



YEREVAN PRESS CLUB



Analysis of Armenia's Judicial Practice in Cases of Libel and Insult

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INTRODUCTION

On May 18, 2010 the RA National Assembly adopted the Laws “On Introducing Amendments and Supplements to the RA Civil Code”, “On Introducing Amendments to the RA Criminal Code” and “On Introducing an Amendment to the RA Criminal Procedure Code”. The legislative amendments laid ground for the decriminalization of libel and insult in Armenia. The Article 1087.1 of the RA Civil Code prescribes the terms and conditions for compensating the damage caused to the honor, dignity or business reputation of a person.

The amendments, decriminalizing libel and insult, were immediately put under the spotlight of the media community and the human rights organizations. Specifically, the latter ones were concerned that when defining the limits of public significance and the size of the damage caused by the defamatory statement, the courts might strike arbitrary judgments, without taking into consideration the respondent’s financial situation and the public interest in the disseminated information. This would have consequently undermined the already restricted scope of freedom of expression in Armenia. In fact, the Court practice unfolded several months after the decriminalization showed that these concerns were justified. The follow-up of the Court cases demonstrated that the legislative amendments did not aim to protect the reputation of the majority of Armenian citizens at all. Very often, the Court decisions, which imposed large pecuniary awards on the media, had a chilling effect on the freedom of expression, which, in its turn, was a threat for the right of the public to receive information. This was mainly driven by the non-uniform application of the legislation on libel and insult by the courts - the disputable judgments did not pursue a legitimate aim, but rather served as a tool for the political and business elites to punish the media outlets. However, later, with the efforts of the civil society representatives and international organizations, as well as the opinions of the experts, an improving trend was observed in the Court practice.

This study analyzes the judgments, made by the Courts of General Jurisdiction, RA Civil Court of Appeals and the RA Court of Cassation on the suits lodged by physical and legal entities on the grounds of libel and insult. The research specifically focuses on those cases in which the courts have used such criteria and tests that contravene the international standards and the ECHR case law, thus restricting the freedom of expression. At the same time, the study reveals those Court findings, which expand application of the principles of the freedom of expression and may establish a favorable case law. By examining the implementation practice of the Article 1087.1 of the RA Civil Code, and the international law in this sphere, the authors of the study propose a set of legal instruments, which would enable the Armenian courts to align their findings with the international standards and particularly with the ECHR case law, when assessing the facts of defamation cases. This research would be useful for media representatives, students, whose future professional path would relate to the information sphere and respective disputes.

The study is divided in 8 parts. Each of the parts elaborates on the issues, on which the Armenian courts have provided the most controversial interpretations, and on which the European Court of Human Rights and the international law provide clear-cut conclusions: ***the public benefit and public interest as criteria for assessing the legitimacy of intervention in freedom of speech, defense mechanisms of fair comments, reasonable publications and reproduction of statements by***

other persons, regulation of defamation in the new media, statement of facts and value judgments, the balancing of the right to freedom of speech with other rights, the reasonable limits of pecuniary remedies to a person's honor, dignity and good reputation, the definition and characterization of the term "information source", violations of judicial procedures in cases of libel or insult). At the initial stage, the courts' findings regarding these issues were the most disputable and were running counter the international law.

THE PUBLIC BENEFIT AND PUBLIC INTEREST AS CRITERIA FOR ASSESSING THE LEGITIMACY OF INTERVENTION IN FREEDOM OF SPEECH

The Legal and Judicial Practice of the Republic of Armenia

In cases of libel and insult the courts of Armenia, based on the provisions of Article 1087.1 of the Civil Code, use the following three tests to assess the factual circumstances of each case (whether the information is of a defamatory nature; if there is an intent to injure; and whether the information has been publicly disseminated). As an exception to this rule, the 2nd point of Part 1 of Article 1087.1 of the the Civil Code stipulates that a public statement that is based on accurate facts or is conditioned by the prevailing public interest cannot be regarded as an insult. Regarding libel, only point 3 of the 5th part in the above-mentioned Article of the Civil Code refers to the "prevailing public interest," noting that "the public presentation of the actual data is not considered libel if, in the given situation and by its contents, it is conditioned by the prevailing public interest, and if the person publicizing actual information can prove that he has used reasonable means to clarify their veracity and validity, as well as presenting the data in good faith and in a balanced fashion. "

In almost all cases of libel and insult, the courts have evaluated and invoked the "public interest". This is definitely based on democratic principles and the case-law of the European Court on Human Rights (ECHR). The Court has repeatedly stated that the restriction on freedom of speech should be assessed not only by the aforementioned universal tests, but also that in each case the Court must assess the significance of the information, that is, whether, under the circumstances, the right to disseminate information was necessary "in a democratic society"; whether the action is based on the "pressing social need "; whether proportionate and equivalent means have been used to reach the "legitimate aim pursued"; and whether the reasons advanced in justifying the intervention by the authorities are "relevant and sufficient" (see below **Greenberg v. Russia** decision of the ECHR).

However, the practice of the courts of the Republic of Armenia is not uniform on this issue, and if in some cases the courts have examined the merits of the "public interest" in essence, in other cases they have just cited it without specifically and concretely applying it with reference to the specific circumstances of the case under review.

In the case of **Samvel Aleksanyan et al v. "Dareskizb" LLC (ԵԿԴ / 2347/02/10)** the Court of First Instance of Kentron and Nork-Marash Administrative Districts of Yerevan did not consider the public interest, but simply pointed out that "*freedom of speech should be coupled with obligations and responsibilities ...* ", "*even if the case under consideration is subject to serious public interest.*" On the same case, the Civil Court of Appeals and Cassation of the Republic of Armenia, despite the argument of the plaintiff that "*perhaps there is no doubt that the prevailing public interest dictates public awareness of linkages to serious crimes by elected representatives of the people,*" did not basically examine the existence of the prevailing public interest,

simply reiterating the conclusion of the Court of First Instance regarding the “serious public interest”.

In the case of ***Bella and Sedrak Kocharyan v. "Skizb Media Center" LLC*** (ԵԿԴ / 2479/02/10) the Court merely cited the public interest, but did not consider the specific factual circumstances of the case, stating that in its factual circumstances the case is *"significantly different from dissemination of information of a broader scope regarding political personalities, since, in the given case, this is not in reference to the political actor, but to the family members of the Second President of the Republic of Armenia enjoying immunity, as defined in Article 56.1 of the Constitution."*

The application of the public interest test in Armenian judicial practice was perhaps first noted in the ***Tigran Arzakantsyan v. "Yerkir Editorial Ltd"*** (ԵԿԴ / 0261/02/11) and ***Tigran Arzakantsyan v. "Iravunk Media"*** (ԵԿԴ / 0526/02/11) cases, in which the Court took into account the status of the plaintiff (the fact that he was a political figure), and accordingly acknowledged the public significance of the disseminated information. In the first case, the Court noted that the disputed *"article generally refers to the behavior of the member of the National Assembly and its various manifestations"* therefore it took into account, *"the plaintiff's position in society and the fact that he was elected by the people, therefore information about his behavior is of public interest and the public has a right to receive such information."* On the other hand, the Court also underlined the fact that *"the media has a special role in a democratic society in providing information regarding news of public sonority, thus realizing its role as a public watchdog."* In this regard, the Court applied the requirement from the ECHR case law that in deciding the limits of curtailment of freedom of speech, its necessity in ***"a democratic society"*** must be essentially considered.

In ***Tigran Arzakantsyan v. "Iravunk Media" LLC*** the Court interpreted the public interest more widely putting it on the same scale with the right for respect of personal life. Specifically, the Court concluded that *"it is undisputed that everyone is entitled to the protection of personal life, however, it is essential to know whether the news story refers to a person who is still in office and performs official functions."* The Court concluded that *"in such cases, the incumbent politicians should expect less protection for their private lives, because their every word and deed is in the public spotlight, and the community, wishing to be informed of its political leaders, exercises its right to information, which is a legitimate interest."* In fact, the Court placed first preference on the right of access to information over the protection of privacy, in this case the protection of the reputation of a politician, which is quite a commendable approach.

In another case, ***Hayk Babukhanyan v. Khmbagir Ltd*** (ԵԿԴ / 0790/02/11), the Court did not consider as defamatory towards a politician such exaggerated statements as: *"If Hayk had possessed a head, he would shake it and would tell his dogs to stay, instead he shakes his ears and admires the stupidity of quotes from his own newspapers. Until now, no Armenian historian has uttered such stupidity as Hayk has. And since it is only Hayk who holds this opinion, he is engaged in disseminating it. Forget that this is not the place for it. If you have something to say about the article, say it. Otherwise, the rest is barking, barking that has no connection with the article."* It is noteworthy that in this case the Court was guided by the objective requirement of democratic self-regulation, according to which the scope of permissible criticism of politicians should be wider, while the latter should exhibit

extreme tolerance, in which case, according to the Court *"the expressions published in the article were not aimed at sullyng the individual."* Doubtless, such words aimed at ordinary citizens would have been considered defamatory. At this point, we would like to cite the following quote from the Court decision reached on this case:¹*"In addition, the accepted limits of criticism regarding the plaintiff politician, as a politician, are wider. Consequently, in acting, the latter is inevitably and consciously under the close scrutiny of journalists as well as the wide masses of the public. Therefore, the plaintiff should have exhibited a greater tolerance in this case also, because in a democratic society it is not necessary for the Court to intervene in the freedoms guaranteed by the 10th Article of the Convention. Thus, the Constitutional Court, in its 15.11.2011. ՄՂՈ-997 decision stated that in applying the Article of the Civil Code (1087.1) the courts should, inter alia, consider the pivotal role of the media in disseminating issues of concern to the public in a democratic society, that wider protection should be provided for those publications that are part of the debate around the issue of public interes. Therefore, the case reviewed above, subject to non-intervention by the Court in light of the rights guaranteed by Article 10 of the Convention, the published material of public interest and the opinions around it are considered a result of a debate, therefore the authors have more extensive protection. "*

As much as the Court's expressed position regarding the special role of the media in a democratic society, as well as its fairly wide interpretation of the public interest is to be hailed, its decision in another case, ***Gegharkunik Governor Nver Poghosyan v. "The Editorial Office of Zhoghovurd Newspaper" LLC*** (ԳՂ /024/02/11) is equally unacceptable. Particularly the Court's argument that, *"the facts of the case demonstrate that the plaintiff, in his administration of the province, has displayed good behavior, has worked within the limits of legal principles, and additionally there have been no recorded cases of bribe-taking"* does not mean that the possible manifestation of corruption by the public official does not spring from the public interest and from the prevailing interest in receiving information. Moreover, the media, in its role of public "watchdog" is compelled to provide such information. In that sense, the Court not only did not consider such facts as submitted by the respondent, but also noted that *"the facts presented by the defendant in this case do not directly emanate from the 'prevalent public need' in which case to avoid being penalized for the characterization "he has taken a bribe" cannot be acceptable in a democratic society and despite that serve a legal purpose..."*. In fact, the Court refused to recognize that the gathering and dissemination of information regarding possible bribe-taking by a public official springs from public interest and the prevalent public gain, stating that the dissemination of information about that must necessarily be punished. In fact, in this case, the Court interpreted the understanding of "public interest" to the detriment of the journalist, by giving a controversial meaning to that expression.²

The Court of Cassation case-setting decision of April 27, 2012, regarding the ***Tatul Manaseryan v. "Skizb Media Center" LLC*** case (ԵԿՂ / 2293/02/10; see also ***Vano Yeghiazaryan v. Boris Ashrafyan, and "Skizb Media Center" LLC as third party*** (ԼՂ/0749/02/10)) the Court of Cassation, April 27, 2012) focused on the notion of "prevailing public interest" and particularly the "watchdog" role of the media, the free debate on political and public interest issues, as well as the limits of criticism of

¹ Monitoring of judicial cases on the bases of libel and insult, "Rule of Law" NGO.

