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**Opinion no. 533 / 2009**

**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**SECOND INTERIM OPINION**  
**ON THE DRAFT AMENDMENTS**  
**TO THE CIVIL CODE**  
**OF ARMENIA**

**Adopted by the Venice Commission**  
**at its 80<sup>th</sup> Plenary Session**  
**(Venice, 9-10 October 2009)**

**On the basis of comments by:**

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

## I. 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)157), taking into consideration the Commission’s proposals.

2. The present interim opinion was adopted by the Venice Commission at its 80<sup>th</sup> Plenary Session (Venice, 9-10 October 2009).

## II. Consideration of the Law

3. The Venice Commission appreciates the new draft law, 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 are still necessary.

4. § 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.

5. 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 expressly extends the given protection to legal persons.

6. 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)<sup>1</sup>. 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.

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<sup>1</sup> 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.

7. 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: the burden of proof should still lie with the defendant, if he/she has access to the relevant facts – notwithstanding whether the plaintiff himself/herself has access to these facts. Importantly, 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<sup>2</sup>. It is suggested to make this clear in the law.

8. The Venice Commission was informed by the Armenian authorities that the exception in case that the truth has been established by final court decision<sup>3</sup> is already part of the Civil Procedure Code of the Republic of Armenia, which is applicable in these issues. The Venice Commission will look into this matter with the assistance of the Armenian authorities.

9. § 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.

10. 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.

11. § 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.

12. 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<sup>4</sup> 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 Venice Commission would 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.

13. 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. It will look into this matter with the assistance of the Armenian authorities.

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<sup>2</sup> CDL-AD (2009) 037, § 15, 1<sup>st</sup> indent.

<sup>3</sup> CDL-AD (2009) 037, § 15, 3<sup>rd</sup> indent.

<sup>4</sup> CDL-AD (2009) 037, §§ 19, 28 et seq., 35.

14. The Venice Commission understand the wish for a more concrete formulation of § 12. In this context the term “prescribed by law” should as well be specified with due regard for the other applicable regulations, including the law “On Mass Media”.

15. The Venice Commission has not commented on the maximum amount of compensation yet. It appreciates the deletion of the minimum amount, but considers that the maximum amount may be too high. The Commission had sought information about the equivalent of "1000 times the minimum monthly salary" in Europe, and 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.

### **III. Conclusion**

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

- the inclusion of “private interest” in § 2;
- the indication in § 4 that the burden of proof lies with the defendant, if he/she has access to the relevant facts, even if the plaintiff himself/herself has access to these facts, unless 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;
- 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 indication of the manner and time of the retraction in § 12;
- specified and abated compensation amounts.

17. The Venice Commission has been informed by the Armenian authorities that they intend to further amend the draft legislation under consideration in order to bring it into full compliance with the Commission’s recommendations. It welcomes this constructive attitude and remains at their disposal for future collaboration.