Strasbourg, 2 October 2009

CDL(2009)149*
Eng.Only

Opinion no. 533 / 2009

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT OPINION

ON THE DRAFT AMENDMENTS TO THE CIVIL CODE

OF ARMENIA

On the basis of comments by:

Mr Pieter van DIJK (Member, the Netherlands)
Mr Wolfgang HOFFMANN-RIEM (Member, Germany)

**This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

Introduction

1. Subsequent to the “Interim Opinion on the draft law on amending the Civil Code of the Republic of Armenia” [CDL-AD (2009) 037] the Venice Commission had a productive exchange with the Armenian Authorities, who finally proposed a new draft law (CDL(2009)**), taking into consideration the proposals of the rapporteurs.

Consideration of the Law

2. The Venice Commission appreciates the new draft, which is by far more balanced than the previous one. As far as previous suggestions have been seized entirely, they are out of the scope of the present opinion. Although the new draft reflects most of the recommendations, in its article 1087.1 some clarifications still are requisite.

3. § 1 of this article speaks of “citizen”, a formulation that normally refers solely to persons with the nationality of the state concerned. A restriction of the rights granted in this article to Armenians exclusively would be unacceptable. But then, the Venice Commission was informed by the Armenian authorities that according to the use of terms in the Armenian Civil Code “citizen” is used as a synonym for “natural person”. On the other hand, the Venice Commission had to deal with Armenian laws in the near past which explicitly distinguished between citizens and persons. It is hard to understand why the new amendment does not take the opportunity to make explicitly clear that all persons are protected.

4. The Venice Commission was informed that the new provisions are meant to cover insult and defamation by both natural and legal persons. It is on the Armenian authorities to decide, whether § 1 should therefore be specified or if it was clear from Division 2 Chapters 4 and 5 of the Armenian Civil Code that the term “person” includes natural and legal ones. Anyhow, it has to be pointed out that § 16 expressively extends the given protection to legal persons.

5. The deletion of the provision, that takes into account that under certain circumstances even “private interest” can lead to the result that an insulting phrase is deemed to be not humiliating, raises serious concerns (§ 2) [1]. Such an exception may be given, if e. g. an insulting phrase is a direct response to an insult of the other person affected who had thus provoked the insult by its own activities. In any case there has to be a weighting of interests. This includes on the one hand occasion, content and other modalities of the expression; on the other hand one has to look on the specific public or private interest to assess whether it is overriding and legitimate and thus suffices to create a balance. Since it is sometimes very difficult to distinguish public interests and private interests – many interests have impacts in both areas – it leads to a curtailment of the freedom of expression if only clear public interests may serve as a justification for an expression with insulting consequences. The rapporteurs therefore suggest accepting their original proposal.

6. If § 3 defines defamation as the "dissemination of false facts" then – according to general principles of proof – the plaintiff has to show that the facts are false. § 4 makes clear, that the amendment wants to place the burden of proof on the defendant in principle but provide for an exception. But this exception goes too far compared to the draft of the rapporteurs: According to the recommendations of the rapporteurs the burden of proof still

[1] There seems to be a little mistake with the numeration of the English version. Hence, these comments refer to the English text but numbers of the paragraphs are taken from the parallel Armenian version.

lies with the defendant, if he/she has access to the relevant facts – notwithstanding whether the plaintiff himself/herself has access to these facts. It is suggested to stick to the proposal of the rapporteurs. Their proposal also includes the important reference to the fact whether it requires unreasonable efforts on the part of the defendant to prove the truth. [2]

7. The Venice Commission was informed by the Armenian authorities that the exception in case that the truth has been established by final court decision[3] is already part of the Civil Procedure Code of the Republic of Armenia, which is applicable in these issues. The rapporteurs cannot scrutinize whether this provision is sufficient, since they have no access to an English translation.

8. § 5 a) is limited to public speeches. It is true that hearings and sessions of the legislative body usually take place in public. Anyhow, it cannot be agreed, that statements of facts which would not form defamation in an open hearing or session will do so, if the public is excluded. In § 5 b) the term "substance of the problem" could be understood as being aimed at utterances which strictly stick to the core of the issue. Such an interpretation undermines the protection needed: every statement must underlie this privilege, as long as it is at least related to the subject of evidence.

9. Eliminating the formulation "as an indemnity for the moral harm" from § 6 and § 7 puts the content of § 8 in question, since all provisions afford compensation. It is recommended to separate the compensation for the material damages suffered from that for the moral harm, as it still can be found in § 9.

10. § 9 provides for a change from the degree "gross negligence" to simple negligence. This increase in the standard of care may lead to a chilling effect, especially in light of the high maximum sum of the compensation.

11. In § 10 it should be clarified that the dissemination may occur via TV or radio and not necessarily via both cumulatively by formulating "or" instead of "and". Besides this, § 10 provides for a surprising change: the formulation "media agency" has been changed for "person disseminating mass information". It was a major postulation of the Interim Opinion[4] to preserve the unique function and role of the media in a democratic state ruled by law and to prevent chilling effects. The new formulation of the draft leaves certain things unclear: Does "person" include both natural and legal persons? (See para. 4 above) What will be the requirements to qualify a person as disseminator of mass information? The rapporteurs prefer a restriction to editors (persons having editorial or equivalent responsibility for the content of the statement or the decision to publish it) and to publishers (persons, whose business is issuing material to the public). Other persons like the author very often lack the power to push through what shall be published in a mass media.

12. The Venice Commission takes note of the given information that a right to reply equivalent to the suggested one can already be found in the law "On Mass Media" of the Republic of Armenia. The rapporteurs cannot verify this since they do not have access to the English translation of this law.

[2] CDL-AD (2009) 037, § 15, 1st indent.
[3] CDL-AD (2009) 037, § 15, 3rd indent.
[4] CDL-AD (2009) 037, §§ 19, 28 et seq., 35.

13. The rapporteurs understand the wish for a more concrete formulation of § 12. In this context the term “prescribed by law” should as well be specified, since the Venice Commission did not receive information about the specific content of the respective regulation. The rapporteurs suggest to keep the phrase “given about the same prominence as was given to the retracted statement”, but to add as examples additions like the ones mentioned in Article 1087.1 § 8 of the rapporteurs’ draft – unless these provisions are already part of the law “On Mass Media”.

14. The rapporteurs have yet not commented on the maximum amount of compensation. They appreciate the extinction of the minimum amount but they are afraid that the maximum amount may be too high. They suggested that the Armenian authorities tell the Venice Commission about the equivalent of "1000 times the minimum monthly salary" in Europe. The Venice Commission has been informed that the official level of the "minimum salary" is Euro 2 while the actually paid minimum salary is Euro 20. Which sum is the relevant one? Isn't there a risk that the legislator (or the courts in interpreting the norm) might at some time raise the now official sum to the one which is actually paid? Then the amounts chosen would be far too high.

Conclusion

15. The Venice Commission appreciates that the new draft reflects most of the recommendations of the rapporteurs. However, in its article 1087.1 some clarifications are necessary, especially:

- the inclusion of “private interest" in § 2;

- a separation of the regulations concerning “indemnity for moral harm” on the one hand and compensation for material harm on the other;

- a specification of the term “person disseminating mass information” in §§ 10 and 11;

- a more precise rendering of manner and time of the retraction in § 12;

- specified and abated compensation amounts.