>

The existing definition of insult cannot deem that any negative opinion **or value judgment having some factual basis, which insults one’s reputation**, is not protected by law. Expression of a negative opinion is protected by the European Court’s legal positions, to the extent that it is based on a confirmed and accepted fact and has been done with fair intentions. **At the same time, for expression of value judgment arguments aren’t requested.** Critique which is directed to one’s activity in the political, business, science, art and other public spheres, as well as in regard with public position, social statues and obviously doesn’t exceed legitimate limits, cannot be considered as an insult in the sense of the disputable Article.

Not a value judgment, but a public expression performed with the intention to humiliate the person’s honor, dignity or business reputation can be considered as an insult. In this case, the proper perception of the legal sense of the expression “defamatory” is also important. In this context it deems presumption, premeditated action, inroad towards person’s dignity.

The provisions of the civil legislation of the Republic of Armenia, as a rule, do not allow imposing liability for dissemination of information which assaults the person’s honor, dignity, and business reputation if it has been proven that they correspond to reality in respect to which, such cases do not get proper legal response<sup>68</sup>. Analysis of the provision of Article 1087.1(3) of the Civil Code of the Republic of Armenia shows that one of the criteria for assessment of defamation is the requirement of non-conformity of the specific statement to reality, i.e. the statement must be false, unsubstantiated or unreliable.

### **Publicly**

Article 1087.1 deprives from the legal protection the persons whose reputation or dignity is harmed non-publicly. According to the previous edition of the 19th article of the Civil Code, every person had the right to demand refutation of the information discrediting his honor, dignity or professional reputation, unless the person who had published such information does not prove that it is true. This mean, that there was no any distinction of public or non-public insult of defamation. And in comparison with the former regulation, the current settlement enshrined in Article 1087.1 regarding the publicity is considered as a major legal gap by Professor Tariel

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<sup>67</sup> Lingens v. Austria, note 10, para. 46. See also Dichand and others v. Austria, note 16, para. 42.

<sup>68</sup> RA Cassation Court decision AVD/0179/02/13, paragraph 2, page 10.

Barseghyan.<sup>69</sup> In particular, he proposed that the amendments in the Civil Code of RA bounded and what is even worse deprived the constitutional right of everyone to legally protect their dignity and reputation in a certain situation when possible defamation took place in private setting and there is no possibility for third parties to inquire about made statements through any accessible means.

Publicity is one of the mandatory elements of the characteristics of defamation, which is present even in the case of passing information to any third party.<sup>70</sup> Interpretation of the term “public communication” is provided in the decisions of the Cassation Court of the Republic of Armenia. Meanwhile, verbal statements made and facts presented in the presence of a third party may be considered public. It is obvious that the legal regulation of the impugned Article refers to overcoming the consequences of defaming person in front of the public, at least in the presence of a third person.

In fact, within the framework of the current legal regulations in Armenia, the verbal statements made non-publicly, which assault the individual’s honor, dignity, and business reputation, are not considered as insult and in this case and the person does not enjoy the means of protection prescribed by law. Necessity of resolving the issue of legal regulation of defense from non-public insult is pointed out in Decision DCC-997 of the Constitutional Court of the Republic of Armenia of November 15, 2011. The Court deduced in the ruling that “in such situation, persons, whose honor, dignity or business reputation are assaulted non-publicly, are deprived from the legal protection, which, at least, is dubious, as, for instance, no legal liability is prescribed for swearing a person non-publicly or insulting, e.g. spitting on his or her face. Thus, there is a need to overcome the legal omission and legally regulate the problem of a defense from non-public insult or defamation.”<sup>71</sup>

Freedom of expression is important not only as an individual right, but because of social benefits of a free flow of information. The Court emphasizes, “that the promotion of free political debate is a very important feature of a democratic society. It attaches the highest importance to the freedom of expression in the context of political debate and considers that very strong reasons are required to justify restrictions on political speech. Allowing broad restrictions on political speech in individual cases would undoubtedly affect respect for the freedom of

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<sup>69</sup> Տարիել Բարսեղյան, Անձի պատվի, արժանապատվության և գործարար համբավի փառաբանողական պաշտպանությունը, available at [http://www.y-su.am/files/01T\\_Barseghyan-1359637445-.pdf](http://www.y-su.am/files/01T_Barseghyan-1359637445-.pdf), [last access: 1 May 2016 at 12:33 am].

