Lilit Avagyan
University of Gdansk, Poland

CYBERCRIME AS A NEW PHENOMENON. ARTICLE 10 (FREEDOM OF EXPRESSION) OF ECHR THROUGH THE INTERNET AND THE ISSUES OF DEFAMATION AND INSULT UNDER ARMENIAN LEGISLATION

The article discusses the crimes committed through the internet – Cybercrime, as in the 21st century internet web, social websites, e-mails became an inseparable part of the up-to-date social and public relations. However, the global and positive character of the internet shifted internal crimes to international ones. Therefore, cybercrimes are discussed within the ambit of this paper, with the particular reference to the protection of Article 10 – Freedom of Expression of European Court of human rights (ECHR) through the internet by illustrating international conventions due in place for affirming and protecting this basic human right. Moreover, the state positive obligation towards its individuals is discussed alongside with the ECHR case law. Furthermore, the Armenian legislative regulations with regards to Freedom of Expression is presented and the gaps of proper judicial protection after the decriminalization of the article of defamation and insult is discussed as well as recommendations made for the further improvement of shortcomings and the level of compliance of Article 10 of ECHR.
Keywords: Cybercrime, ECHR, ECtHR Freedom of Expression, human rights, computer, crime, defamation, Civil Code.

The first personal computers became popular in 1980s of pervious century which led to the further development of computer systems. This new global digital environment created new pace of human activities in the local, regional and global level. At one point those activities are not real because of the virtual nature, but on the other side they are an essential and inseparable part of nowadays citizens lives. As of today we actively share different types of information on the Internet, put comments in social websites, likes in Facebook, Instagram, simultaneously freely expressing our thoughts and exercising our human rights. Thus, it is an unequivocal fact that today internet is a vital part of our lives.

Therefore, Information legally made available in one country is available globally – even in countries where the publication of such information is criminalized. Thus, the global character of internet shifted the originally local crimes into transnational crimes and the new global digital environment became a new arena for unlawful behavior, such as:

- dissemination of hate speech;
- child pornography;
- incitement to violence;
- identity theft;
- fraud;
- money laundering;
- terrorism and new emerging cybercrimes.

However, currently, the universal definition of the term "Cybercrime" does not exist. Various attempts were done to give a definition in a more or less broad or narrow sense.

Thus United Nations broke Cybercrime into two categories and defined as:

- Cybercrime in a narrow sense (computer crime): Any illegal behavior directed by means of electronic operations that targets the security of computer systems and the data processed by them.
- Cybercrime in a broader sense (computer-related crime): Any illegal behavior committed by means of, or in relation to, a computer system or network, including such crimes as illegal possession [and] offering or distributing information by means of a computer system or network"[1].

[1] Scene of the Cybercrime, Second Edition, Littlejohn Shinder and Michael Cross, July 21, 2008 / 10th UN Congress on the Prevention of Crime and the Treatment of Offenders, 2000, A/CONF.187/10, page 5.

Freedom of expression as a key human right is not a new phenomenon and the importance of it as the cornerstone of the democratic society proved several times. Indeed, Freedom of Expression is the vital basis of democratic countries, as the right to freely state ideas on various issues and concerns without any limitation and any fear to be punished by authorities plays an important role for the a healthy society. Therefore, it has a vital significance to entitle every person to form his own opinions and beliefs, which is a main guarantee to develop his personality and achieve liberty.

Therefore, the right of freedom of expression, it is protected by many fundamental international instruments.

Accordingly, Article 19 of the Universal Declaration of Human Rights says:

"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers"[1].

This right is further specified and made legally binding in Article 19 of the International Covenant on Civil and Political Rights and in Article 10 of the European Convention on Human Rights.

Freedom of expression is also protected in the regional human rights systems. Article 10 of ECHR, which was ratified by the Republic of Armenia in 2002, provides in part "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers". The limitations on that freedom foreseen in Article 10 § 2: "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

Hence, Freedom of expression, protected by Article 10 § 1 constitutes an essential basis of a democratic society and the limitations on that freedom are interpreted strictly.

