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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT OPINION

**ON THE DRAFT LAW ON MAKING CHANGES AND ADDITIONS
TO THE CIVIL CODE**

(INTRODUCING COMPENSATION FOR NON-PECUNIARY DAMAGE)

OF THE REPUBLIC OF ARMENIA

on the basis of comments by

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I. Introduction

1. By a letter of 23 October 2013, the Permanent Representative of the Republic of Armenia to the Council of Europe requested an opinion by the Venice Commission on the "Draft Law of the Republic of Armenia on Making Changes and Additions to the Civil Code of the Republic of Armenia" (CDL-REF(2013)049, hereinafter "the draft law").

2. Messrs. Hoffmann-Riem and Mihai, as well as Mr Pieter van Dijk (expert, the Netherlands) were appointed as rapporteurs.

3. Their comments were based on the English translation of the draft law and of the "Rationale for the need to adopt the Draft Law" (hereinafter the "Rationale") provided by the Armenian authorities; certain comments may depend on inaccuracies of the translation.¹

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

II. Background

5. As is explained in the Rationale, the draft law introduces compensation for non-pecuniary damages into the Armenian civil law in specific, limited circumstances, in order to implement Armenia's obligations under the ECHR and in order to properly execute the judgments of the European Court of Human Rights (ECtHR) in the cases Poghosyan and Baghdasaryan v. Armenia² and Khachatryan and Others v. Armenia³, in which the Court found a breach of the right to an effective remedy under Article 13 of the European Convention for the protection of Human Rights and Fundamental Freedoms (ECHR), under Article 3 of Protocol No. 7 to the ECHR and under Article 5 paragraph 5 ECHR respectively, on account of the unavailability of compensation for non-pecuniary damage in the Armenian law.⁴

¹ Difficulties seem to derive from the translation in relation to two provisions, as follows:

- in Article 2, "*approved by the judicial act*" (at para 2 of the proposed Article 162.1 of the Civil Code) should be understood as "determined by court decision";
- similarly, in Article 4, "*judicial act*" (at para 8 of the proposed Article 1087.2 of the Civil Code) should be understood as "court decision";
- in Article 4, "*Compensation for non-pecuniary damage shall be liable for compensation, irrespective of the recoverable material damage*" (at para 2 of the proposed Article 1087.2 of the Civil Code) should be probably understood as "Compensation for non-pecuniary damage shall be obligatory (available?), irrespective of the recoverable material damage";
- similarly, in Article 4, "*Compensation for non-pecuniary damage shall be liable for compensation, regardless of the presence of guilt of the official*" (at para 3 of the proposed Article 1087.2 of the Civil Code) should be probably understood as "Compensation for non-pecuniary damage shall be obligatory (available?), regardless of the presence of guilt of the official."

² ECtHR, Poghosyan and Baghdasaryan v. Armenia, application no. 22999/06, Judgment of 12 June 2012.

³ ECtHR, Khachatryan and Others v. Armenia, application no. 23978/06, Judgment of 27 November 2012.

⁴ According to the Rationale, a mechanism for the protection of honor, dignity and reputation, including specific provisions related to compensation for non-pecuniary damage, was introduced in Article 19 of the Civil Code in 2010. On that addition, see addition, see Venice Commission CDL-AD(2009)037, Interim Opinion on the Draft Law on Amending the Civil Code of the Republic of Armenia, adopted by the Venice Commission at its 79th Plenary Session, (Venice, 12-13 June 2009), CDL-AD(2009)047; Second Interim Opinion on the Draft Amendments to the Civil Code of Armenia, adopted by the Venice Commission at its 80th Plenary Session (Venice, 9-10 October 2009); CDL-

6. In addition, the draft law aims at increasing the legal protection of citizens of the Republic of Armenia and the responsibility of state bodies and officials, as well as at reducing the number of judgments delivered by the ECtHR against the Republic of Armenia.⁵

III. Relevant legal background

7. Art. 5 § 5 ECHR provides as follows:

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

8. In the case *Khachatryan and Others v. Armenia* the ECtHR found that:

[...] Article 5 § 5 should not be construed as affording a right to compensation of purely pecuniary nature, but should also afford such right for any distress, anxiety and frustration that a person may suffer as a result of a violation of other provisions of Article 5.⁶