<sup>70</sup> The same issue is touched upon also in Decision SDVo-997 of the Constitutional Court of the Republic of Armenia of November 15, 2011.

<sup>71</sup> Decision DCC-997 of the Constitutional Court of the Republic of Armenia of November 15, 2011

expression in general in the State concerned.”<sup>72</sup>,

Meanwhile, the protection of free speech without any exception does not extend to hate speech. Also, hate speech is a criminal offense according to the Article 226 of the Criminal Code. However, the current regulation is narrow and only 3 types of hate speech are included, which are national, racial and religious hate speech. Besides, there is also established criminal charge against the action of denial of genocide. We believe, that the concept of hate speech should also be defined in civil regulation, as hate speech usually offends the dignity of the person. Although it is difficult to distinguish insult from hate speech. Taking into account the fact that in some cases there can be a possibility when no criminal proceedings are exercised and if an individual want to make liable the offender in civil proceedings, the current regulation does give the possibility to the court to characterize an action as an insult or defamation. In reality, however, hate speech is more than an insult.

The other issue in the Article 1087.1 of Civil Code is that it does not state any regulation regarding the removing the content even after it is established the fact of insult or defamation. Even it can be considered as a serious interference with freedom of expression, but we think that it is necessary to define the appropriate legal mechanisms. Specially, in the judgment on the case filed by Ruzanna Khachatryan versus “Hraparak” daily<sup>73</sup>, the court not only obliged to publish refutation but also to remove the content from the website. This was done based on the Article 14 of the Civil code by reinstating the situation that existed before the violation of the right.

## **2.2. Exemptions from liability, periods of limitation**

It is widely recognized that on certain occasions it is in the public interest for people to be able to speak freely without fear or concern that they may have to answer in court for what they have said. That is why it is very important to reveal in the frameworks of relations regulated in Article, the certainty of circumstances, excluding person’s legal responsibility, as well as of possible legal consequences in case of absence of such conditions.

Parts 5 and 6, Article 1087.1 of the RA Civil Code stipulate provisions that exclude civil responsibility within the framework of the Article. It is derived from the analysis of their legal content that the legislator does not consider as “insult” and “defamation” those facts that:

1) It took place during the prejudicial or judicial proceedings in the expression made or evidences presented by a participant of the proceedings about the circumstances of the case

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<sup>72</sup> Feldek vs. Slovakia, Application No. 29032/95, Judgment of 12 July 2001.

<sup>73</sup> Available at <http://www.idcarmenia.am/en/idc-conclusion-42>, [last access: 5 April 2016 at 03:51pm].

under hearing,

2) In the given situation and by its content it is justified by an overriding public interest, and if the person, who has publicly disseminated the statement of facts, proves, that in the reasonable limits he/she has undertaken measures to find out their truthfulness and substantiality, as well as has presented these facts in a balanced manner and in a good faith,

3) It follows from the defamed person's or his/her representative's public speech or response or the documents coming from them.

Moreover, it is stated in the part 6 of the Article 1087.1 that “the person shall be exempted from the liability for insult or defamation, if the statement of facts expressed or provided by him/her is the literary or faithful reproduction of the information disseminated by news agency, as well as information presented in a public speech of another person, contained in official documentation, materials of other means of publication and works of authorship, and a reference to the source (author) of information is provided while disseminating it”.