² Monitoring of judicial cases on the bases of libel and insult, "Rule of Law" NGO.

official persons. The Court of Cassation stated that *"in the event of imposing sanctions and intervention in the right to freely disseminate information as per point 8 of Article 1087.1 of the Civil Code, courts must take into account the fact that the limits of criticism of politicians, public servants and state and local self-governing authority employees, are wider than those for private individuals. However, such criticism may be considered acceptable, if it is regarding the activities of such official persons and does not exceed the abovementioned limits set by the case law of the European Court of Human Rights. Otherwise, criticism of a politician as a private person is fully subject to the limitations set by point 2 of Article 10 of the Convention and in assessing the expressed opinion or disseminated information regarding such persons as libel, the fact of the person being an official should not be taken into consideration."*

Referring to the notion of **"prevailing public interest"** the Court of Cassation correctly noted that in each case the courts should not only evaluate the overall circumstances of the three tests (whether information is defamatory, whether there is an intention to defame, and whether the information was publicly disseminated), but also *"within the frames of any judicial investigation it is necessary to determine whether the factual data in their content and within the given framework are based on the "prevailing public interest", which is directly related to the public interest regarding the right to be informed? Whether the public has followed the process of dissemination and waited for their subsequent publication? In assessing the "prevailing public interest" the necessity of answering these questions emanates from responsibility placed on the mass media regarding the dissemination of information and ideas on areas and issues of public interest. The responsibility of the mass media to provide this information is coupled with the right of the public to receive such information."*

At the same time, the Court of Cassation noted that *"unlike cases of insult, when the presence of the prevailing public interest excludes the consideration of the disseminated information as insult, in cases of libel additional documentation is necessary. Particularly, the person who has published factual data must prove that before publication he has taken measures that have availed him with the possibility of concluding that the factual data are conditioned by the prevailing public interest and could be correspondent with reality."* This differentiated approach is not justified and restricts the journalists' circle of protection in cases of libel, forcing them to take extra measures to prove that the expression of libel is based on the prevailing public interest.

Referring to limits on the criticism of politicians, the Court of Cassation, referring to the practice of ECHR case law, noted that *"the limits of acceptable criticism of politicians is therefore broader than in the case of private persons"* (see below **the decision of the European Court in the case of Lingens v. Austria, July 8, 1986, pt. 42**).

Earlier, the Constitutional Court expressed a similar opinion regarding this issue in decision **U11-997 of November 15, 2011**, with reference to *"...the issue of the legal definition of the terms **"the prevailing public interest"** as well as "balanced and honest presentation", the Court finds that in each specific case, depending on the circumstances, it must be decided whether the public's interest to be informed has been prevalent with reference to the responsibility and duty placed on the person disseminating the information. According to the case law practice of the European*

Court of Human Rights, in such cases the discretion of the national authorities is limited by the interests of the democratic society, which consists in allowing the media to carry out its function as watchdog, by disseminating information on matters of serious public interest. According to the position of this Court, in implementing the law the first thing that should be assessed is the existence of such an "urgent public demand" which is capable of justifying that intervention was made in a balanced and conscientious manner, without malicious and defamatory intent."

International Legal Practice and the Case Law of the European Court of Human Rights

In analyzing the limits of criticism of politicians, the courts of the Republic of Armenia very often have referred to the ***Lingens v. Austria*** case law decision of the ***European Court of July 8, 1986***. In point 42 of that decision, the ECHR established that, *"Freedom of the press furthermore affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally, freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention. The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance. No doubt Article 10 para. 2 (art. 10-2) enables the reputation of others - that is to say, of all individuals - to be protected, and this protection extends to politicians too, even when they are not acting in their private capacity; but in such cases the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues."* Furthermore, with this decision the ECHR affirmed that, based on the requirements of a democratic society, the courts need to be more tolerant with respect to the information disseminated by journalists about political figures, and the evidence in each case must necessarily analyze the "prevalent public interest" test.

Another case, to which the Armenian Courts very often refer, is ***Castels v. Spain (decision of April 23, 1992)***. With this case, the Court noted the significant role that the media play in a country of laws. ECHR reiterated that the press has an important role in disseminating information and ideas on political and other issues of public interest, provided these do not violate the permissible limits set by the Convention. In this same case, the Court cited its position in the *Lingens v. Austria* decision that is, that the limits of criticism of political figures are wider while political debate is pivotal for democratic society.

In ***The Sunday Times v. Great Britain (April 26, 1979)*** the ECHR noted that in each case it must be considered whether the restriction of the freedom of speech was "necessary in a democratic society", that is, the evidentiary circumstances of the case must be assessed from the point of view of the public interest. The Court assessed the information about the medication disaster to be of public concern and considered the limitation of dissemination of information about it unacceptable. In this connection, the Court noted that Article 10 of the Convention ***not only guarantees the freedom of the press freedom, but also the right of the public to get the appropriate information.***

In *Standard Verlags GMBH v. Austria (June 4, 2009)* the ECHR noted that freedom of speech is among the essential foundations of a democratic society and a fundamental condition of its development and personal self-fulfilment and once again underlined the media's significant role in a democratic society. The Court also noted that in assessing the laws on the restriction of freedom of speech, the courts must consider the interests of a democratic society and the “**watchdog**” function of the press. The ECHR also took an important position, which in Armenian legal practice the Court only implemented in the case of *Tigran Arzakantsyan v. "Irvunk Media" LLC (ԵԿՂ/0526/02/11)*. ECHR underlined that **such information about the activity of political actors** during their official tenure that contributes to the shaping of political debate (even if the given information is contentious) **must be distinguished** from **information on the personal lives of individuals** that do not refer to the performance of official duties by political actors or public officials. Moreover, in this case, ECHR noted that “*the public's right to know may, under special circumstances, also be applied to aspects of the private lives of public figures, particularly regarding politicians.*”

In its decision on *Greenberg v. Russia (July 21, 2005, point 27)* the ECHR clarified the test on the “**necessity in a democratic society**” decision noting that courts must evaluate whether the restriction on freedom of speech proceeds from the “**prevailing public interest**”, whether it is proportionate to its “**legitimate purpose**” and whether the reasons advanced by the authorities for the intervention are “**relevant and sufficient**”.

In fact, we are pleased to note that although the courts of the Republic of Armenia have not always applied the means of avoiding liability for disseminating information conditioned by the “prevailing public interest”, nevertheless in subsequent judicial practice and particularly in the case law decision of the Court of Cassation (April 27, 2012) and the Constitutional Court's clarifications are consistent with the case law of the ECHR and emanate from internationally recognized standards. The latter have also had a positive impact on subsequent legal practice in 2012 since when almost all the decisions by the courts have at least made reference to the “prevailing interest” test, citing the decisions of the Court of Cassation and the Constitutional Court.

DEFENSE MECHANISMS OF FAIR COMMENTS, REASONABLE PUBLICATIONS AND REPRODUCTION OF STATEMENTS BY OTHER PERSONS

The Legal and Judicial Practice of the Republic of Armenia

Article 1087.1 of the Civil Code refers to the international practice for defense mechanisms of fair comments, reasonable publications and reproduction of statements by other persons.

The "**fair comment**" principle is expressed in Civil Code Article 1087.1 parts 2, 3 and 5. According to part 2, a public statement that has not been disseminated with the "intent to defame" the individual or which is based on veritable facts or is conditioned by the prevalent public interest cannot be considered insult.

According to part 3 of the same Article, libel is a factual disrespectful expression regarding the individual, while according to part 5, a person is free from responsibility for such a statement if it emanates from a public speech or reply by the person (or his representative) subjected to libel, or a document based on the speech, or the statement is conditioned by the prevalent public interest, or if the person publicizing the statement can prove that, within reasonable limits, he has taken measures to check its veracity and foundations as well as presenting those data in a balanced and reasonable manner. The "**reasonable publication**" defense is a unique expression of the "fair comment" defense and it is interpreted in 1087.1, part 5.³

The principle of the reproduction of the statements of other persons is enshrined in part 6 of the Civil Code Article 1087.1, according to which the person is released from liability for libel or insult, if the actual data expressed or presented by him are the literal and conscientious reproduction of the information disseminated by the news agency or consist of the contents of a public speech or official documents and in disseminating those the person has cited the source (author).

Since the decriminalization of libel and insult in 2010, the courts of Armenia have very rarely used the abovementioned defense systems. However, following the case law decisions of the Constitutional Court of November 15, 2011 and of the Court of Cassation of April 27, 2012, the courts began to refer to those methods of protection of journalists more often.

In the case of **Samvel Aleksanyan et al v. "Dareskizb" LLC** (ԵԿԴ / 2347/02/10) where the verdict was rendered prior to the adoption of these decisions, the Court, having corresponding bases for the application of the above three methods of defense did not however resort to them, holding the media to the highest threshold of responsibility. The Court did not consider the activities of the journalist and the newspaper, which could have been rated as "fair". The media had published its source, which attests to journalistic integrity, the absence of actual malice and the

³ Conclusion of the IDC (October 20, 2011) regarding the case of National Assembly members *Samvel Aleksanyan (no party affiliation), Levon Sargsyan and Ruben Hayrapetyan (members of the Republican Party) v. the founder of "Haykakan Zhamanak" Daily Dareskizb LLC*

conscientious possibility availed to the defamed persons to defend themselves. The offer of such a possibility is also contained in the letter dated 01/11/2010 by the editors to the claimants, where the media expresses willingness to *“the issue of the dissemination of the text of the reply ...by the methods prescribed by law...”*

In this case, the courts did not apply the **"reasonable publication"** defense system, elements of which partially overlap with the **"fair comment"** system. The first mandatory element of “reasonable publication” is the interest of the public. It is evident that the disputed publication is of public interest (it is in reference to the possible participation of members of the National Assembly in some crimes). At the same time, the news outlet presented the subject in a balanced and conscientious manner, refraining from making statements of such nature that could violate the presumption of innocence of the persons involved. Furthermore, within reasonable limits, it took sufficient measures to determine the truth of the facts, and conducted a vast interview with Smbat Karakhanyan (the source of information).⁴

In a similar case in which the plaintiff was once again National Assembly member Tigran Arzakantsyan, the Court took into account the reasonable actions taken by the journalist and the news media, in fact, using the accepted defense mechanism. In ***Tigran Arzakantsyan v. "Yerkir Editorial Board" LLC (ԵԿՂ / 0261/02/11)*** the Court examined each of the disputed expressions in detail and did not apply the above defense mechanisms regarding only one of them. Thus, the Court of First Instance correctly noted that for the use of the word "puppy" the *“media would not bear any responsibility ... in case it could provide justification that the word was used by another person and that the journalist was simply citing that word keeping himself sufficiently distant from its ownership.”* While, the media had cited Hrant Bagratyan as the source of that expression, the latter had presented a written statement signed by him denying the fact of having made such an expression. Therefore, the Court determined that the journalist *“did not exhibit appropriate conscientiousness and diligence in verifying the fact that the disputed expression was indeed pronounced by Hrant Bagratyan.”*

In the ***"Glendale Hills" CJSC v. "Skizb Media Center" LLC (ԵԿՂ/1963/02/10)*** case, the Court found that *“any audio statements made by individual citizens have no evidentiary value and consequently are not relevant according to the second part of Article 51 of the Civil Procedures Code of the Republic of Armenia and therefore the Court is taking them out of the list of permissible evidence.”* In this case actually, the Court refused to consider the fact that the media source presented the abovementioned recordings in order to prove the truth and foundations of the disputed facts. An examination of said recordings would have allowed the Court to determine whether the journalist had a malicious intent to defame, whether the **"fair comment"** and **"reasonable publication"** mechanisms could be applied. For the application of the "reasonable publication" principle the Court could also have considered the fact that the news about the collapse of the building in the "Mush-2" district of the City of Gyumri may have had public significance, but the Court failed to do that.⁵

⁴ Conclusion of the IDC (October 20, 2011) regarding the case of National Assembly members *Samvel Aleksanyan (no party affiliation), Levon Sargsyan and Ruben Hayrapetyan (members of the Republican Party) v. the founder of "Haykakan Zhamanak Daily" Dareskizb LLC*

⁵ Conclusion of the IDC (July 26, 20112) regarding the *Glendale Hills CJSC v. "Skizb Media Center" LLC* case.