9. Art. 13 ECHR provides as follows:

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

10. In the case *Poghosyan and Baghdasaryan v. Armenia* the ECtHR reiterated

*[...] that the existence of an actual breach of another provision of the Convention is not a prerequisite for the application of Article 13. Article 13 guarantees the availability of a remedy at national level to enforce – and hence to allege non-compliance with – the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. Thus, for Article 13 to apply it is sufficient for an individual to have an arguable claim in terms of the Convention (see *Boyle and Rice v. the United Kingdom*, 27 April 1988, § 52, Series A no. 131).*

44. The Court observes that the fact of the applicant's ill-treatment by police officers was unequivocally established by the domestic courts, namely, the judgment of the Lori Regional Court of 15 June 2005 convicting two of the police officers involved (see paragraph 18 above). The Court therefore considers that the applicant undoubtedly had an arguable claim before the domestic courts under Article 13 of having been subjected to treatment prohibited by Article 3 of the Convention.

45. The applicant lodged his civil claim for compensation, including for the ill-treatment suffered, by instituting a separate set of proceedings following the police officers' conviction, seeking, inter alia, non-pecuniary damages (see paragraph 22 above). However, no compensation for non-pecuniary damage was awarded to the applicant because that type of compensation was not envisaged by the domestic law.

AD(2009)056, Final Opinion on the Draft Law on Amending the Civil Code of the Republic of Armenia, endorsed by the Venice Commission at its 81st Plenary Session (Venice, 11-12 December 2009).

⁵ On all these aspects see "Rationale for the need to adopt the law of the Republic of Armenia on "Making Changes and Additions to the Civil Code of the Republic of Armenia - 4. Results to be achieved".

⁶ See footnote 3, *Khachatryan and Others v. Armenia*, § 157.

46. *The question therefore arises whether Article 13 in this context requires that such compensation be made available. The Court will itself in appropriate cases award just satisfaction, recognising pain, stress, anxiety and frustration as rendering compensation for non-pecuniary damage appropriate. It has previously found that, in the event of a breach of Articles 2 and 3 of the Convention, which rank as the most fundamental provisions of the Convention, compensation for the non-pecuniary damage flowing from the breach should in principle be available as part of the range of possible remedies (see Keenan, cited above, § 130, and Kontrová, cited above, § 64).*

47. *In this case the Court concludes that the applicant should have been able to apply for compensation for the non-pecuniary damage suffered by him as a result of his ill-treatment. No such compensation being available to him under Armenian law, the applicant was deprived of an effective remedy.⁷*

11. Art. 3 of Protocol 7 to the ECHR provides as follows:

When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed, or he has been pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to the law or the practice of the State concerned, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

12. In the case *Poghosyan and Baghdasaryan v. Armenia* the ECtHR found that:

[T]he aim of Article 3 of Protocol No. 7 is to confer the right to compensation on persons convicted as a result of a miscarriage of justice where such conviction has been reversed by the domestic courts on the ground of a new or newly discovered fact. [...] [T]he purpose of Article 3 of Protocol No. 7 is not merely to recover any pecuniary loss caused by a wrongful conviction but also to provide a person convicted as a result of a miscarriage of justice with compensation for any non-pecuniary damage such as distress, anxiety, inconvenience and loss of enjoyment of life.⁸

IV. General Comments

13. The Venice Commission attaches high importance to the proper and comprehensive execution of decisions by the ECtHR. In a previous opinion, it stated as follows:

⁷ See footnote 2, *Poghosyan and Baghdasaryan v. Armenia*, §§ 43-47; see also ECtHR, *Z. and others v. The United Kingdom*, application no. 29392/95, Judgment of 10 May 2001, § 109; ECtHR, *Keenan v. The United Kingdom*, application no. 27229/95, Judgment of 3 April 2001, §§ 122, 129 f.; ECtHR, *Paul and Audrey Edwards v. The United Kingdom*, application no. 46477/99, Judgment of 14 March 2002, § 66 et seq.; ECtHR, *McGlinchey and others v. The United Kingdom*, application no. 50390/99, Judgment of 29 April 2003, § 46; see also CDL-AD(2006)036rev, Report on the Effectiveness of National Remedies in Respect of Excessive Length of Proceedings, adopted by the Venice Commission at its 69th Plenary Session (Venice, 15-16 December 2006), paras 34 et seqq.

⁸ See footnote 2, *Poghosyan and Baghdasaryan v. Armenia*, §§ 49, 51.

