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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT OPINION

ON THE DRAFT LAW ON AMENDING THE CIVIL CODE OF THE REPUBLIC OF ARMENIA

on the basis of comments by

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I. *Introduction*

1. The Office of the President of the Republic of Armenia requested on 30 March 2009 the Opinion of the Venice Commission on the draft Law on amending the Civil Code of the Republic of Armenia. The amendment concerns Article 19 of the Civil Code (Protection of Honour, Dignity and Business Reputation). A revised version of the draft amendment was submitted to the Venice Commission on 15 April 2009. Both versions are reproduced in a separate document, together with the current wording of Article 19 of the Civil Code and an Explanatory Note on the purpose of the reform (document CDL(2009)062).

2. This Opinion was drawn up on the basis of comments by Messrs van Dijk and Hoffmann-Riem (CDL(2008)081 and 082, respectively), who were invited by the Venice Commission to act as rapporteurs. The comments by Mr van Dijk refer to the first version of the amendment dated 30 March 2009 and the comments by Mr Hoffmann-Riem refer to the revised version dated 15 April 2009.

3. This Opinion was transmitted to the authorities of the Republic of Armenia on … and subsequently endorsed by the Venice Commission at its … Plenary Session (Venice, …).

II. General remarks

3. The Venice Commission received a revised version of the draft amendment to the Civil Code once it had started to work on the first version dated 30 March 2009. This state of affairs has complicated the task of the Venice Commission as the two versions not only differ from one another as regards the numbering of Articles, but more importantly they also differ as to the substance. For the sake of clarity, the current consolidated Opinion refers to the revised version of the draft amendment dated 15 April 2009, unless specified otherwise.

4. The following comments are based on an unofficial English translation of the two versions of the draft amendment to the Civil Code. These translations may not accurately reflect the original version on all points and, consequently, certain comments may have been made as a result of misunderstandings based upon the translation of the text.

III. Objectives of the reform and impact on the criminal code

5. According to the amendment, the protection of honour, dignity and business reputation will be regulated in detail in the Civil Code. The distinction between insult and defamation as defined in Article 2 § 2, items 2 and 3, forms the basis of the draft amendment under examination. Persons harmed by insult or defamation may demand an apology or a retraction in addition to a financial indemnity for the moral harm incurred and a compensation for other harm caused.

6. The intended purpose of the draft amendment is to move towards decriminalisation of the offences of libel (Article 135 of the Penal Code) and insult (Article 136 of the Penal Code) by ensuring stronger protection of the right to honour, dignity and business reputation in the Civil Code. The amendment, however, does not provide for a simultaneous change in the Penal Code. This aim of decriminalisation has so far only been expressed in an explanatory note to the Amendment, which cannot be binding on Parliament.

7. In several legal systems the protection of honour, dignity and reputation is regulated by both criminal and civil law. If libel and insult are offences under criminal law, that means that these acts are unlawful and may for that reason give cause for an action for rehabilitation and/or compensation. Depending on the legal system, a claim to that effect may be put forward by the

alleged victim in the course of the criminal procedure and/or through a tort action under civil law. In the former, dual system the regulation under criminal law is usually detailed, while under civil law the general rules concerning tort action apply, possibly with special provisions about rehabilitation and compensation for moral damage.

8. The criminal procedure and the civil procedure differ substantially. First of all, a criminal charge may be initiated by the alleged victim or he or she may bring a claim after the prosecuting authorities have brought the case before the court, but, in general, he or she will not have control over the subsequent prosecution, while in a civil procedure the private party who brings an action remains in control of that action and may withdraw it at any time. The role of the court is also a different one in both procedures.

9. There is a certain tendency in Europe to decriminalise libel and insult in view of the fundamental right to freedom of expression, except in cases where these acts are of a nature to incite hatred, violence or discrimination.[1]

10. Duplication in different legal codes without harmonisation or at least co-ordination should be avoided in this matter, as well as the creation of serious lacunas. It is therefore recommended that the draft amendment explicitly provide for a corresponding change in the Penal Code and that the latter retain a possibility to prosecute and punish defamation, libel and insult when these acts constitute an incitement to hatred, violence or discrimination.