The decision of the Court (January 20, 2012) in refusing to admit recordings presented by the respondent as evidence would perhaps be contradictory to the later precedent-setting decision by the **Court of Cassation (April 27, 2012)**. In that decision, the Court of Cassation noted that *“in hearing cases, the courts must pay close attention to the explanations, approaches, as well as the behavior exhibited by persons submitting factual data regarding those facts, in order to clarify whether the person had the intention to defame anyone by the presented evidence, and if he has objectively expressed his evaluative judgments while concurrently displaying a conscientious approach.”* While in **Glendale Hills CJSC v. “Skizb Media Center” LLC**, the Court of First Instance found that *“recorded statements of ordinary citizens have no evidentiary significance.”* After the precedent-setting decision of the Court of Cassation, the **Glendale Hills CJSC** case was taken up by the Court of Appeals, but taking into account the limits of review as set in Article 219 of the Civil Procedures Code, the Appeals Court could no longer review any new evidence.

It should be noted, however, that even after the abovementioned decision of the Court of Cassation, as well as the precedent-setting decision in the **Tatul Manaseryan v. “Skizb Media Center” LLC (ԵԿԴ/ 2293/02/10)** case, the courts in some cases did not take into account the defense mechanisms for exemption from responsibility. Thus, for instance, in the case of **Gegharkunik Governor Nver Poghosyan v. “The Editorial Staff of ‘Zhoghovurd’ Newspaper” LLC (ԳԴ/ 0241/02/11)** the “fair comment” and “the reproduction of other peoples’ comments” defenses were not used. In this given dispute, the “Zhoghovurd” daily newspaper had reproduced the literal text of the interview with teacher Anna Torosyan, who was the source of information. This was also affirmed by the latter’s testimony as a witness in Court. Anna Torosyan is a physical person who is the “author” according to the Cassation Court case on Tatul Manaseryan. Therefore, the aforementioned person is a proper source of information and hence the paper is an honest re-producer and should have benefited from the defense afforded by part 6, paragraph 2 of part 5 of Article 1807.1 of the Civil Code, and the case law of the European Court of Human Rights.⁶ Moreover, according to the decision of the Court of Cassation, *“in the event when reference is made to the source of information, but when the information is not published literally or honestly or otherwise the publisher has introduced changes in the information or added and/or changed the evidence (the composition or part thereof) then the person publishing the information is not free from liability.”* Moreover, given the factual circumstances, it is clear, and the author herself has confirmed this, that the paper had reproduced her words literally. Furthermore, there are other elements of defense based on fair comment and reasonable publication in the case, for example, the public significance of the case (in this instance, the possible involvement of a public official in corruption during the discharge of official duties is altogether a theme that generates public interest) and within reasonable limits the actions taken by the paper to prove the truthfulness of information (presentation of Anna Torosyan’s opinion, the information and comments obtained from the Governor and the Governor’s office and their proper and literal presentation in the article).

In another case, **Margarita Khachatryan v. “Hraparak Daily” LLC (ԵԿԴ/ 0807/02/11)**, the Court of first instance applied the well-known defense mechanisms, which, in our opinion, was not appropriate. Taking into account that parallel to the

⁶ Conclusion of the IDC (October 26, 2012) regarding the *Gegharkunik Governor Nver Poghosyan v. “Zhoghovurd Daily Editorial Board” LLC* case.

publication of the defamatory information the full text of Margarita Khachatryan's refutation was also published, the Court stated: *"The reporter acted in good faith, particularly listening and publishing the position of the interested party regarding the material to be published in the same article, thus effectively denying the information published in the first part of the article. It thus follows that the journalist published the disputed material in such a manner that it definitely does not create such a conviction or impression that the incident described in the article really took place, or that Margarita Khachatryan, quarreled and cursed in a rude manner. In analyzing the above, the Court found that in publishing the article, within reasonable limits, the journalist took substantive measures to determine the truth and validity of the published evidence. That is, from the very beginning, he had no intention or purpose whatsoever to injure Margarita Khachatryan's honor, dignity and business reputation; therefore, he is not subject to liability for disseminating defamatory information."*

However, it must be noted that the publication of plaintiff Margarita Khachatryan's refutation, which the Court considered appropriate, cannot be considered by the Court as a reasonable refutation action by the paper on the basis of the first part of Article 8 of the Republic of Armenia's law on "The Mass Media" thus exempting it of responsibility.⁷ The fact is that, in the given case, the respondent media, in the controversial article, simply published the negating position of the plaintiff regarding the dissemination of its own information, which cannot be considered an appropriate denial since it was published concurrently with the disseminated information and is not consistent with the foreseen method. Besides, as noted in the conclusion of the Information Disputes Council, the simultaneous publication of information regarding a person and the contrary opinion of the latter does not free the publisher from the responsibility of publishing a proper denial as prescribed by law.

On November 23, 2012, the Court of Appeals rendered a verdict in which it did not agree with the above mentioned position of the Court of first instance, noting that *"...the fact that the second part of the same article also contains M. Khachatryan's position regarding the published material in which the latter states that the information in the article does not correspond to reality, is not sufficient for the rejection of the complaint. Furthermore, the voluntary statement and purpose of the journalist in publishing the information cannot serve as a basis for denial of the complaint. Therefore, the opinion of the Court, that from the beginning, the journalist had no intention or purpose in defaming or injuring M. Khachatryan's honor, dignity or business reputation does not constitute a basis for exempting the latter from legal responsibility."* It is exactly on this basis that the Court of Appeals approved Margarita Khachatryan's complaint, forcing the paper to publish a denial regarding the article about her and apologizing to her. Although this decision of the Court of Appeals is readily acceptable, nevertheless in the same decision the Court reached a conclusion which, in our opinion, is not acceptable. Thus, the Court noted: *"...based on the dimensional interpretation of the Republic of Armenia Civil Code Article 1087.1, to wit, an individual is subject to civil legal responsibilities in all cases where the information disseminated by the latter, by its nature, is defamatory that is, it does not conform with reality and discredits the honor, dignity or business reputation of any subject in a legal relationship. The lawmakers have not given importance to the subjective approach, nor the purpose and intent of the disseminator of information in qualifying libel."* This position directly contradicts the **November 11, 2011 decision of the Constitutional Court** where the latter directly notes: "A person is **exempt**

⁷ Conclusion of the IDC regarding the *Margarita Aghvan Khachatryan v. "Hraparak" Daily* case.

from the responsibility of disseminating defamatory information if he has acted conscientiously, without the intention of damaging the authority and honor of the injured party.” Besides this, as will be explained below, one of the basic elements of “fair comment” and “reasonable publication” is the absence of malice of the journalist. Moreover, in international practice, they are used not only in cases of insult but also libel.

International Legal Practice and the Case Law of the European Court of Human Rights

The defense mechanisms for reasonable publication, fair comment and the reproduction of declarations by other persons are widely recognized in the practice of the ECHR as well as in international law, in general. Therefore, the courts of the Republic of Armenia should take steps in each case to implement those principles, of course if the elements of those mechanisms exist in the specific case.

The defense for “**fair comment**” is implemented in the rights systems of many countries as well as by the ECHR. In the United States, this theory is characterized by the terms “fair interpretation” or “fair comment”, the legal definition of which is as follows: “*It is a defense mechanism used in general legal practice, which guarantees the freedom of the press in making statements regarding events with public resonance, if those statements have not been made maliciously or with the intention of injuring the plaintiff.*” This definition was used in the famous U.S. Supreme Court decision **The New York Times v. Sullivan**. The importance of this decision lies in the fact that it included the “obvious malice” measure, according to which the non-concurrence of the statement with reality is not a sufficient condition to hold the media source to accountability (whereas that was, in itself, a sufficient condition) and the plaintiff must also prove that in making the factual statement, the journalist pursued actual malice. The duty of proving actual malice works only when the information is about a “public official”, “public figure” or “event with public resonance”.⁸

The 11th Principle of the ARTICLE 19 human rights organization’s study, “Defining Defamation”, refers to the principle of “fair comment” citing it among the mechanisms for relieving journalists of responsibility. According to that principle: “*Certain types of statements should be exempt from liability unless they can be shown to have been made with malice, in the sense of ill-will or spite. These should include statements made in the performance of a legal, moral or social duty or interest.*” In interpreting this principle, the advocacy group notes that, based on international practice, this defense mechanism is interpreted more and more widely, taking into account the importance of the protection of speech in this sense.

In the ECHR decision in **Times Newspaper LLC v. United Kingdom (June 10, 2009)** cites the national case law in England, giving the following comment: “... *The*

⁸ Conclusion of the IDC (October 20, 2011) regarding the case of National Assembly members *Samvel Aleksanyan (no party affiliation), Levon Sargsyan and Ruben Hayrapetyan (members of the Republican Party) v. the founder of “Haykakan Zhamanak Daily” Dareskizb LLC*

public welfare requires that citizens be able to communicate freely (even if it relates to the defamatory nature of the statement of fact, the truth can not be proved) without fear that it will be the responsibility of the media to remove the defamatory nature of private persons; obligation to verify factual statements, if they are taking into account all relevant factors and the spread of "responsible journalism" standards "(page 17).

In **Romanenko et al v. Russia (January 8, 2010)**, the ECHR reiterated one of the principles it adopted in other cases. According to this, when the press participates in public debates on issues emanating from legal interests, it should regularly have the right to use official documents without separately examining their content. In this respect, the ECHR also cited the similar well-developed legal doctrine known as the "fair report privilege", being entrenched in the United States jurisprudence (Restatement (Second) Torts, § 611 (1977)) for a long time and noted *"that journalists had a right under Article 10 to publish statements from a non-confidential document accurately without being liable for the content of such statements"*.