The guarantee of freedom of expression applies to all forms of expression, not only those that fit in with majority viewpoints and perspectives. The European Court of Human Rights (ECtHR) has repeatedly stated: "Freedom of expression . . is applicable not only to "information" or "ideas" that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there can be no "democratic society"[2].

The crimes conducted via internet challenged the basic human rights of citizens inside States which lead to the new approaches of current changing environments that goes beyond traditional interpretation of ECHR, but extended alongside to the negative obligation to the positive obligation, which requires states to make an such an environment through the adequate legislation and sophisticated mechanisms. States obtain positive right towards freedom of speech, which means that governments not only should refrain from unlawful interference but also have an obligation to provide with necessary tools for transaction of that right.

In the judgment Editorial Board of Pravoye Delo and Shtekel v. Ukraine the European Court of Human Rights, for the first time, acknowledged that Article 10 of the Convention had to be interpreted as imposing on States a positive obligation to create an appropriate regulatory framework to ensure effective protection of journalists' freedom of expression on the Internet[3].

The recognition by the European Court of a *horizontal effect* of Article 10, assessing interferences with the right to freedom of expression by private persons or corporate organizations, and of the *positive obligations* for member states to protect and effectively create an environment for guaranteeing the right to freedom of expression has further extended the scope of that right as the interpretation of the Convention "in the light of present-day conditions" must take into account the specific nature of the Internet as a "modern means of imparting information"[4]. Therefore, internet publications fall within the scope of Article 10.

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[1] Universal Declaration of Human Rights (UDHR), UN General Assembly Resolution 217A(III), adopted 10 December 194.

[2] Handyside v. United Kingdom, Application No. 5493/72, paragraph 49, ECHR 7 December 1976.

[3] Editorial Board of Pravoye Delo and Shtekel v. Ukraine , no. 33014/05, ECHR 5 May 2011.

[4] Internet: case-law of the European Court of Human Rights Updated: June 2015.

Nevertheless, Article 10 as mentioned above does not guarantee unlimited freedom of expression, but the scope of Article 10 covers criticism or satire as court deems that without these "democratic society" cannot exist.

Domestic courts must give relevant and sufficient reasons for the justification a judgment finding that someone has committed defamation on the Internet which Court will have to test. Indeed, hate speech does not benefit from the protection of Article 10 of the Convention . As in Perrin v. the United Kingdom the Court rejected the applicant's complaint under Article 10 of the Convention as inadmissible (manifestly ill-founded). The case is about a French national based in UK who was operating a United States-based Internet company with sexually explicit content for publishing obscene articles on Internet. In these circumstances Court found that criminal conviction considered necessary and proper for a democratic society and was not disproportionate[1].

Article 42 of the Constitution of Republic of Armenia (RA), which was amended in 2015, also prescribes the right to freedom of expression which includes everyone's right both to openly express ideas and hold opinions as well as to seek, receive and impart information and ideas through any mean of information without any interference by public or local authorities and regardless of frontiers. Even more, the amendments of the Constitution guarantee the freedom of media (press, radio, TV) and particularly operation of independent public television and radio, which offer diversity of educational, informational, cultural and entertainment programs.

Moreover, in accordance with the Article 5 (3) of the Constitution of the Republic of Armenia "In case of any conflict between the norms of international treaties ratified by the Republic of Armenia and those of laws, the norms of international treaty should apply"[2].

Consequently, chapter 24 of RA Criminal code is devoted to crimes against computer information security. Also, besides the scope of the chapter 24, Article 144, Article 166 and Article 263 set forth the protection referring to illegal collecting, keeping, use and dissemination of information pertaining to personal or family life, Involving a child into antisocial activity as well as illegal dissemination of pornographic materials[3].