IV. Specific comments

A. Definition of the terms insult and defamation, and burden of proof

11. The term "insult" is defined in Article 2 § 2, item 2 (option 1 and option 2), of the draft amendment and the term "defamation" in Article 2 § 2, item 3. The application of these terms in practice by Armenian courts will have to take into account the case law established by the European Court of Human Rights (hereinafter: the Court) in relation to the right to freedom of expression enshrined in Article 10 ECHR.

12. In its case law, the Court has distinguished between statements of fact and value judgments. While the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof. The requirement to prove the truth of a value judgment is impossible to fulfil and would infringe freedom of opinion itself, which is a fundamental part of the right secured by Article 10 ECHR. Where a statement amounts to a value judgment, the proportionality of an interference may depend on whether there exists a sufficient factual basis for the impugned statement, since even a value judgment without any factual basis to support it may be excessive.[2]

13. Contrary to the first version of the draft amendment, the second version dated 15 April 2009 no longer makes the lack of proof of truthfulness a *conditio sine qua non* for the defamatory nature of the statement, which is to be welcomed. Article 2 § 2, item 3, however, considers as defamation the dissemination of information "which is not in accord with reality". The Venice Commission is of the opinion that the formulation eventually chosen must also take into account situations where the proof does not have to be provided by the person who made the statement or by the mass media which disseminated it.

[1] More in general about criminal legislation as a basis for interference with freedom of expression, see the Report of the Venice Commission on the Relationship between Freedom of Expression and Freedom of Religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to hatred, (CDL-AD(2008)026), 23 October 2008, §§ 43-87.

[2] ECtHR *Feldek v. Slovakia*, Judgment of 12 July 2001, §§ 75-76 ; *Steel and Morris v. UK*, Judgment of 15 February 2005, § 87; *Busuioc v. Moldova*, Judgment of 21 December 2004, § 61.

14. It is true that when an insult rests on a factual basis or when defamation occurs, sanctions may only be applied if the facts are not based on the truth. In principle, the burden of proof lies with the author. Certain exceptions must, however, be provided for:

- if it is impossible for the defendant to prove the truth or if it requires unreasonable efforts on his part, while the plaintiff has access to relevant facts in these cases, the burden of proof will devolve upon the plaintiff;

- if one participates in a debate on a matter of public concern, a chilling effect would be created if the burden of proof lies with the defendant even in cases where he has exercised due diligence to find the truth, especially by undertaking adequate research to substantiate the allegation[3] as well as presenting it in a reasonably balanced manner;.[4]

- if the insult concerns an act or behaviour for which the person concerned has been convicted by final court decision and even though the allegation may appear not to be true, the one who makes the public statement does not have to prove its truthfulness. On the other hand, if a person is accused of an act or behaviour for which he was acquitted by a final court decision, the accusation is of a defamatory nature even if the author of the accusation is able to prove its truthfulness. In that context, reference could also be made to the horizontal aspects of the principle of *presumptio innocentiae*, laid down in the second paragraph of Article 6 ECHR.[5]

15. Applying these criteria depends as much on the nature and degree of defamation as on the opportunity of the subject of defamation to defend him- or herself.[6] Moreover, it has to be considered whether the applicant could have formulated his criticism without resorting to insulting expressions.[7]

16. In view of the foregoing, the Venice Commission considers that the proposed definitions need to be reviewed to reflect more accurately the difference between an insult (i.e. the expression of an opinion or a value judgment) and a defamation (i.e. a statement of facts) and the resulting requirements of proof, in line with the ECHR.