Referring to the principle of "**fair comment**", in some other cases the ECHR has given the following collective opinion in one of its decisions: *"The Court recalls that when the need arose to determine whether the newspapers are exempt from the defamatory nature of the ordinary obligation to verify factual statements, the Court applied the discretion, after taking into account a number of factors, particularly the nature and degree of the libel, to what reasonable limits the newspaper could consider its sources reliable sources, regarding the assertions presented ... These factors, in turn, require other factors to be taken into account, such as reputation of the source (**Bladet Tromsø and Stensås v. Norway (MR)**, cited above), whether the newspaper did sufficient research within reasonable limits before publication (**Prager and Oberschlik v. Austria, 1995, April 26, judgment, Series A, No. 313, paragraph 37**), whether the paper presented the story in a reasonably balanced fashion (**Bergens Tidende et al v. Norway, No. 26132/95, § 57, ECHR 2000-IV**), and whether the paper gave people the opportunity to protect themselves (**Bergens Tidende et al v. Norway, cited above, paragraph 58**)."*⁹

The **reasonable publication** principle is based on the fact that the particularity of journalistic work requires that news should be published at the moment when it is absolutely necessary and unpostponable and when further delay could diminish the urgency of the news. Even the best of journalists could make mistakes, but that does not mean that in each case one should hurry to hold the journalist or the news item liable.¹⁰ In such cases, the defense works on the basis of the principles of "fairness" and "reasonableness", that is: *"By reason of the "duties and responsibilities" inherent in the exercise of the freedom of expression, the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they [journalists] are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism (**Bladet Tromsø and Stensås v. Norway, May 20, 1999, point 65**)."*

Point 9 of the ARTICLE 19's study, "Defining Defamation" discusses the term "reasonable publication". According to ARTICLE 19, the "reasonable publication" defence is established if it is reasonable in all the circumstances for a person in the

⁹ Conclusion of the IDC (October 20, 2011) regarding the case of National Assembly members *Samvel Aleksanyan (no party affiliation), Levon Sargsyan and Ruben Hayrapetyan (members of the Republican Party) v. the founder of "Haykakan Zhamanak Daily" Dareskizb LLC*

¹⁰ *ibid*

position of the defendant (journalist) to have disseminated the material in the manner and form he or she did.¹¹ According to this interpretation by ARTICLE 19, even if the news is with reference to an event of public interest, the journalist could benefit from the “reasonable publication” defense even in case the facts do not correspond to reality. In deciding the limits of reasonable publication, the courts must consider, from the viewpoint of the interest of the case and the right of the public to be informed about it in time, how important was the expression of freedom of expression. In interpreting this principle, ARTICLE 19 noted that in acting in a “reasonable”, which is to say in “good faith” or with “due diligence”, the journalist could stay free of liability. The use of this method of defense is basically conditioned by the fact that the courts of some countries, according to traditional rules, subject journalists to liability, whenever they disseminate false statements, or statements which they cannot prove to be true. This traditional rule is unfair for the media, since the latter have the important mission of satisfying the public’s right to be informed and often cannot wait until they are sure that every fact alleged is true before they publish or broadcast a story: “Even the best journalists make honest mistakes and to leave them open to punishment for every false allegation would be to undermine the public interest in receiving timely information.” Therefore ARTICLE 19 finds that it would be more conducive for the courts to use the “reasonableness” test, that is, they should observe if the media acted according to professional rules. Meanwhile, those journalists who have worked within the limits of reasonableness must be protected by the rights of freedom of speech.

In *Petersen and Baadsgard v. Denmark (December 17, 2004)*, the ECHR noted that “*protection of the right of journalists to impart information on issues of general interest requires that they should act in good faith and on an accurate factual basis and provide “reliable and precise” information in accordance with the ethics of journalism*”. Nevertheless, the Court noted in the same case, that “*special grounds are required before the media can be dispensed from their ordinary obligation to verify factual statements that are defamatory of private individuals. Whether such grounds exist depends in particular on the nature and degree of the defamation in question and the extent to which the media can reasonably regard their sources as reliable with respect to the allegations (78th paragraph)*”.

¹¹ “The Definition of Defamation”, July 2000, ARTICLE 19 NGO.

REGULATION OF DEFAMATION IN THE NEW MEDIA

The Legal and Judicial Practice of the Republic of Armenia and International Regulation

In the legal practice of the Republic of Armenia, the courts in essence have pronounced verdicts in only two cases with reference to information disseminated on the Internet.

The first case, **Arthur Grigoryan v. “Hraparak Daily” LLC (ԵԿՂ/2491/01/01)** in which lawyer Arthur Grigoryan was contesting six comments posted by a group of readers in response to an article published on the media’s website. The plaintiff argued that the comments contained insulting and defamatory statements. Since the persons making the comments were not known, the complaint was brought against the media despite the fact that the disputed comments were not its own. The verdict of the Court widens the confines of defense for electronic media considerably. Thus the Court underlined the unique role of “*Hraparak*’ daily in providing information on news of public resonance in a democratic society” and exempted it from all responsibility for the disputed comments. The following is the Court’s position: *“Hraparak Daily” LLC, being a mass media outlet with a unique role in providing information on news of public resonance in a democratic society and performing the important role as a watchdog on public and private entities, being a champion and promoter of freedom of speech, could not have, prior to Arthur Grigoryan’s written or oral complaint, limited its readers’ right to free expression (such as deleting or removing them) since that would definitely be viewed as non-necessary in democratic society, therefore the daily cannot bear responsibility for comments left by others and since there is no apparent intention of the latter to insult or defame the plaintiff Arthur Grigoryan. At the present time, the six comments have been extirpated from the webpage and uncovering the identities of the persons who disseminated the comments injurious to the honor, dignity and business reputation of the plaintiff is impossible, since they left aliases under their comments.”*

In fact, the Court used the “fair comment” and “reasonable publication” defense mechanisms, citing the elements of those mechanisms, the public significance of the themes discussed in the article, the conscientiousness and balance in the manner of presentation of the information, as well as the absence of any intention on the part of the newspaper to sully the plaintiff’s honor and dignity. Thus, at the end of the case, the Court reached the conclusion that: *“there is no premeditation in the operations of “Hraparak Daily” LLC . The company did not harm the honor, dignity and the business reputation of Arthur Grigoryan through insult or libel, since the article published under the title “Citizens as Victims of Unscrupulous Lawyers” concerned issues of public interest, under which six people left comments signed by aliases and thus their identities are unknown. That is, the daily presented the facts in a balanced and fair fashion. Later, displaying good will in response to Arthur Grigoryan’s subjective request, the newspaper removed the six comments from its webpage. In other words, there is no presumption of premeditation by “Hraparak Daily” LLC, which, in case of slander would have involved intentional injury to the dignity of the individual by the dissemination of false and bogus facts and data by accusing him of*

guilt or delinquency on the bases of fake facts, while insult implies the intentional, premeditated derogation of the person, therefore the suit is struck down because it is baseless.”

Actually, the Court concluded that there was no intention to insult and defame on the part of the media since the authors of the comments were other people, while the paper simply provided a forum for those comments and in addition, after a while, the media had erased and extirpated the mentioned comments. But at the same time, it would have been desirable for the Court to also consider other important aspects of the issue. Thus, a study of international law and practice shows that in solving the issue of responsibility of the media, the courts and legal norms take into account such aspects as whether the media was informed about the comments and whether they had definite control of the comments field.¹² Otherwise stated, it is important to consider whether the disseminator of information specifically manages the flow of comments placed on its news portal. Such factual aspects as, for instance, the use of search mechanisms through key words, providing opportunities to readers to point out insulting and defamatory comments, the preselection of comments by the publisher (or otherwise the implementation of definite editorial operations) constitute evaluative criteria establishing the fact of direct control of the comments by the publisher which, in turn, serves as a basis in resolving the issue of the publisher's responsibility. Anyway, not only should the aspect of whether or not the author of the comments is the publisher itself, be the subject of assessment, but also whether the control of the comments field by the media is purely mechanical and passive. If the media exercises active and vigorous control, then this aspect could raise the issue of responsibility for the media.¹³

In the given instance, the Court took into consideration the fact that the plaintiff had not asked the paper to remove the controversial comments before taking the matter to Court and consequently the media was not informed about the existence of insulting and defamatory comments on its website, but here the Court did not examine the circumstance cited above, that is, how much control did the media have on the flow of comments on its webpage. Because, if it were to be proven that the paper managed or controlled the flow of comments, it would have been shown that the newspaper was aware, or could not have been unaware, of the comments. The judicial examination revealed such facts which showed that the media controlled the flow of comments. For example, the media admitted that the staffer responsible for the site could select and remove certain comments and that this was accepted procedure. Besides, it was established (and that was a publicly known fact) that the paper had taken a selection of insulting comments (posted by others) towards the plaintiff and published those texts separately. These were facts establishing that, in the given instance, the media knew and would not have been uninformed that words of an insulting nature were disseminated on its site. That is, while the Court's decision on the issue of rights was progressive and palpably widened the rights of the media, it was deficient in the strength of its evidence, because the Court failed to

¹² See, among other documents, the June 8, 2000 (number 2000/31/ED) the directive of the European Parliament and Council on “Certain Legal Aspects regarding Specific Services for the Media Community in the Internal Market”, Article 14. See also *Delfi v. Estonia* (decision), ECHR number 64569/09 communicated on 11/02/2011. Also, the notations of the Helsinki Fund for Human Rights within the *amicus curie* process regarding the *Delfi v. Estonia* case (the entire text is available on http://www.hfhr.org.pl/obserwatorium/images/Delfi_amicus.pdf).

¹³ Conclusion of the IDC (May 30, 2012) on the case of Lawyer Arthur Grigoryan v. Hraparak Daily, regarding the verdict of March 7, 2012 by the Court of First Instance of the Kentron and Nork-Marash district.

conduct an appropriate investigation of facts and proofs. The narrow limits of judicial inspection do not afford opportunities for effective legal protection. What is more, such judicial regulations also contradict point 9 of Article 1087.1 of the Civil Code according to which, if the source of information is unknown, the responsibility for remedy is borne by the publisher of the insult or libel. In the given case, the authors of the comments were not known but, to the extent to which the comments were publicly disseminated from the forum provided by the media company, then the latter became the “public disseminator” of the disputed information willy-nilly and thus subject to civil lawsuit. In this sense, the position of “Hraparak Daily” LLC during the judicial examination is also unacceptable. According to this position, the company bore no responsibility for the comments of others published on its site, since those flowed from the social networks and did not belong to the producer of content. According to point 2, of Article 10 of the European Convention on Human Rights, the freedom to receive and disseminate information is coupled with duties and responsibilities. Every person, in acquiring the right to free speech also acquires certain duties. The concept of “rights” and “duties” are coupled. This format remains unchanged even in this modern era of rapid development of information technologies. Consequently, the mere fact that the media outlet provided a technical forum for the opinions and interpretations of others does not absolve it from duties and responsibilities.

Following this verdict, taking the April 27, 2012 precedent-setting decision of the Court of Cassation regarding the case of *Tatul Manaseryan v. “Skizb Media Center” LLC* as a basis, it is possible to conclude that “Hraparak” daily constituted a “**medium of dissemination**” because the Court of Cassation, citing the ECHR case law, noted that *“not only information and ideas expressed in writing and verbally fall within the purview of the 10th Article of the Convention, but also information and ideas expressed and disseminated through various other media.”* Among other media the Court mentions “electronic systems of information dissemination”. Besides that, it follows from the interpretation of the Court of Cassation that subsequently in similar cases the courts should clarify, as noted above, how much control the media has on the flow of comments on its electronic page, because otherwise the paper may be legally responsible as “**disseminator of information**” as per the position of the Court of Cassation. However, this does not refer only to web-based media. Any company that offers online interactive services is subject to the mentioned regulation, for instance, electronic libraries, counselling services, social and professional forums, advertising services, etc. The position of the Court of Cassation is clear in this regard: *“The publisher of information, even if it has printed the contents literally or conscientiously and has cited the source, cannot be absolved of responsibility if during the trial it is established that the publisher knew or could have obviously known that the information was defamatory, because in that case the person has an intent to defame. In this case, both the information source and the publisher of the information have equal liability for causing damage together.”*

The conclusion of the Court in this case is important, because it noted that the plaintiff had not asked the media to remove the controversial comments before taking the case to Court and in the absence of such notice the media could not, within reasonable limits, realize that defamatory announcements were disseminated on its site. Such an approach affords online media the defense mechanism of “**Notice and Take Down**” according to which the media does not bear responsibility for the expressions disseminated on its site if the plaintiff has not notified the media, requesting the removal of the given expressions. Such a regulation gives the

electronic media wide defense possibilities, since in a given unit of time they can stream thousands of electronic files via their portal (as opposed to print and other mass media) and because online news media cannot check all files and then publish them, especially if the online media also offers interactive services. It is also important to note that, if and until the news media is notified of the existence of information of a defamatory nature, the latter cannot know about the existence of such information, because as different from insult, a defamatory statement may not contain any insulting expression or word. Therefore, in all cases, the individual should first let the media outlet know and after being refused, he should apply to the Court, something that Arthur Grigoryan did not do. The **“Notice and Take Down”** defense, in essence, is based on the principle of **“being informed”** cited above. According to this, the news media is not liable for insulting or defamatory statements if it can demonstrate that it did not know that such a statement was placed on its site.