The content analysis of the above-mentioned legal conditions proves that based on the circumstances of the given case and facts, responsibility for defamation and (or) insult of a person can be excluded. Referring to the issue of legal certainty of the terms “overriding public interest” and “presenting statements in a balanced manner and in good faith” depending on the circumstances of the case, it should be decided whether the interest of public to be informed was prevailing over the obligation and responsibility of the person providing the information<sup>74</sup>. In accordance with the case law of the European Court of Human Rights, in such cases the margin of appreciation of domestic authorities is restricted with the democratic society interest, that is- the press is allowed to play its role of “public watchdog” and disseminate information on the serious issues of public interest. Pursuant to the position of the Court, first of all the fact of such a “pressing social need” should be assessed in the law enforcement practice, which can justify that interference in a balanced manner and in good faith without malicious, defaming intention<sup>75</sup>. The Court talked of the importance of the role of the media as a “public watchdog” on matters of importance – not only politics, but also other matters of public concern. Whilst the press must not overstep the bounds set, inter alia, for “the protection of the reputation of ... others”, it is nevertheless incumbent on it to impart information and ideas on matters of public interest. Not only does it have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of “public

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<sup>74</sup> Decision SDVo-997 of the Constitutional Court of the Republic of Armenia of November 15, 2011.

<sup>75</sup> Freedom of expression, Media Law and defamation. A reference and training manual for Europe, February 2015. Available at

<http://www.mediadefence.org/sites/default/files/resources/files/MLDI.IPI%20defamation%20manual.English.pdf>,  
[last access; 1 May, 2016 at 3:14 pm]



watchdog” ...”<sup>76</sup>

It is well established in the Principle 6 adopted by Article 19 that the guarantee of freedom of expression entitles journalists, and others who disseminate information in the public interest, to refuse to disclose the identity of a confidential source. This Principle simply applies that right in the context of defamation law. Where individuals do refuse to reveal confidential sources, they may still introduce evidence of the existence of these sources in court. It will be up to the trier of fact to determine how much weight this evidence should be given.<sup>77</sup>

The Civil Code of RA provides that “the burden of proof of the availability or absence of the necessary factual circumstances under the cases of defamation lies with the defendant. It will devolve upon the plaintiff if the burden of proof requires unreasonable actions or efforts on the part of the defendant, while the plaintiff possesses the necessary proofs”. In its decision ECtHR insisted “...it was not in principle incompatible with Article 10 to place on a defendant in libel proceedings the onus of proving to the civil standard the truth of defamatory statements. ... special grounds were required before a newspaper could be dispensed from its ordinary obligation to verify factual statements.”<sup>78</sup>

It is enshrined in the part 9 of Article 152 of Civil Code of Russian Federation<sup>79</sup> that “If the person, who has spread the information, discrediting the honor, dignity or business reputation of the citizen, cannot be identified, the citizen shall have the right to turn to the court with the demand that it recognize the spread information as not corresponding to reality.” This means that in cases when the victim does not clearly know the person who should be a respondent in the Court, the legislator provides with effective measure to demand protection from Court by recognizing the proliferated information as erroneous. Such kind of regulation has an urgent importance in the line of ability of Internet users to post their ideas or convictions with complete anonymity. And because everyone can easily access and search the content of online-posted materials, very often it leads to the result where false statement or review damaged the reputation of individuals and companies. That is why we believe that appropriate amendments should be conducted in RA Civil Code, which will enable everyone to protect their reputation in a mentioned specific situation. This is a question of utmost importance especially after the failure of the draft law fakes. We believe that it can act as a deterrent and preventive measure and should be considered as a unique tool for the protection of honor and dignity.

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<sup>76</sup> Thorgeirson vs. Iceland, Application no. 13778/88,1992 paragraph 63.

<sup>77</sup> Defining defamation. Principles on Freedom of Expression and Protection of Reputation, ARTICLE 19, London, June 2000.

<sup>78</sup> Steel and Morris v. United Kingdom, Judgment of February 15, 2005, paragraph 93.