17. The Venice Commission also notes that the definitions of the terms “insult” and “defamation” laid down in Article 2 § 2, items 2 and 3, combined with the protection offered in Article 2 § 2, items 4, 5 and 6, may not be sufficiently flexible to leave the necessary room for the Armenian courts to develop standards case by case, to decide whether the conditions of insult or defamation have been fulfilled and to reject any form of compensation in certain justified cases, notwithstanding that the truthfulness of the facts has not been established by the defendant.

[3] ECtHR *Prager and Oberschlick v. Austria*, Judgment of 26 April 1995, § 37.
[4] ECtHR *Bergens Tidende and Others v. Norway*, Judgment of 2 May 2000, § 57.
[5] ECtHR *Pedersen and Baadsgaard v. Denmark,* Judgment of 17 December 2004, §§ 91-92.
[6] ECtHR *Bladet Tromsø and Stensaas v. Norway*, Judgment of 20 May 1999, § 66.
[7] ECtHR *Tammer v. Estonia*, Judgment of 26 February 2001, § 67.

B. Author and subject of insult and defamation

18. As regards the author, it is important that the Armenian courts should take due account of the vital role of the media as a "public watchdog" in a democratic society, in compliance with the Court's case law.[8] The Court has in particular emphasised that although the Contracting States are permitted, or even obliged by their positive obligations under Article 8 ECHR, to regulate the exercise of freedom of expression so as to ensure adequate protection by law of individuals' reputations, they must not do so in a manner that unduly deters the media from fulfilling their role of alerting the public to problematic developments, especially to apparent or suspected misuse of public power. Investigative journalists are liable to be inhibited from reporting on matters of general public interest (…) if they run the risk, as one of the standard sanctions imposable for unjustified attacks on the reputation of private individuals, of being sentenced to imprisonment or to a prohibition on the exercise of their profession. [9]

19. The mass media are not the only category that should be allowed a high level of freedom of expression in this respect. What counts is the contribution to the public debate on matters of public interest. Consequently, persons who impart information and ideas on all matters of public interest, such as members of campaign groups[10] and elected representatives of the people, [11] should be allowed a certain degree of exaggeration and even provocation[12] as long as they act in good faith and exercise due diligence in order to provide accurate and reliable information.[13]

20. As regards the subject, the ECHR case law distinguishes ordinary persons from public figures and politicians: There is little scope under Article 10 § 2 ECHR for restrictions on political speech or on debate on questions of public interest. Moreover, the limits of acceptable criticism are wider as regards a politician as such - and public figures in general - than a private individual. Unlike the latter, politicians inevitably and knowingly lay themselves open to close scrutiny of his words and deeds by journalists and the public at large, and they must consequently display a greater degree of tolerance.[14] In the same way, public figures and large public companies also lay themselves open to close scrutiny of their acts and, as in the case of the businessmen and women who manage them, the limits of acceptable criticism are wider than usual.[15]

21. The above-mentioned distinctions and specific functions pertaining to the author and subject of an insult or defamation according to the Court's case law will be of relevance in those civil procedures which will be initiated on the basis of the draft amendment under consideration. It is therefore essential that they be taken into account not only to fix the amount of the compensation (see Section B below), but also to determine whether a sanction is at all justified (Article 2 § 2, items 4, 5 and 6).

[8] ECtHR *Goodwin v. UK*, Judgment of 27 March 1996, § 39; *Tammer v. Estonia*, Judgment of 26 February 2001, § 62; *Cumpănă and Mazăre v. Romania*, Judgment of 17 December 2004, § 102; *Times Newspapers v. UK*, Judgment of 10 March 2009, § 40.
[9] ECtHR *Cumpănă and Mazăre v. Romania*, Judgment of 17 December 2004, § 113.
[10] ECtHR *Steel and Morris v. United Kingdom,* Judgment of 15 February 2005, § 89.
[11] ECtHR *Pakdemirli v. Turkey,* Judgment of 22 February 2005, § 33.
[12] ECtHR *Tammer v. Estonia,* Judgment of 26 February 2001, § 67.
[13] ECtHR *Cumpănă and Mazăre v. Romania*, Judgment of 17 December 2004, § 102.
[14] ECtHR *Feldek v. Slovakia*, Judgment of 12 July 2001, § 74.
[15] ECtHR *Steel and Morris v. UK*, Judgment of 15 February 2005, § 94.