In the case of ***Daniel Ioannisyán, Bayandur Poghosyan and Hasmik Simonyan v. “Mek Azg” party*** (ԵԱՀԴ /0074/02/12), for the first time in Armenian legal practice, the Court dealt with the law on information disseminated on the social networks. Since the verdict in this case was handed down after the Court of Cassation’s precedent-setting decisions, the Court based itself on the clarifications provided by the Court of Cassation in setting its positions. Particularly, in examining the issue of whether the comments made on the wall of the Facebook group *“Mek Azg” Federation of Organizations* could be considered public statements, the Court referred to the April 27, 2012 Court of Cassation precedent-setting decision regarding the modes of public presentation of statements: *“Public statements or public presentations could be through publication, radio or television, via broadcast, dissemination through the mass media, the Internet, as well as the use of other means of telecommunication, by public speeches, or any other means, by imparting them to any third party. The delivery of such statements to those intended cannot be considered public if the person presenting them has undertaken sufficient measures to ensure their secrecy, so they do not become accessible to other persons.”*

Moreover, citing the criterion of **“third person”** well-established by case law, the Court at the same time introduced the **“accessible to everyone”** criterion which, we think, could have a more appropriate application regarding information spread over the Internet.¹⁴ For instance, the user of the social network *Facebook* could select such a mode of dissemination for his statements that would make them accessible only to friends who, by mutual agreement, read one another’s status or to a specific friend. In another case, the user can select such a mode which makes the reading of his status available not only to his friends but to all visitors, in other words, the public at large. In this case, it could be said that the statement was spread in a manner accessible to everyone. In this case, the *“Mek Azg”* party chose exactly such a mode of communication.

¹⁴ Conclusion of the IDC (September 7, 2012) regarding the *Daniel Ioannisyán, Bayandur Poghosyan and Hasmik Simonyan v. “One Nation Party”* verdict of the Court of first instance of the Ajapnyak and Davitashen districts of Yerevan, 28/06/2012.

STATEMENT OF FACTS AND VALUE JUDGMENTS

The Legal and Judicial Practice of the Republic of Armenia

The “Rule of Law” human rights NGO, in the course of monitoring cases on insult and libel, has studied judicial positions regarding statement of facts and value judgments and their application by the Republic of Armenia courts. Here is an excerpt from that study.

“The term “**value judgment**” is not defined in Article 1087.1 of the Armenian Civil Code which, as we have noted often, is one of the shortcomings of this Article. That is why, from the beginnings of judicial practice, starting in June 2010, it became a point of concern whether the courts would take into consideration a legal category which had not been expressed in the legal norms as well as the law. In similar circumstances, the legal practice of the Russian Federation was in constant conflict with the case law of the ECHR, since Article 152 of the Russian Federation defined only the term “information” and the courts, in examining expressed opinions and evaluative judgments assessed them based on the term “information” requiring plaintiffs and defendants to prove their veracity.¹⁵

In contradistinction with Russia, the term “evaluative judgment” became a subject of examination at the start of the judicial practice that began after decriminalization in Armenia. This was conditioned, first and foremost, by the fact that both the plaintiffs and defendants, in their arguments (even in cases regulated by the former legal norms where differentiation between evaluative judgment and opinion was absent) would consistently cite the concept of evaluative judgment and would construct their defense partly on that concept.¹⁶ The courts, in their turn and starting with these initial cases, did not reject the new concept of evaluative judgment or evaluation judgment, but accepted it as a concept included in domestic rights, since the sides were presenting such claims as a rule, citing the case law of the ECHR.¹⁷

During the entire course of judicial practice, up to the latest cases and verdict, the courts have not asked the plaintiffs to prove the veracity of evaluative judgments, thus accepting the case law approach of the European Court, according to which evaluative judgments are not subject to verification. In lieu of that, the courts have examined the expressions considered as evaluative judgments by the plaintiffs and defendants alike with a view to clarifying their defamatory or insulting nature under the light of the presence of the intention to injure.

In order to clarify the circumstances of libel as well as injury, the courts have been inclined to use criteria based on objective reality. An example of that is the etymology provided by the Court for the term “*stilyag*” (*dandy*) which had a wide public resonance, both in its regular meaning and within the context in which it was used to clarify the ordinary meaning of the word. The Court used the dictionary and decided that the given word is not currently considered by the public as an invective

¹⁵ See for example *Greenberg v. Russia*, number 23472/03, 21/07/2005, paragraph 29; Also, see The State of the Media Law in Russia, p. 101. The complete text of the study is available at <http://www.tourolaw.edu/ILR/uploads/articles/V12/Sheftel.pdf>.

¹⁶ See the judicial act in the Hrachya Keshishyan case, esp. the assertions of the sides.

¹⁷ See the judicial act on the Glendale Hills case.

or otherwise possessing a derogatory meaning.¹⁸ As to the context, the Court interpreted it thus: *“Regarding the nature of the given expression, the Court finds that it also constitutes an evaluative judgment, by which the media expressed an opinion about the dressing style of the plaintiff. As such, the lifestyle of the chosen of the people is a subject of public interest and, in that sense, it is allowable to use exaggerated language which, viewed through the lens of the media as an effective means of public oversight, is likewise protected by Article 10 of the Convention. On the basis of the abovesited, the Court finds that the noted expression is not insulting and under the circumstances of the given case is accordant with the standards of journalistic freedom.”*¹⁹

Namely, the Court considered objective requirements such as the wider frameworks of allowable criticism of political actors, the fact of the news becoming subject to public interest, the requirement of wider toleration by political actors, etc.

In making such an interpretation of context, the Court at the same time took into account, according to ECHR case law, that the evaluative judgments were built on an evidentiary foundation which the media used. A similar approach was also used in the formulation of the verdict in *Hayk Babukhanyan v. “Khmbagir” LLC*: *“In the given instance, the Court views expressions in unsigned and anonymous texts as the result of evaluative judgments of members of the public, because all the essential preconditions for establishing the fact of evaluative judgment are present, especially since the mentioned individuals have expressed opinions with definite evidentiary conjunctures and the expression of good will, as in the case of the material published on the website, in which the authors had recourse to some exaggeration and used publicly shocking expressions aimed at the political actor and his policy, consequently the truth of evaluative judgments is not subject to verification, since the expressed opinions had published materials at their legal bases, in line with which different statements were cited on the website, towards which likewise tolerance should be shown by the political actor.”*²⁰

In this formulation, the context, with all of its important elements necessary for democratic society, has likewise been considered.

A logically opposite approach to the examples cited above was manifested in the case ԵԿԴ/2479/02/10 in assessing the word “blood” used in the controversial article *“The Blood from the Kocharyans, the Pleasure from Tsarukyan while the Countershock from Lfik”*.²¹ Although the Court, in this case also, interpreted the word in its context, it limited this context within the confines of the subjective interests of the plaintiffs, ignoring those issues of public interest that were being raised under the metaphorical use of the word. *“The word ‘blood’ in its literal use and interpretation does not contain any insulting elements and it is used with this meaning ... its entire meaning, while the word ‘blood’ used in the title of the article and its reference to the Kocharyans loses its simple literal meaning of ‘blood’ since in reading the text, it evokes negative impressions among readers, that is, the word blood can be used to assess the mentioned persons negatively (for instance, as persons who have committed transgressions) therefore that expression has been disseminated by the defendant with the aim of sullyng the honor and dignity of the plaintiff’s family, that is,*

¹⁸ See the case *Tigran Arzakantsyan v. “Yerkir Editorial Board” LLC*

¹⁹ “Monitoring of cases on Libel and Insult” pp. 24-25, “Rule of Law” NGO.

²⁰ “Monitoring of cases on Libel and Insult” p. 35, “Rule of Law” NGO.

²¹ See the case *Bella and Sedrak Kocharyan v. Zhamanak Daily*.

*in order to diminish the objective opinion held by the public about the latter. Therefore, the right to denial and compensation belong to each and every member of the mentioned family.*²²

In its subsequent corroborations, the Court continued to underline the possible negative effect of the statement on the plaintiffs, but did not give any assessment about the “public” context of the disputed expression.

Following this, taking into account the wide implementation of the concept of “evaluative judgments” both in domestic and ECHR judicial practice, the Court of Cassation, in its two precedent-setting decisions defined the terms “evaluative judgment” and “facts” as follows: *“With reference to the term ‘reliable facts’, the Court of Cassation underlines that those are facts that are based on evidence presented simultaneously with the publication of the information or they are publicly well known facts (which do not need to be proved). It is necessary that attention be paid to the differentiation between facts and evaluative judgments, because they are important in the examination of the case and could greatly affect the outcome of the case. The European Court, dealing with this issue within the context of Article 10 of the Convention, makes a clear distinction between facts and evaluative judgments regarding which it composed the following general principle: “If the existence of facts can be proven, then ‘evaluative judgments’ cannot be proven. The proving of evaluative judgments is an impossible task, and such a requirement violates the freedom of expression of opinion, that is a basic right guaranteed by the Convention’s Article 10 (see the *Lingens v. Austria* verdict paragraph 46 of the ECHR dated 8 July 1986). In addition to the above, the Court of Cassation registers that it is necessary also to take into account that an evaluative judgment must be seen as an expression of free opinion and not as one of disseminating information and therefore in each specific case there should be an evaluation as to whether the given judgment was based on certain evidence or not. An evaluative judgment that is devoid of an evidentiary basis is not protected from state intervention. Such a positioning by the Court of Cassation is also conditioned by the fact that, in referring to this issue, the European Court noted that personal opinion could be considered as exaggerated especially in the absence of evidentiary bases (see the ECHR verdict, paragraph 33, on *Oberschlik v. Austria*, July 1, 1997).”*

International Legal Practice and the Case Law of the European Court of Human Rights

In cases regarding violations of the right to free expression, the European Court makes a distinction between facts and evaluative judgments, considering that while it is possible to prove the existence of facts, value judgments are not provable. It is impossible to prove them because they refer to spheres of convictions and preferences (see the ECHR verdict on ***Lingens v. Austria*, 8 July 1986**). At the same time, the ECHR noted that the connection between evaluative judgments and the necessity of their factual bases is different depending on the specific circumstances of the case (***Feldek v. Slovakia*, No. 29032/95, 86th paragraph; *De***

²² “Monitoring of cases on Libel and Insult” p. 42, “Rule of Law” NGO.