In Armenia the criminal investigations of the crimes against computer security are implemented by the criminal investigation units of the RA Police established in 2005. The division to combat against cybercrimes further supplemented in order to provide every day implementation of 24/7 contact point.

In 2007 Parliamentary Assembly of Council of Europe invited states to repeal or amend criminal defamation provisions[4]. In accordance with the Council of Europe resolution "Towards decriminalization of defamation" ten Council of Europe member countries, including Armenia, initiated corresponding legislative reform towards the decriminalization of insult and defamation. The Republic of Armenia decriminalized libel and insult laws in an attempt to regulate relations between the media and public officials and as a result of that the issue is regulated exclusively in a framework of civil law.

Previously, defamation and insult were covered and regulated through the Articles 135 and 136 of Criminal Code of the Republic of Armenia adopted in 18 April, 2003.

Considering current regulation in Armenia with regard defamation and insult consulted by means of internet we can come into conclusion that effective judicial mechanism currently is not in place, as before May 2010 the Republic of Armenia legislation prescribed both civil and criminal regulation for the protection of honor and dignity.

Nevertheless, Article 19 (1) of the Civil Code provides that:

"The honor, dignity and business reputation of a person should be protected from the publicly pronounced insult and defamation by another person in cases and order prescribed by this Code and other statutes."

In particular, the article 1087.1 was included in RA Civil Code from May of 2010 which regulates defamation and insult by the "Procedure for and Conditions of Compensation for the Damage Caused to Honor, Dignity and Business Reputation".

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[1] Stephane Laurent Perrin against the United Kingdom, Application no. 5446/03, ECHR 2005.

[2] Հայաստանի Հանրապետության Սահմանադրություն, ընդունվել է՝ 06.12.2015.

[3] Հայաստանի Հանրապետության քրեական օրենսգիրք, ընդունվել է՝ 18.04.2003.

[4] Recommendation 1814 (2007) and Resolution 1577 (2007) of the Parliamentary Assembly "Towards decriminalization of defamation", http://www.assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=11684&Lang=EN

According to the Article 1087.1 part 1:

"The person whose honor, dignity or business reputation have been disgraced through insult or slander, may apply to court against the person having insulted or slandered.

According to the Article 1087.1 part 2 Insult is defined as:

"a public expression by means of speech, picture, voice, sign or by any other form of publicity with the intention of causing harm to honor, dignity and business reputation".

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

According to part 3 of the same article slander is:

"Within the meaning of this Code, slander shall be deemed as public communication of factual data (statement of fact) relating to a person, which do not correspond to the reality and disgrace the honor, dignity or business reputation thereof."[1]

Under the provisions of the same article a person shall have the right to require, under a judicial procedure, from the person having insulted or slandered him or her to compensate the damage only if the person who caused insult or slander is known.

The judicial protection enshrined in the article 1087.1 also extends to the part 5 of article 22 of RA Civil Code:

"The damage caused to a person upon illegal use of his or her name shall be subject to compensation in accordance with this Code.

In case of distorting or using the name of a citizen in a way or in a form that affects his or her honor, dignity or business reputation, the rules provided for by Article 1087.1 of this Code shall apply". [2]

Those protection enshrined in abovementioned articles are effective if the identity of offender is discovered. But the remaining cases where the gathering, preserving and using of such information conducted through by anonymous users of computer systems or through the internet, the protection enshrined of Civil Code within previously discussed articles does not operate and protect adequately. In this situation even if the use of personal data can be qualifies as "defamation", the legislative regulation cannot be considered sufficiently effective, because the lack of opportunity to bring a civil lawsuit against the offender.

Whereas laws must provide effective protection in regard to the dissemination of offensive statements, which become the most common problem in line with the development of the Internet.

But the Civil Code provisions must be stipulated in a way that will preclude the exemption of liability in favor of defamatory speech. The existence of such provisions may pose a threat to protection of the right of Freedom of Expression of the European Convention on Human Rights and is likely to be determined as a violation and cause a noncompliance to the Armenia's Positive obligation towards its individuals.

