



Strasbourg, 24 November 2009

Opinion no. 533/2009

CDL (2009)174*
Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT FINAL OPINION
ON THE DRAFT LAW
ON AMENDING 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.*

I. Introduction

1. *At the request of the Armenian authorities, the Venice Commission assisted them in the preparation of amendments to i.a. Article 19 of the civil code of Armenia relating to the Protection of Honour, Dignity and Business Reputation. The Venice Commission assessed two subsequent versions of these amendments (CDL-AD(2009)037 and CDL-AD(2009)047).*

2. *In October 2009, the Armenian authorities further revised the draft amendments to the civil code (CDL(2009)173) and provided the rapporteurs with further information on the legal context.*

3. *The present opinion, which is based on comments by Mr van Dijk and Mr Hoffmann-Riem, was sent to the Armenian authorities on 12 November 2009. The draft amendments have subsequently been submitted to parliament.*

4. *The present opinion was endorsed by the Venice Commission at its ... Plenary Session (Venice, ... 2009).*

I. Analysis of the Amendments

5. The Venice Commission appreciates the fruitful dialogue with the Armenian authorities and emphasizes the good progress, that has hitherto been achieved, including especially

- the lesser rigidity of the new draft and its openness for more flexible solutions;
- the introduction of a weighing of interests;
- the deletion of minimum compensation amounts;
- the inclusion of "private interests" in the list of justifications for insult in § 2;
- the specification of time and manner of retraction in § 12.

6. Moreover, the Armenian authorities have supplied additional information on the legal context of the amendments. The Venice Commission now understands that in the special use of words of the RA Civil Code the word "citizen" means any natural or physical person. Furthermore, it recognizes that a provision with a similar effect as the suggested one, that facts of which the truth has already been established by final court decision are either binding or not subject to proof, is already part of the Armenian legislation applicable in this field, namely Article 52 of the RA Civil Procedure Code.

7. Concerning the minimum salary the Venice Commission takes note of Article 3 of the RA law "On minimum monthly salary", which provides regulations on the amount of this salary and safeguards, that it can only be altered by law. The Armenian authorities have ensured the Venice Commission that the term "minimum monthly salary" in the amendments has to be understood as an incorporation of this provision.

8. The Venice Commission acknowledges that a number of points such as a right to reply are already part of the Armenian legislation in this field. It understands that the RA law "On mass media", which the Armenian authorities referred to, is identical with the RA law "On the dissemination of mass information" which they provided to the Venice Commission. The confusion raised by the use of two different titles can be ascribed to different translations of the same words.

9. Anyhow, there are certain aspects which still need improvement:

10. Concerning § 4, it has to be clarified that the burden of proof lies with the defendant only insofar as the truth of the facts is concerned. It remains with the plaintiff to prove the other relevant facts, for instance that a statement was made at all.

11. The Venice Commission suggests to edit § 5 and to substitute the word “facts” with the term “statement of facts”. Since it is important for the committees mentioned in § 5 b) to gain all the information available, the term “concern” should not stimulate a too strict interpretation in order not to discourage witnesses from giving comprehensive testimony. For this reason, the Venice Commission suggests to use the term “related to” instead. The same suggestion refers to § 5 c)

12. Rethinking the draft thoroughly, the Venice Commission suggests to eliminate the words “in court” in §§ 6 and 7 and to reformulate § 1, as the rights granted should not be constituted by filing a lawsuit but only be enforceable by a court of law.

13. Moreover, the Venice Commission stresses, that not the insult itself, but only the facts underlying it, can be rectified and thus proposes to modify the provision of § 6 of the latest draft: First of all there should be a chance to rectify the underlying facts, but in addition an apology may be demanded if necessary. The term “the aggrieved party has the right to demand” may be misleading. It might be understood in a way that it only depends on the plaintiff’s demand, which sanctions will be applied. The Venice Commission therefore proposes to change the wording “has the right to demand” to “may demand” or “has the right to ask for”.

14. Recalling the need to separate the compensation for the material damages suffered from that for the moral harm as stated in the Second Interim Opinion [CDL-AD 2009 047, § 10], the Venice Commission suggests to readopt the formulation “for moral harm” in §§ 6 c) and 7 b), the more so as it still can be found in § 9, which shows, that it perfectly fits to the inner logic of the Amendment, and to introduce the criterion “material damages” in § 8.

15. The Venice Commission proposes a clarified reformulation of § 9.

16. Moreover, the Venice Commission recalls, that a specification of the criteria qualifying a person as disseminator of mass information (§§ 10 and 11) should be provided for in the Amendment. Due to the fact that chilling effects resulting from high compensation amounts have to be avoided, such a provision must be restricted to the editor or the publisher – one of them or both jointly - , excluding the author, since he – as will ordinarily be the case - lacks the power to push through what shall be published in mass media. Therefore the Venice Commission proposes to substitute the term “disseminator of mass information” with the words “editor or publisher” and to introduce the previously suggested definitions of these functions into the Amendment.

17. Furthermore, the Venice Commission emphasizes, that the sanctions envisaged under § 11 are only to be applied in most severe and extraordinary cases, when all the other sanctions together still do not suffice to restore the infringed rights. It will then be up to the Armenian courts to decide whether it is adequate in the individual case to sanction either the editor or the publisher individually or both jointly. In this context it must be underlined, that it is important whether a reply or correction was published at all, notwithstanding the fact whether this was done voluntarily or if the enforcement required legal action. These points must be stated clearly in the formulation of § 11. Besides this, every public interest, even it is not of a general nature but restricted to special groups or situations, should be taken into account, when considering the amount of compensation.

18. Finally, as regards § 14, it is not compelling to take into account the property status of the defendant in relation to material damages. It is sufficient to restrict this provision to the compensation of moral harm.

II. Conclusions

19. The Venice Commission appreciates the new draft amendments, since good progress has been achieved.

20. Several doubts and misunderstandings relating to the legal context of the amendment have been dispelled due to additional information supplied by the Armenian authorities.

21. The Venice Commission considers that the draft amendments could still be improved in certain respects, as outlined above, and remains at the disposal of the Armenian authorities for further assistance.