Haas v. Belgium, No. 19983/92 47th paragraph).²³ Thus, for instance, in the second case, the ECHR noted that in subjecting the journalist to responsibility for his evaluative judgments, domestic courts have violated the 10th Article of the Convention, because, according to the ECHR, in certain instances evaluative judgments could be considered as exaggerated, especially if they are not based on factual circumstances. However, in the present case, they could not have been considered as such. But, in another case (**Brager and Oberslik v. Austria, verdict of April 26, 1995, series A, No. 313, point 37**), the ECHR noted that although “journalistic freedom presupposes a certain degree of exaggeration and even the possibility of provocation” the opinions expressed by the journalist about Austrian judges were exaggerated, therefore the Court concluded that the interference by decision of the domestic courts in the freedom of expression does not contradict Article 10 of the Convention.

The 10th principle, entitled “The Expression of Opinions”, of ARTICLE 19 human rights organization’s study, “Defining Defamation”, states that a person may not be held to responsibility within the frames of the law on libel and insult for the expression of his opinion. According to the same principle, these expressions that meet the following criteria may be considered opinions:

- I. It is not based on a factual basis, which can be proven to be false, or*
- II. that based on the circumstances, including the style of language used in the expression (such as rhetoric, hyperbole, satire or irony), it can not reasonably be considered facts.*

In interpreting this principle, the ARTICLE 19 organization notes that in those cases of libel and insult where the expression of opinions (or otherwise called evaluative judgments) is also disputed, there is yet no clear criteria in judicial practice, but one thing is clear, that is, that evaluative judgments have an even higher degree of protection. In some jurisdictions, opinions are afforded absolute protection, on the basis of an absolute right to hold opinions. The highly subjective nature of determining whether an opinion is ‘reasonable’ also argues in favour of absolute protection. “Some statements may, on the surface, appear to state facts but, because of the language or context, it would be unreasonable to understand them in this way. Rhetorical devices such as hyperbole, satire and jest are clear examples. It is thus necessary to define opinions for the purposes of defamation law in such a way as to ensure that the real, rather than merely the apparent, meaning is the operative one,” the ARTICLE 19 notes.

²³ Conclusion of the IDC 20, 2012 regarding the case of National Assembly members *Samvel Aleksanyan (no party affiliation), Levon Sargsyan and Ruben Hayrapetyan (members of the Republican Party) v. the founder of “Haykakan Zhamanak Daily” Dareskizb LLC*

THE BALANCING OF THE RIGHT TO FREEDOM OF SPEECH WITH OTHER RIGHTS

The Legal and Judicial Practice of the Republic of Armenia

In the judicial practice of the Republic of Armenia, the courts have examined and basically rendered verdicts on such cases where they have placed on a scale the rights to freedom of speech of the defendant, on one side, and on the other any other fundamental right of the same. Two cases studied by the domestic courts have examined the right to free expression by media, on the one hand, and the rights of citizens to freedom of thought, conscience and religion, on the other. We have in consideration the cases involving **“Word of Life’ Church” religious organization and its leader Arthur Simonyan v. “Iravunk Investigation”** (ԵԿԴ/2840/02/11) and **“The Jehovah’s Witnesses” Christian Religious Organization v. The Public Television of the Republic of Armenia** (ԵԿԴ/2621/02/10). In the second case, the Court did not basically issue a verdict, because the sides concluded a reconciliation agreement.

In **“Word of Life’ Church” religious organization and its leader Arthur Simonyan v. “Iravunk Investigation”** (ԵԿԴ/2840/02/11) the verdict of the Court of first instance and the decision of the Court of Appeals provide grounds for concern because the courts did not secure a complete and effective framework for judicial investigation. The Court of first instance examined the word “sect” based on its routine usage and dictionary meaning, without taking into consideration the context of its usage. Thus, the word “sect” even in its ordinary, daily meaning could be considered disturbing and in that sense may be unacceptable for certain religious groups. Nevertheless, this conjuncture is not sufficient for insisting that the media have crossed the line of allowable criticism under the conditions of contemporary democratic principles. Besides, the fact that the right to freedom of expression protects even troublesome and incendiary speech, democratic principles provide the opportunity for the use of freedom of expression to be used as a means for the public control of the religious views and beliefs of others, as well as religious institutions, even subjecting them to open discussion or rough criticism, provided that the mode of realizing the public discourse is not converted into an incitement to religious hatred. Therefore, the subject of examination should not have been any *a priori* definition of the word “sect”, but rather the context in which the word is used. If the context is one of dissemination of hostility and hatred, then even a word with a neutral meaning could lead to problems. As we mentioned above, citing the ARTICLE 19 study, it is necessary to focus attention on the word’s real, not primary, meaning. Everyone who is more or less acquainted with our reality knows that in our public the word “sect” is used to express disdain, hatred, and intolerance and even to incite hostility. In this sense, although the word “sect” in itself does not contain any defamatory meaning, its continuous and highlighted use, in light of the general context of the two disputed articles, is problematic. Consequently, the general context of the article and the continuous and systematic use of the word “sect” transform the news item into a hate-mongering speech.²⁴ But even in this instance,

²⁴ IDC conclusion of May 11, 2012 regarding the case *“Life’s Word” organization v. Iravunk Investigation and Argumenti Nedeli v Armenii weekly*.

the Court did not refer to the context of the use of the word “sect”, noting that “in the given instance, the Court views the use of the word ‘sect’ by the author as the result of his evaluative judgment, through which the write used publicly-stunning expressions, among others, labeling the religious organization as a “sect”. Noting that “the requested intervention in the public expressions in the published material is not necessary in democratic society” the Court threw the case out.

The Court also did not pay attention to the fact that with the purpose of elucidating and criticizing the activities of the leader of the organization and in order to produce reverberations among public circles (which, in itself, is a lawful purpose), the media prepared its news item wholly and unconditionally basing itself on the public statements of a third person, without conducting its own investigation. And although this journalistic method, in itself, does not violate the letter of the law, it is problematic from standpoint of journalistic ethics and journalistic responsibility. In conducting a judicial check to verify the implementation of the Convention, the Court should have ascertained whether, before publishing the disputed material, the journalist had conscientiously performed his own examination and in that sense and under the given circumstances, the reporter was free from the journalistic obligation of checking the factual circumstances of his statements.²⁵

In the Armenian judicial practice, only one incident of violation of the presumption of innocence has been registered which has been studied by the “Rule of Law” organization. Following is an excerpt from that organization’s report:

“In the case ***Gevorg Hayrapetyan v. “Multi Media Kentron TV” CJSC (ԵԱԴԴ/003/02/11)***, “Kentron TV broadcast a wide report about a trial in progress in which the accused was described as a person who had committed treason against the State through spying. The report presented certain details regarding the case, especially the allegation that, because of monetary interests, the accused provided the enemy country with materials containing state secrets and anti-Armenian propaganda for which he expected monetary compensation. The information was disseminated as established facts and not suppositions or suspicions of the body conducting the case. At the time of the broadcast, the Court of first instance had completed the trial but the verdict had not yet come into force, because the deadline for appeal had not yet expired (the broadcast was made during November 14-21, 2010, while the verdict was published on October 25, 2010). As the facts subsequently showed, at the time of the broadcast, the defendant’s lawyer was preparing his appeal. “Kentron” TV insisted in Court that within the frames of the series “Investigation” they reproduced the criminal case materials received from the Republic of Armenia General Procuracy and therefore should not be held responsible on the basis of part 6 of Article 1087.1 of the Civil Code. The courts of first instance, appeals and cassation considered an established fact that *“the defendant company solely published information contained in the criminal case documents and the Court verdict and cited the sources of information simply presenting the facts cited in the criminal case materials without drawing its own conclusions, nor expressing personal opinions. The Court rightfully reached the conclusion that no information, that was not in the pretrial materials, was ever put on the air.”*²⁶

Although in the given case, the media is rightly benefiting from the defense offered by Point 6 of Article 1087.1, nevertheless not only the bodies conducting criminal trials

²⁵ Conclusion of the IDC of May 11, 2012 regarding the case “Life’s Word” organization v. *Iravunk Investigation and Argumenti Nedeli v Armenii weekly*.

²⁶ See the decision of the Court of Cassation of 02/11/2011.

but also everyone, especially the media, should respect the presumption of innocence, taking into account the media's unique public role and mission. "Regarding the reporting on criminal trials by the media," the 2nd Principle of the Recommendation (2003)¹³ of the Committee of Ministers notes that: *"Respect for the principle of the presumption of innocence is an integral part of the right to a fair trial. Accordingly, opinions and information relating to on-going criminal proceedings should only be communicated or disseminated through the media where this does not prejudice the presumption of innocence of the suspect or accused."* Therefore, regardless of the fact that the media outlet was reproducing information received from a reliable source, it was obliged to respect the defendant's presumption of innocence while broadcasting the news item.

We must also note here that on this same case the Civil Court of Appeals, which ruled in favor of the media, offered the following definition: *"In the given case, one person's right defines the obligations of others."*²⁷ That is, the presumption of innocence of the defendant creates an obligation for the media to respect it, moreover, the obligation to respect the presumption of innocence is also a universal norm for journalistic practice. It is obvious from this quote that the Court's conclusion contradicts the decision reached by the Court itself.

International Legal Practice and the Case Law of the European Court of Human Rights

In numerous verdicts, the ECHR has mentioned that the right to free speech cannot be seen as an absolute right, which give the media the possibility of acting irresponsibly, by, among other things, accusing people in wrongdoing in the absence of evidence at that given moment and without giving those people the opportunity to appose the accusations. Respect for presumption of innocence is one of the legal limitations to the right to freely disseminate information. Therefore, a balance must be maintained between the right to free speech and the person's right to presumption of innocence until the publication of the Court's guilty verdict (among others see ECHR decisions on ***Flux v. Moldova, July 29, 2008***; ***White v. Sweden, September 19, 2006***).

Regarding the balancing of the freedom of speech and the freedom of thought, conscience and beliefs, the following legal rules operate in terms of universal human rights (the UN system) and the regional (Council of Europe system) mechanisms: Articles 18 and 19 of the UN Covenant on Civil and Political Rights define the rights to freedom of thought, conscience and religion (including the right to express religious views freely), while Article 20 prohibits the employment of the above mentioned freedoms in any speech that could be used to incite ethnic, racial or religious hatred which, of itself, represents provocation for discrimination, hostility or violence. There are no exceptions to the above limitation. Therefore, speech that sows hatred is prohibited in an absolute sense. A similar regulation is likewise defined in regional documents, in this case the European Convention on Human Rights, whose Articles 9 and 10 define the rights to free expression and the freedoms of thought, conscience and religion, while Article 17 states that no thesis of the Convention can be interpreted in the sense that any person has the right to engage

²⁷ See point 4, p. 6 of the Appeals Court decision.

in such activity or to perform such action as aims to remove or limit any of the rights or freedoms set in the Convention by a greater extent than foreseen by the Convention. From this, we conclude that the Convention allows a limitation of free speech if that includes religious hatred,²⁸ speech offending God²⁹ and religion (blasphemy)³⁰ or if there's a call to violence, or if a person is negating certain historical facts, for example Genocide.³¹ In the domestic judicial practice of the Republic of Armenia, the courts have so far dealt with this issue in two cases, the above mentioned **“Word of Life’ Church” religious organization and its leader Arthur Simonyan v. “Iravunk Investigation”** (ԵԿԴ/2840/02/11) and **“The Jehovah’s Witnesses” Christian Religious Organization v. The Public Television of the Republic of Armenia** (ԵԿԴ/2621/02/10). In the first case, the examination was deficient and ineffective, as a result of which the courts of first instance and appeals refused to accept the organization’s case, while in the second event the Public Television proposed a truce which was accepted by the religious organization. In the truce agreement, the TV refuted the information it broadcast.³² Regarding the domestic practice outside the courts, the situation is very worrisome, since speech of defamatory and insulting nature towards religious minorities, as well as speech that sows hatred are openly encouraged by state bodies and higher state officials, as well as representatives of the Armenian Apostolic Church. Let us also note that, according to Article 226 of the Republic of Armenia Criminal Code, the dissemination of religious hostility, publicly and through the media, is a criminal offense punishable by imprisonment.