C. Nature and severity of penalties

22. Criminal sanctions are, as a rule, more severe than awards of damages. Therefore, the overall objective of the Armenian authorities to decriminalise defamation and insult is to be welcomed (see Chapter III above). Nevertheless, the award of damages in civil proceedings may, on occasion, be experienced as a sanction of great severity. Hence, to meet the criteria of Article 10 § 2 ECHR, an award of damages for defamation must bear a reasonable relationship of proportionality to the injury to reputation suffered.[16] The Court has, in numerous cases, developed case law on the nature and severity of the penalties and on the standards to be taken into account when assessing the proportionality of an interference with the freedom of expression.[17]

23. The draft amendment provides for financial penalties in Article 2 § 2, item 4 b) [*lump-sum payment of 150-250 times the minimum monthly salary for an insult*], Article 2 § 2, item 5 b) [*lump-sum payment of 250-500 times the minimum monthly salary for defamation*], Article 2 §2, item 7 [*500-1000 times the minimum monthly salary for defamation in public and 250-500 times the minimum monthly salary for an insult in public*], Article 2 § 2, item 8 [*1000-2000 times the minimum monthly salary for defamation disseminated via mass media and 500-1000 times the minimum monthly salary for an insult disseminated via mass media*]. The explanatory note on the draft amendment suggests that the Armenian courts should not be given discretion to fix the amount of financial compensation.[18]

24. The Venice Commission is not familiar with the actual amount of minimum monthly salary in Armenia and is, consequently, not in a position to give a final comment on the proportionality of the fixed compensation sums laid down in the aforementioned provisions. However, it points to the fact that the sanctions currently provided for in Articles 135 and 136 of the Penal Code are fines of an amount of 50 to 200 times the minimum salaries, correctional labour for up to 2 years and arrest of up to 2 months. The maximum compensation sums fixed in the draft amendment under consideration are therefore 10 times higher than the maximal fine, which seems, at the very least, questionable.

25. It is positive that contrary to the first version of the draft amendment, the second version dated 15 April 2009 no longer provides for inflexible and absolute amounts of money, with no margin of appreciation whatsoever for the courts. It is indeed important that the amount of compensation be left to negotiation between the parties and, ultimately to the decision by the competent court which should have full jurisdiction in the matter. To a certain extent the second version means an improvement in this respect, but it is recommended that, in the final run, the proportionality is totally left for the courts to judge as part of their discretionary power.

26. Moreover, certain authors of insult or defamation should not be sanctioned at all (this can either be provided for in the law itself or the principle may be developed by the courts):

- Authors of statements made in the course of proceedings before legislative bodies or by witnesses called upon to give evidence to legislative committees;
- Persons directly involved in judicial proceedings for statements made in the course of those proceedings as long as the statements are connected to them.

[16] ECtHR *Steel and Morris v. UK*, Judgment of 15 February 2005, § 96.
[17] ECtHR *Cumpănă and Mazăre v. Romania*, Judgment of 17 December 2004, §§. 111 and 114; *Skalka v. Poland*, Judgment of 27 May 2003, § 41; *Tammer v. Estonia*, Judgment of 26 February 2001, § 69.
[18] "Another specific feature of the Armenian reality is that the Armenian courts do not practice the civil law that prescribes monetary restitution of moral damages through civil procedures. Regretfully, the Armenian courts do not have the professional capacity and public trust to have discretion to define the amount of fair compensation in cases of moral damages", Explanatory Note on the Proposed Amendment to Article 19 of the Civil Code, § 3.