<sup>79</sup> Civil Code of Russian Federation, Part 1, adopted on 21 October, 1994, available at <http://www.gk-rf.ru>, [last access: 1 May, 2016 at 7:30 pm]

Proposed Article 1087.1 sets out the time limit for lodging a claim for compensation for defamation and insult. According to the part 1 of Article 8 of the RA Law on “Mass Media” a person has a right to demand that the implementer of media activity refute factual inaccuracies in the information disseminated by the implementer of media activity if the latter does not prove the truth of those facts. The demand for refutation has to be presented within a one-month period following the day of publication of the information subject to refutation<sup>80</sup>. Regarding the period of limitations, it is mentioned in the part 13 of the Article 1087.1 that “A claim for protection of the right under this Article shall be submitted to the court within one month from the moment the person becomes aware of the insult or defamation, but no later than within six months from the moment of insult or defamation.” A longer deadline can be used to chill freedom of speech, both because it makes substantiation of defense difficult, and because leaving an uncertainty about the consequences of certain statements depressed further faultfinding discussion. If the period prescribed by the statute of limitations has passed, the defendant should be able to raise this before the Court as a complete ground for rejection of defamation claim. In any case, the Cassation Court holds that the selection of the right remedy for each case belongs to the victim.<sup>81</sup> But a person shall not use remedies defined in Parts 7 and 8 of the Article 1087.1, if before applying to the court the individual has demanded refutation and (or) publication of his/her response in accordance with the RA Law on “Mass Media”, and the person implementing media activities has fulfilled that requirement.

## **CHAPTER 3**

### **Compensation for defamation and insult as a compensation for non-pecuniary damages**

Disproportionate remedies or sanctions can significantly limit the free flow of information and ideas. As a result, it is now well established that remedies or sanctions, like standards, are subject to scrutiny under the test for restrictions on freedom of expression<sup>82</sup>.

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<sup>80</sup> RA Law “Mass Media”, adopted on December 13, 2003, available at <http://www.arlis.am>, [last access: 5 April 2016 at 05:19 pm].

<sup>81</sup> LD/0749/02/10 of the Cassation Court of the Republic of Armenia of April 27, 2012

<sup>82</sup> Defining defamation. Principles on Freedom of Expression and Protection of Reputation, ARTICLE 19, London, June 2000.

Article 1087.1 also deals with remedies for insult and defamation. Particularly, it is stipulated that:

“7. In the case of insult, the person has the right to demand judicially application of one or several of the measures listed below:

1) Public apology. The manner of apologizing shall be determined by court.  
2) If the insult took place in the information disseminated by a person implementing media activities, partial or complete publication of the court’s decision through the same media. The method and volume of the publication shall be determined by court.

3) Compensation to be paid in the amount of up to 1000-fold of the established minimal salary.

8. In the case of defamation a person has the right to demand judicially application of one or several of the measures listed below:

1) If the defamation took place in the information disseminated by a person implementing media activities, a public refutation of defamatory facts through that media and (or) to publish his/her response to those facts. The manner of the refutation and the response shall be determined by court in compliance with the RA Law on “Mass media”.

2) Compensation to be paid in the amount of up to 2000-fold of the established minimal salary.”

European Court has established that the purpose of a remedy for defamatory statement should be limited to redressing the immediate harm done to the reputation of the individual who has been defamed.<sup>83</sup> Using remedies to serve any other goal would exert an unacceptable chilling effect on freedom of expression, which could not be justified as necessary in a democratic society

While deciding the legitimacy of compensation the respondent’s limited measures should be considered as a factor, his/her profit should be taken into consideration, a disproportionate heavy financial burden shouldn’t be defined for the respondent, which will make a crucial negative financial influence on his/her activity. In the case of *Filipovic v. Serbia*, the Court recalled its conclusions in *Tolstoy Miloslavsky and Steel and Morris* that “the award should be proportionate to the moral damage suffered, and also to the means available to the defendant”. Compensation shall be proportional to the harm caused and shall be awarded solely with the purpose of redressing the harm done to the reputation of the person or to compensate for any demonstrable actual financial loss or material harm. In making a determination of compensation, the court is obliged to have regard for all of the circumstances of the case.