²⁸ *IA v. Turkey*, number 42571/98, 13/09/2005.

²⁹ *Otto Preminger Institute v. Austria*, number 13470/87, 20/09/1994.

³⁰ *Vingrof v. United Kingdom*, number (19/1995/525/611), 25/11/1996.

³¹ See for instance, *Roger Garaouti v. France* (decision number 65831/01). The plaintiff was convicted in France for libel based on Article 24 of the media law (an old law that was passed in 1881 and amended in 1990), which made it a criminal offense to deny crimes against humanity. His suit against the French government was subsequently denied by the European Court. The ECHR, citing the well – entrenched case law, which was built on the bases of cases brought from France (*Lehitduxandlsorni v. France* (MP), number 55/1997/839/1045) adopted a precedent-setting definition according to which the right to free speech does not extend to people who refuse to unequivocally accept such established historical facts as the Holocaust, since in refusing to accept crimes against humanity as a historical fact, such people are rejecting the fundamental values underlying the European Convention on Human Rights.

³² See <http://hetq.am/arm/news/15563/hanrayiny-herqel-e-ehovayi-vkaneri-masin-hraparakats-texekatvutyuny.html>

THE REASONABLE LIMITS OF PECUNIARY REMEDIES TO A PERSON'S HONOR, DIGNITY AND GOOD REPUTATION

The Legal and Judicial Practice of the Republic of Armenia

According to point 11 of Article 1087.1 of the Republic of Armenia Civil Code: *“...in setting the extent of compensation, the Court takes into account the particularities of the specific case, including: 1. The manner of insult or libel and the frames of its dissemination; 2. The economic situation of the insulter or defamer. According to cases that are covered under points 7 and 8 of this Article, the Court should not take into account the economic damage caused by the insult or libel.”*

It must be noted that the study of libel and insult done by the “Rule of Law” NGO has shown that “the most claimed legal defense method has been the demand for monetary compensation for libel and insult which was used in 45 out of 52 cases (86.5%), followed by the request for denial used in 32 cases (61.5%), afterwards the request for payment of Court costs in 25 cases (48%), followed by the demand for apology for the insult in 11 cases (21%), the request for an opportunity to reply in 7 cases (13%) and the demand for publication of the verdict in 4 cases (9%).³³ Moreover, the highest request for monetary compensation was by the Jehovah’s Witnesses religious organization for 24 million Armenian Drams (AMD) and the lowest by the head of Lernapat village in Lori Marz, Vano Yeghiazaryan for one Luma from Adrine Torosyan, reporter for the weekly “Hetq” (case number ԼԴ/0628/02/11). The average of the total monetary compensation requested was 2,952,495 AMD which, in our estimation, is a very high amount, while the total of all the requested monetary compensation was 126,957,301 AMD. Of this total, 21,700,000 was presented as lawyers’ fees. The compensation requested for lawyers’ fees varied between a low of 200,000 AMD to a maximum of 4 million AMD. The most frequent amount requested for lawyers’ fees was 500,000 AMD. In determining the size of compensation for violations of peoples’ honor, dignity or business reputation as a result of libel and insult, since the decriminalization of these institutions, the courts have expressed different, non-consistent positions. As the “Rule of Law” NGO has noted in its study: “Although statistics show that the courts systematically and in essence have reduced the requests for monetary compensation, observations have shown that, in deciding on the size on the size of compensation, in the sense of taking into account the economic situation of the defendent, judicial practice in 2010-2011 has not progressed in harmony. There have been judicial acts essentially different from one another. Although point 2 of the 11th part of Article 1087.1 of the Civil Code has been consistently cited by the courts, not in all the cases has this issue been examined in factual detail by the courts. After the dicisions of the Constitutional Court and the Court of Cassation (April 27, 2012) a tendency for unity has been detected in this practice. The courts have begun taking into account the economic situation of the defendent company, while the superior courts have been reversing verdicts in which the above condition has not been met.”³⁴

³³ Monitoring of cases regarding libel and insult, pp. 10-12, “Rule of Law” NGO.

³⁴ Monitoring of cases regarding libel and insult, “Rule of Law” NGO.

It must be noted that after decriminalization, initially the courts basically met the plaintiffs' demand for compensation which were extremely high and thus were not in line with the principles of proportionality and necessity of interference in the freedom of speech. Thus for instance, in **Samvel Aleksanyan et al v. "Dreskizb" LLC** (ԵԿԴ/2247/02/10), noting that *"in setting the level of compensation based on point 8 of Article 1087.1 of the Civil Code, the Court takes into account the particularities of the given case, including the manner and dissemination frames of libel, as well as the economic situation of the slanderer"* the Court did not take into account the economic status of the defendant, stating that *"no evidence characterizing the economic status of the defendant was presented to the Court, which could have been used as a basis for reducing the level of compensation"*. However, as the "Rule of Law" NGO has noted in its study, in the given case *"no opportunity was given to the lawyer to effectively participate in the judicial examination, while the Appeals Court did not refer to the substantial facts presented by the lawyer, including information about the economic situation of the defendant. In this case, in the entire course of the trial, neither the Court of first instance, nor the appeals Court and the Court of Cassation referred to this important circumstance."* Instead, in setting the size of compensation, the courts took into account *"the social position of the plaintiffs as representatives of the legislative authorities and taking into account that the slanderous information was disseminated through a daily newspaper with a print run of 7480, which made the information accessible to wide masses of society, the Court sets the level of compensation at 2000 times the minimum wage for each plaintiff."* The Court settled the case exactly on this basis, demanding that the defendant compensate each of the plaintiffs with a sum equal to 2000 times the minimum wage (the highest threshold of compensation for damages due to libel). The use of the plaintiff's official position as a criterion for setting the level of compensation was used by the Court in other cases as well, a fact which is cause for great concern. In case number ԵԿԴ/2479/02/10 (**Bella and Sedrak Kocharyan v. "Skizb Media Center" LLC**) where in fact the wife and son of Armenia's second President, Robert Kocharyan, were the plaintiffs, the Court arrived at the following conclusion: *"In satisfying the demand for compensation, it is necessary to also take into consideration the particularities of the case in relation to the status of the harmed party, that is the plaintiffs, in which conditions, in contradistinction with others, the latter enjoy greater attention and respect."* In case, **Gegharkunik Marz Governor Nver Poghosyan v. "Zhoghovurd Daily Editorial Board" LLC** (ԳԴ/0241/02/11) the Court, in setting the compensation level, took into account, among other factors, the *"social position of the plaintiff as a representative of the executive power"*.³⁵ This decision of the Court contradicts the well-known decision of the Constitutional Court (ՍԴԴ-997) where it is noted that *"in the case of persons occupying public positions or with reference to political actors, publications regarding issues of public interest benefit from maximum protection, so that in setting the level of compensation, the plaintiff's status cannot be interpreted to the detriment of the defendant."*³⁶

It must also be noted that in the beginning the courts, in dealing with the defendant's economic situation, evaluated it from a humanitarian point of view. Thus, for instance, in case number ԵԿԴ/1963/02/10 (*Glendale Hills CJSC v. "Skizb Media*

³⁵ Verdict of the Court of First Instance of Yerevan's Kentron and Nork-Marash districts, 06/06/2011, p. 58.

³⁶ Conclusion of the IDC (October 26, 2012) regarding Gegharkunik Governor Nver Poghosyan v. Zhoghovurd Daily Editorial Board.

Center” LLC) the Court noted: *“It follows from the analysis of the abovementioned articles that the legislature, in pursuing a natural legal goal, has afforded an opportunity to the citizen whose business reputation has been sullied through libel to demand as compensation from the slanderer at the rate of at least 2000 times the minimum wage, by setting measures (the economic situation of the slanderer) by which the Court should be directed in implementing justice. That is, the legislature, based on humanitarian principles has given the Court wide leeway to decide the size of compensation in each specific case. In this case, the Court, having established that the defendant has indeed sullied the business reputation of the plaintiff through slander, decides that the amount of 200,000 AMD should be paid by “Skizb Media Center” LLC as compensation, taking into account the mode of slander, the range of dissemination, as well as the economic situation of the company.”* While according to the accepted international practice, the need to take account of the defendant’s economic situation in libel and insult cases must emanate from *“the principle of keeping the media free of unnecessary pressure and thus protecting the free flow of information necessary for the public via the media and not on humanitarian principles.”*³⁷ In this sense, the requirement was perhaps best implemented in the case of **Tigran Arzakantsyan v. “Yerkir Editorial Board” LLC** (ԵԿԴ/0261/02/10), in which the Court used point 2 of part 11 of Article 1087.1 of the Civil Code with the following interpretation: *“Therefore, the Court finds that the request for compensation presented by the plaintiff in the amount of 1,000,000 AMD is a very excessive demand that could seriously damage the given media’s right to free expression and in a general sense, could have a chilling effect on the right to free expression of the whole media, which would harm the public interest of receiving information. Therefore, led by the principle of proportionality, as well as taking into account the economic situation of the defendant, especially the low print run of the paper, the paper’s value and circulation...finds that in this instance, for damages to the plaintiff, the defendant should pay 200,000 AMD as compensation, which will redress the plaintiff’s violated rights.”* The mentioned interpretation is entirely in concert with the decision of the Constitutional Court which came five months later (ՄՄԴ-997) in which the Court, *inter alia*, revealed the constitutional content of the 2nd subpoint of point 11 of Article 1087.1 of the Civil Code.³⁸ In general, we must note that, in contrast to the judicial practice of 2010-2011 regarding the consideration of the defendant’s economic situation in assessing the size of compensation which did not develop evenly, after the mentioned decision of the Constitutional Court, as well as the precedent-setting later decision (April 27, 2012) of the Court of Cassation, a tendency for unity in practice has been observed. The courts have begun taking into account the defendant company’s economic situation, while the superior judicial body has been repealing verdicts where the mentioned requirement has not been met.³⁹ The “Rule of Law” NGO has analyzed the Court decisions on the determination of the amount of state taxes assessed in cases of libel and insult, as well as the payment of such taxes. The following is an excerpt from that analysis: In case number ԵԱԴԴ/0231/02/11 (*Murad Asryan v. “Media Consult” LLC*) the plaintiff presented pecuniary and non-pecuniary demands, the right to respond and monetary compensation for libel, but paid the state tax for the Court only for his non-pecuniary demand, while refusing to pay the state tax for his pecuniary claim, arguing that because he had presented a request for non-economic (moral damage) compensation, he should pay the state-mandated tax for non-pecuniary demands.

³⁷ Monitoring of cases regarding libel and insult, 2012, “Rule of Law” NGO.

³⁸ Monitoring of cases regarding libel and insult, p. 20, 2012, “Rule of Law” NGO.

³⁹ Monitoring of cases regarding libel and insult, p. 21, 2012, “Rule of Law” NGO.

The state tax fee for non-pecuniary demands is set at 4,000 AMD, while for pecuniary claims are assessed 2% of the requested amount for procedures in courts of the first instance and 3% in the appeals courts. The courts refused to accept the plaintiff's interpretation and determined that the request for compensation at the tune of 2000 times the minimum wage, as set in part 8 of Article 1087.1 of the Civil Code is a pecuniary demand.