Thus, to sum up, within the ambit of this paper the essence of cybercrime as the new and unprecedented threat to the nowadays world discussed which, undoubtedly, requires effective combat efforts. As one chain of this changing environment, Armenia must also define clear and concise techniques as well as proper legislation for fighting against cybercrime, As already mentioned above the new informational society has created such an environment that existing legal concepts are challenged, particularly, criminals are located in a place which critically differs from the effects of their illegal acts.

While various international documents enable very broad protections for expression, however, freedom of speech is not an absolute right and is subject to number of limitations. The exercise of the rights regarding freedom of expression is subject to certain restrictions. Given what has been outlined in the present paper in terms of progress and effectiveness of state work schemes it should, however, be highlighted that there still exist major gaps in regulation of the concepts of defamation and insult, as well as non-pecuniary compensation in case of the harm to one's honor, dignity or reputation through the internet. Even if the article prescribes criminal liability, nevertheless some concepts in this article also can be

[1] Հայաստանի Հանրապետության քաղաքացիական իրավունք, ընդունվելէ 05.05.1998

[2] Հայաստանի Հանրապետության օրենքը Հայաստանի Հանրապետության Քաղաքացիական Օրենսգրքում Փոփոխություններ և Լրացումներ կատարելու մասին, ընդունվել է 18.05.2010

defined as not effective protection in case of use of personal data and information related to the person. Moreover, as highlighted above if the offence conducted through the internet where the process of discovering a criminal itself very risky.

Though the Republic of Armenia has initiated and gradually implements the institution of moral damage, there are still, some further legislative changes are required. Therefore, there is a need to overcome the legal omission and legally regulate the problem of a defense from non-public insult or defamation. Moreover, a particular measure must be implemented in the *Civil Code of RA aiming to enable everyone with the legal tool to demand the Court to hold that the spread statements are false when it is not possible to identify concrete person who is liable for it*.

References:

1. Scene of the Cybercrime, Second Edition, Littlejohn Shinder and Michael Cross, July 21, 2008 / 10th UN Congress on the Prevention of Crime and the Treatment of Offenders, 2000, A/CONF.187/10 [in English]
2. Universal Declaration of Human Rights (UDHR), UN General Assembly Resolution 217A(III), adopted 10 December 1948 [in English].
3. Handyside v. United Kingdom, Application No. 5493/72, paragraph 49, ECHR 7 December 1976 [in English].
4. Editorial Board of Pravoye Delo and Shtekel v. Ukraine , no. 33014/05, 5 May 2011 [in English].
5. Internet: case-law of the European Court of Human Rights Updated: June 2015 [in English].
6. Stephane Laurent Perrin against the United Kingdom, Application no. 5446/03, ECHR 2005 [in English].
7. Hayastani Hanrapetutyan Sahmanadrutyun popoxutyunnerov, yndunvel e 06.12.2015 Constitution of the Republic of Armenia (with amendments) adopted 06.12.2015 [in Aremnian].
8. Hayastani Hanrapetutyan qreakan orensgirq, yndunvel e 18.04.2013 Criminal Code of The Republic of Armenia, 18.04.2003 [in Aremnian].
9. Recommendation 1814 (2007) and Resolution 1577 (2007) of the Parliamentary Assembly “Towards decriminalization of defamation” [in English].
10. Hajastani Hanrapetutyan qaxaqaciakan iravunq, yndunvel e 05.05.1998.

Civil Code of Republic of Armenia, adopted on May 5, 1998 [in Aremnian].

11. Hayastani Hanrapetutyan orenqy Hayastani Hanrapetutyan qaxaqaciakan orensgrqum popoxutyunner ev lracumner katarelu masin, yndunvel e 18.05.2010 (The Republic of Armenia Law on Making Amendments to the Republic of Armenia Civil Code)adopted on 18 May, 2010 [in Armenian].