In its judgment in *Khachatryan and others v Armenia* case the European Court found that owing to the absence of the compensation mechanism for non-pecuniary damage, the person who

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<sup>83</sup> *Tolstoy Miloslavsky v. United Kingdom*, Judgment of 13 July 1995, paragraph 51.

was a victim of violation of the safeguards defined by Article 5 Paragraphs 1-4 of the European Convention of Human Rights, loses the opportunity to get the compensation, and this, in its turn is a violation of Article 5 Paragraph 5. Therefore, the domestic code must provide such an opportunity.

In “Poghosyan and Baghdasaryan v. Armenia “case (2012) the ECHR concluded “the applicant should have been able to apply for compensation for the non-pecuniary damage suffered by him as a result of his ill-treatment. Since no such compensation had been available to him under Armenian law, the applicant was deprived of an effective remedy. There has accordingly been a violation of Article 13 of the Convention.”

After these decisions legislation changes were initiated to implement to establish compensation for non-pecuniary damages that will result proper implementation of international obligations, which Armenia took upon itself and this necessity was also noted in the above mentioned judgments of the European Court of Human Rights against Armenia. In fact, a new Article 162.1 was established that set the concept of non-pecuniary damages. It is prescribed that “non-pecuniary damage is physical or psychological suffering, which is caused by a decision, action or inaction encroaching upon the non-material amenities that belong to the person at birth or by force of law or violating the person’s own non-material rights.”<sup>84</sup> Part 4 of that Article stipulates that Damage caused to honor, dignity or business reputation shall be compensated by Article 1087.1 of this Code, and the pecuniary damage caused as a result of violation of conventional rights and wrongful conviction shall be compensated in accordance with the procedure and terms set forth by Article 1087.2.

In civil defamation cases, the principal cause of the “chilling effect” is large monetary awards against the media in favor of defamation claimants. In a civil suit, the purpose of the award is not to punish the defendant (the defamer), but to compensate the plaintiff, the person who was defamed, for any loss or damage caused by the defamation. It follows that the claimant should be able to prove that there was actual loss or damage as part of their suit. If this cannot be demonstrated, then it is unclear why there should be any monetary award. Usually a defamatory statement could be rectified by a correction or an apology. It should also be noted that the European Court itself very rarely awards non- pecuniary damages. It nominally concludes that the finding that a rights has been violated is sufficient-a principle that domestic courts might be advised to follow where possible.

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<sup>84</sup> Law On The Republic Of Armenia “On Making Amendments And Additions To The Civil Code Of The Republic Of Armenia”, Adopted On 19.05.2014

## **CONCLUSION**

The Universal Declaration of Human Rights enshrines that “all human beings are born free and equal in dignity and rights.” There is a need to set out an appropriate balance between the human right to freedom of expression, guaranteed in UN and regional human rights instruments as well as nearly every national constitution, and at the same time to protect individual reputations, widely recognized by international human rights instruments and the law in countries around the world. Even if the right to freedom of expression is not absolute, however, any limitations must remain within strictly defined parameters.

The institute of the protection of personal non-property rights needs substantial improvement in the civil legislation. No full protection of human rights can be provided without the improvement of this institute.

Given what has been outlined in the present paper in terms of progress and effectiveness of state work schemes it should, however, be highlighted that there still exist major gaps in regulation of the concepts of defamation and insult, as well as non-pecuniary compensation in case of the harm to one’s honor, dignity or reputation. Though the Republic of Armenia has initiated and gradually implements the institution of moral damage, there are still, some further legislative changes are required. Therefore, there is a need to overcome the legal omission and legally regulate the problem of a defense from non-public insult or defamation. In our opinion, the concept of hate speech should also be defined in civil regulation, as hate speech usually offends the dignity of the person. And finally special mechanism should be implemented for removing the defamatory content. Also a particular measure can be implemented in the Civil Code of RA aiming to enable everyone with the legal tool to demand the Court to hold that the spread statements are false when it is not possible to identify concrete person who is liable for it.

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