The above-mentioned Court interpretations protect the media from improper demands for large amounts, where the risk of going to Court would be minimal if the plaintiffs are exempt from paying 2-3% of their monetary requests and they were asked, by law, to pay the set state tax fee of 4000 AMD, regardless of the requested amount. It is obvious that the payment of the state tax which definitely limits a person's accessibility to the courts, pursues a natural legal purpose. The payment of the state tax also has a deterring influence, so that plaintiffs do not present unnecessary demands for large amounts against defendant persons or organizations. If the plaintiff realizes that in presenting a request for monetary compensation he must pay 2% in the Court of the first instance and 3% in the appeals Court, in all probability he would not sue for a less promising or non-promising result. One could only imagine what a negative consequence would have presented itself to the media if the courts had ruled that for cases for requests of compensation for non-material damage (in this case for libel and insult) the plaintiffs were to pay the set 4000 AMD state tax only. In such a situation, the risk of going to Court would palpably decrease for the plaintiffs while complaints against the media would increase considerably. Therefore, the Court's interpretation cited above is assessed as a legal position with a positive consequence for the freedom of the media.

International Legal Practice and the Case Law of the European Court of Human Rights

As ARTICLE 19 notes in the 13th Principle of its publication, "the overriding goal of providing a remedy for defamatory statements should be to redress the harm done to the reputation of the plaintiff, not to punish those responsible for the dissemination of the statement." "In applying remedies, regard should be had to any other mechanisms – including voluntary or self-regulatory systems – which have been used to limit the harm the defamatory statements have caused to the plaintiff's reputation. Regard should also be had to any failure by the plaintiff to use such mechanisms to limit the harm to his or her reputation," notes the 15th principle of the ARTICLE 19 guideline.

In the context of compensation for damages to the individual's honor and dignity, analyses of the ECHR case law shows that the ECHR has a united position in this regard. Interference in the freedom of speech must be commensurate with the pursued legal purpose and should be based on its necessity in democratic society. On the issue of the comparability of interference, the ECHR's approach requires that, in deciding the size of the requested compensation, domestic courts should take into account the limited means of those persons against whom the libel or insult suits are brought. Specifically, in **Romanenko et al v. Russia**,⁴⁰ the ECHR considered that

⁴⁰ Romanenko et al v. Russia, number 11751/03, paragraph 48.

the plaintiff's right to free speech was violated also because the domestic courts did not analyze which part of the plaintiff's revenues were comprised of the demanded sums and whether a greater burden was not imposed on them because of that amount. However, the plaintiff insisted, and this was not disputed by the government of the Russian Federation, the amounts requested were equal to four months' worth of his revenues and thus were extremely severe.⁴¹

⁴¹ Conclusion of the IDC on the case the second president of Armenia, *Robert Kocharyan v. Founder of Hraparak Daily "Hraparak Daily LLC"*

THE DEFINITION AND CHARACTERIZATION OF THE TERM “INFORMATION SOURCE”

The Legal and Judicial Practice of the Republic of Armenia

Parts 6 and 9 of Article 1087.1 of the Republic of Armenia Civil Code deal with the term “information source”. According to Part 6: *“A person is exempt from responsibility for libel or insult if the factual data stated or presented by him are literal or conscientious reproductions of the news disseminated by the news agency, as well as the public speech of another person, official documents, or information by another media source or the creative product of an author and in disseminating them he has cited the source of information (author) in interpreting a series of legal positions in the Court”*. Meanwhile, Part 9 notes that *“if in libeling and insulting he has not cited the source (author) or the source (author) is unknown, or the media, using its right not to reveal the name of the author, then the obligation for compensation falls on the one disseminating the insult or libel and if that is contained in the information being disseminated by the one engaged in news production, then the latter will be held responsible.”*

On April 27, 2012, the Republic of Armenia Court of Cassation made a precedent-setting legal decision regarding the term “information source” contained in parts 6 and 9 of Article 1087.1 of the Civil Code. Taking into account that the definition of this term in the decision of the Court of Cassation could have a negative impact on the journalistic field by limiting the scopes of “information source”, we present below the analysis of the Information Disputes Council on this issue, which perhaps can be used by courts and lawyers.

As the Council on Information Disputes noted in its conclusion of June 26, 2012, regarding the ***Court of Cassation decision (April 27, 2012) on Tatul Manaseryan v. “Skizb Media Center” LLC***, the Republic of Armenia Court of Cassation positions, taking into account its functions and special status, could negatively impact on the journalist-journalistic source relationship, in which case the freedom of the media will be endangered in terms of using their sources and consequently the right of the media to freely disseminate the news. The Court established that sources of information might be physical or legal persons, such as *“authors”* or *“news agencies”* *“that publish news through various means.”* Subsequently, in interpreting the term *“means”* the Court established that such may consist of *“a person’s public speeches”, “official documents”, “authored creations”*. Continuing its interpretations, the Court noted that even if the disseminator of the news has literally or conscientiously reproduced the information received from the source, he or it cannot avoid responsibility if *“it has cited a source which is not considered a news source...in the sense of Article 1087.1, that is, it is not an author or news agency”*. Taking into account, as noted above, that only physical or legal persons that publish information via clearly defined means (public speech, official documents, authored creations) can be considered authors, it follows that in all those cases when the journalistic source has published the information by any other means, the possibility of that person being considered an author becomes doubtful. Thus, the noted interpretations

considerably narrow the selection of “information source” which the media could base itself on to avoid responsibility.

In using the above noted legal position based on the evidence underlying the case ***Tatul Manaseryan v. “Skizb Media Center” LLC*** the Court of Cassation determined that although the media had revealed its source, the author named Anton Arakelov, who had told the media about the criminal case opened by the police against Tatul Manaseryan, could not be considered a source of information in the sense of Article 1087.1 because “*he is not the author of any means of information dissemination or someone realizing news production.*” Subsequently, the Court of Cassation drew the general conclusion that the citing of the defamatory or insulting information published by a person who is not considered a source of information, cannot be considered a revelation of the source of information.

International Legal Practice and the Case Law of the European Court of Human Rights

According to the Information Disputes Council, with the noted decision, the concept of **appropriate and non-appropriate sources** is introduced into the Republic of Armenia legal field, by which the frames of sources which the media can use become limited. Such a decision also contradicts the Recommendation No. R (2000) 7 of the Committee of Ministers to member states on the right of journalists not to disclose their sources of information, according to which, a source of information can be “a any person who provides information to a journalis.” In the explanatory section of the same Recommendation, in interpreting the above principle, it is noted that journalists should be given the possibility of receiving information “from all kinds of sources” and for that reason it is “necessary to define that term widely” in domestic legislation and in practice.

The Court of Cassation decision, in effect, puts the media before a choice: either to publish the valuable information from an unknown source and take the risk of the consequences on its shoulders or to abstain from publishing the information from the unknown source, even if it is valuable. In the second case, it is the public anyway that ultimately loses.

VIOLATIONS OF JUDICIAL PROCEDURES IN CASES OF LIBEL OR INSULT

The study of judicial practice in cases of libel or insult has shown that the contradictory legal positions of the Republic of Armenia courts have not only been based on illegitimate interpretations and implementation of material rights but also by uneven limitations of judicial procedures, which undoubtedly is a circumstance that should be taken into account in assessing the legislation on the limitation of freedom of expression. Below, we present the cases of judicial procedural violations which were revealed as a result of the monitoring done by the “Rule of Law” NGO.

The Refusal of Mediation for the Purpose of Accomplishing the Obligation of Proof

According to Part 4 of Article 1087.1 of the Civil Code, the obligation for the presence or absence of evidence in cases of libel and insult rest with the defendant. However, the courts often impertinently refuse the defendant’s mediation, which the latter has presented in order to perform the duty placed on him by the Court. Therefore, the courts should take particular caution in order to ensure the media’s procedural rights. In such circumstances, when in cases of libel the obligation of proving the existence or absence of evidence rests on the defendants shoulders, while the Court deprives the defendant from the opportunity to substantiate those circumstances, or for instance, it deprives the defendant from the opportunity to present evidence and assertions in mounting a defense for “reasonable statement”, the European Court, based on Part 2 of Article 10 of the Convention, registers a violation of the right to discretion in selecting means and methods regarding the implementation of limitations by domestic authorities (*Jerusalem v. Austria, number 26958/95, 27/02/2001, paragraph 46; Novaya Gazeta v Voronezhe v. Austria, number 27570/03, 21/12/2010, paragraph 56*). The European Court accords critical significance to limitations in cases involving insult and libel and if it reaches the conclusion, according to which, in circumstances when it would be impossible to determine how the outcome of trial would be if the defendant could have the opportunity to present all his assertions and evidence, such judicial limitations are not necessary in democratic society according to Part 2 of Article 10 of the Convention (*Castels v. Pain, number 11795/85, 23/04/92, paragraphs 49 and 50*)

Let us present the following example regarding such a limitation of judicial procedural rights. In *Tatul Manaseryan v. “Zhamank” Daily*, the defendant media decided during the judicial investigation to reveal its source, Anton Arakelov, and mediated with the Court to invite its source and question him as a witness but the Court of first instance turned down the mediation while the appeal clearly noted among all the other appeals. This was not included by the appeals Court among the significant facts of the case.

They did not provide the media lawyer with the materials of the civil case.

In the case *Samvel Aleksanyan et al v. “Dareskizb” LLC (ԵԿԴ /2347/02/10)* during the entire trial in the Court of first instance, they did not provide the media lawyer with

the copies of the speeches of the civil case, a right which is clearly fixed in criminal law (Article 93, Part 1 of the Civil Code). The lawyer's application to the Court to receive the copies of documents on the case were not properly answered by the Court. The *in essence* examination of the case was done in the absence of the lawyer. That is, during the entire trial in the Court of first instance, the defendant's lawyer did not have the opportunity to litigate the arguments of the plaintiffs as well as presenting his own arguments and evidence on the basis of the materials of the case. This violation was removed during the judicial examination in the appeals Court.

During the trial, the media lawyer was not given sufficient time to prepare his defense.

In the case, *Samvel Aleksanyan et al v. "Dareskizb" LLC* (ԵԿԴ/2347/02/10), the request of the defendant media's lawyer to have the trial postponed by 15 days was met partially, with seven days. The request was made by the lawyer to get acquainted with the materials of the case. Although the Court had the right to discretion, nevertheless it was bound by nothing, not even by the principle of the reasonable preservation of trial deadlines, to postpone the trial by the time asked by the lawyer, especially taking into account that the deadline requested was reasonable itself.

The courts did not ensure the presence of the editor-in-chief of the media during the litigation.

In the case number ԵԿԴ/2347/02/10 (*Samvel Aleksanyan et al v. Dareskizb LLC*) taking into account the fact that the editor-in-chief of the media was considered the representative of the defendant and he also was directing the media's editorial policy and thus was the only one who could be the full representative of the defendant's case, the lawyer had asked for his presence at the Court hearings but the Court had refused the request. It must be noted that the Court was not bound by any domestic trial rules in doing that, and considering that the editor-in-chief was guiding the media's editorial policy, his presence could have helped the objective examination of the case. The position expressed by the plaintiffs' lawyer is also remarkable regarding the issue raised according to which *"he is a convict who is in his place of incarceration and as such could not have been present as the representative of another person's interests in Court."* Such positioning unnecessarily formalizes the object of free expression. If the issue is about human rights, then it is not right to approach the issue exclusively through formal, legal and procedural categories. In the given instance, the Court, again, was not restricted by any norm to ensure the presence of the general editor, therefore, it could have shown discretion by taking into account the public interest of the issue.



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