27. Article 2 § 2, items 8 and 9, contains a particular problem in that it provides for higher amounts of compensation if the insult or defamation has been disseminated via mass media. This provision raises the issue of the responsibility of mass media. It may well be that they publish information *bona fide* that is provided to them by a person who intends to have defamatory information distributed. In addition, there is the issue of the protection of journalistic sources "as one of the basic conditions for press freedom".[19] Moreover, the special division of responsibility between the editors and the owners of mass media has to be taken into account. In principle, the mass media are under the obligation to verify factual statements that are defamatory of private individuals, but there may be special grounds on the basis of which they are dispensed from that obligation, depending in particular on the nature and degree of the defamation in question and the extent to which they may reasonably regard their sources as reliable.[20]

28. Given the unique role of the media in any democratic society, it is recommended that Article 2 § 2, items 8 and 9, be reviewed in order to avoid a chilling effect resulting from the fact that the media are automatically ordered to pay higher financial compensations. It is on the other hand admissible to provide for specific obligations for the media, such as to correct a false statement, to give the person offended a right of reply and to publish a court judgment which finds a statement to be false.

D. Miscellaneous

29. According to Article 1 of the draft Amendment, the protection of honour, dignity and business reputation is restricted to (Armenian) "citizens" only. Such a restriction cannot be justified from the perspective of equal treatment. It is therefore recommended to extend the protection from insult and defamation to any "person", as is the case in Article 2 § 2, item 1.

30. Article 2 § 2, item 10 introduces a 3-months deadline for initiating a civil action from the moment the victim becomes aware of the defamation or insult, without fixing a general limitation period. This is an improvement as compared to the excessive limitation period of 50 years included in the first version of the draft amendment dated 30 March 2009. There remains, however, a problem of legal certainty since defamation or insult can be discovered many years after it has taken place. It is therefore recommended to set an appropriate limitation period.[21] A maximum time limit of one or two years would, in this context, appear to be reasonable.

31. Article 2 § 2, item 13 option 2 creates the impression that the right to freedom of expression may be a mitigating factor in relation to the prohibition of defamation and insult while, in fact, freedom of expression must be considered the basic principle. Freedom of expression may be restricted in special circumstances and under special conditions, *e.g.* "for the protection of the reputation or rights of others".[22] Consequently, the courts of the Republic of Armenia will in all cases have to take into account the fundamental right to freedom of expression and, in deciding on whether a certain expression may be sanctioned for its defamatory character, will have to follow the very restrictive case law of the European Court of Human Rights on the matter. Article 2 § 2, item 13 option 2 may therefore be considered superfluous since it suggests that the court may only decide to reduce the sanction while in fact the right to freedom of expression of the mass media may require that the court not impose any sanction at all. Moreover, the mass media are not the only category that should be given a high level of freedom of expression in this respect (see Chapter IV section B, above).

[19] ECtHR *Goodwin v. UK*, Judgment of 27 March 1996, § 40.
[20] ECtHR *Busuioc v. Moldova,* Judgment of 21 December 2004, §§ 66-96.
[21] ECtHR *Times Newspapers v. UK*, Judgment of 10 March 2009, § 46.
[22] Article 10 § 2 ECHR.

V. Conclusion

32. Although the shift in the legislation of the Republic of Armenia concerning the protection of honour, dignity and reputation, from criminal to civil law is welcomed, the legislature must be careful to avoid both duplications and lacunas.

33. The approach followed in the draft Amendment under consideration is too rigid insofar as it leaves insufficient room for flexible solutions, especially on the part of the courts. The law itself must be conducive to a fair balance between the freedom of expression of the author and the honour, dignity and reputation of the person affected. The balance must take into account the need to avoid hindering open debates on matters of public interest. The law must also provide for solutions based on the specific circumstances of each individual case. This requires less rigid provisions, which are more sensitive to the value of freedom of expression in a democratic society.

34. It is recommended that the Armenian authorities take the above observations and recommendations into account before adopting the corresponding amendments to the Civil Code and Penal Code. The Venice Commission remains available to assist them in this process.