32. *Given that States have committed themselves to securing the enjoyment of the rights guaranteed by the Convention to anyone within their jurisdiction (Article 1 of the Convention) and that the interpretation of the provisions of the Convention ultimately rests with the Court (see Article 19 in conjunction with Article 44 of the Convention), the interpretations given by the Court in its judgments form part and parcel of the Articles of the Convention concerned and, consequently, share the legally binding force of the Convention erga omnes. The Court's judgments have thus, according to the famous French formula, "autorité de la chose interprétée".*

33. *Indeed, it is a matter of course that the Court's decisions will have effects extending beyond the confines of a particular case. The Court's judgments, in fact, serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties. This means that States parties, besides having to abide by the judgments of the Court pronounced in cases to which they are party, also have to take into consideration the possible implications which judgments pronounced in other cases may have for their own legal system and legal practice; in this respect, it must be underlined that cultural differences may not be used as a pretext to escape the erga omnes effects of the Court's judgments.*

[...]

48. *The jurisdiction of the Court under the Convention is a very important legal mechanism for the promotion and protection of human rights in the Member States of the Council of Europe. Apart from the Court's own functioning and the contents of its case-law, the effectiveness of the mechanism depends to a large extent on the execution of its judgments. A timely and complete execution of the Court's judgments is of vital importance for the authority of the Court, for an effective legal protection of the victims of violations and for the prevention of future violations.⁹*

14. Against this background, the Commission greatly welcomes the efforts by Armenia to give full effect to the ECHR and the ECtHR decisions in the cases Poghosyan and Baghdasaryan v. Armenia and Khachatryan and Others v. Armenia in its domestic legal order. The Commission is mindful of the constructive dialogue between the Commission and the Armenian government in relation to the draft law aiming at introducing the protection of honour, dignity and reputation into the Armenian Civil Code in 2010, where compensation for non-pecuniary damage was also one of the issues¹⁰ and expresses its hopes for a similarly careful consideration of the Commission's views with respect to the new draft law.

⁹ See Opinion on the Implementation of the Judgments of the European Court of Human Rights, adopted by the Venice Commission at its 53rd Plenary Session (Venice, 13-14 December 2002), CDL-AD (2002)34, §§ 32, 33, 48.

¹⁰ See the Venice Commission opinions listed in footnote 4.

V. Analysis of the draft law

15. The Draft Law is composed of 5 articles, which amend Articles 17, 162.1 and 1087.2 of the Civil Code of the Republic of Armenia (enacted on 5 May 1998 and entered into force on 1 January 1999 (hereinafter the “Civil Code”¹¹), thus incorporating into the existing system several new provisions. The use of such technique requires special care to avoid possible inconsistencies which might arise because of the possible lack of correlation with the vast and complicated structure of a very large piece of legislation that a civil code always is.

16. Article 1 of the Draft Law modifies Article 17 para 2 of the Civil Code and introduces a new para 4; Articles 2 and 4 add new texts to the Civil Code (i.e. Article 162.1 and Article 1087.2, respectively); Article 3 changes the title of §2.1 (which is placed just after the existing Article 1087 and before the proposed Article 1087.2); while Article 5 simply establishes the date at which the Law – if adopted – is expected to enter into force (i.e. 1 November 2014).

Draft Art. 17 para 2 Civil Code

17. The new wording of para 2 of Article 17 of the Civil Code provides a list of three categories of possible damages, namely: “material damages”; “lost income” and “non-pecuniary damage”. The proposed specification of non-pecuniary damage - “physical or mental anguish” - is not very precise.

18. Of course, it may be expected that the Armenian civil courts will gradually provide further specifications by their case-law. However, the case-law of the ECtHR and other European sources already provide sufficient basis for further specification, reference to which would provide useful guidance to future victims and the courts. The Commission draws attention in the first place to the judgments of the ECtHR, where the Court circumscribes non-pecuniary damage in various terms, such as “stress, anxiety and feelings of insecurity”.¹²

19. The Commission further points to the Committee of Ministers' Resolution (75)7 on Compensation for Physical Injury or Death, according to which “[...] mental suffering [...] includes, as far as the victim is concerned, a variety of complaints and disorders such as malaises, insomnia, feelings of inferiority, diminution of pleasure in life due notably to the inability to engage in certain pleasurable activities.”¹³

20. The Venice Commission finally refers, as a source of possible inspiration, to reputed documents regarding future regulations of European Private Law, such as the “Principles of European Tort Law”¹⁴ (hereinafter: PETL) and the “Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference”¹⁵ (hereinafter: DCFR). Under the PETL, in “cases of personal injury, non-pecuniary damage corresponds to the suffering of the

¹¹ An unofficial English translation of the Civil Code, as last amended in 2010, can be found by visiting <http://www.wipo.int/wipolex/en/details.jsp?id=7429>.

¹² See, e.g., above footnote 7, Keenan v. The United Kingdom, § 138.

¹³ Council of Europe, Committee of Ministers' Resolution (75)7 on Compensation for Physical Injury or Death, adopted on 14 March 1975, Annex - no. 11.

¹⁴ The PETL are available at www.egtl.org in English and Russian.

¹⁵ The DCFR is available at ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf.

victim and the impairment of his bodily or mental health. [...].”¹⁶ The DCFR mentions, e.g., that “non-economic loss includes pain and suffering and impairment of the quality of life.”¹⁷

21. In the light of the above, the Venice Commission recommends including some of these specifications as non-exhaustive examples of what constitutes "physical or mental anguish".¹⁸

22. Specification would seem the more important, since paragraph 2 limits the cases of non-pecuniary damage to those “prescribed in this code”.

Draft Art. 162.1 para 1 Civil Code

23. Draft Article 162.1 para 1 lacks specificity. The words “attempting against non-material goods belonging to him or her” would seem to be a specification of “non-pecuniary damage caused to him or her”. It is not clear, however, what “non-material goods” mean and include. It seems a somewhat unusual way of indicating physical or mental damage, especially because the (physical) body is not a non-material good. The category of “personal non-property rights” would also seem to lack sufficient specificity.

24. As a source of inspiration, the Venice Commission refers in this respect to several sections of the DCFR, namely:

“Section 2:101: Meaning of legally relevant damage

(1) Loss, whether economic or non-economic, or injury is legally relevant damage if:

(a) one of the following rules of this Chapter so provides;

(b) the loss or injury results from a violation of a right otherwise conferred by the law; or

(c) the loss or injury results from a violation of an interest worthy of legal protection.

(2) In any case covered only by sub-paragraphs (b) or (c) of paragraph (1) loss or injury constitutes legally relevant damage only if it would be fair and reasonable for there to be a right to reparation or prevention, as the case may be, under VI. – 1:101 (Basic rule) or VI. – 1:102 (Prevention).¹⁹

(3) In considering whether it would be fair and reasonable for there to be a right to reparation or prevention regard is to be had to the ground of accountability, to the nature and proximity of the damage or impending damage, to the reasonable expectations of

¹⁶ para (3) of Article 10:301 (Non-pecuniary damage).

¹⁷ para (4) of Section 2:101 (Meaning of legally relevant damage) of Book VI.

¹⁸ The Commission has called for provisions on non-pecuniary damages to be clear and detailed in the past. See footnote 7, CDL-AD(2006)036rev, Report on the Effectiveness of National Remedies in Respect of Excessive Length of Proceedings, adopted by the Venice Commission at its 69th Plenary Session (Venice, 15-16 December 2006), para 207.

¹⁹ **“Section 1:101: Basic rule**

(1) A person who suffers legally relevant damage has a right to reparation from a person who caused the damage intentionally or negligently or is otherwise accountable for the causation of the damage.

(2) Where a person has not caused legally relevant damage intentionally or negligently that person is accountable for the causation of legally relevant damage only if Chapter 3 so provides.”

“Section 1:102: Prevention

Where legally relevant damage is impending, this Book confers on a person who would suffer the damage a right to prevent it. This right is against a person who would be accountable for the causation of the damage if it occurred.”

the person who suffers or would suffer the damage, and to considerations of public policy.

(4) In this Book:

(a) economic loss includes loss of income or profit, burdens incurred and a reduction in the value of property;

(b) non-economic loss includes pain and suffering and impairment of the quality of life.”

“Section 2:201: Personal injury and consequential loss

(1) Loss caused to a natural person as a result of injury to his or her body or health and the injury as such are legally relevant damage.

(2) In this Book:

(a) such loss includes the costs of health care including expenses reasonably incurred for the care of the injured person by those close to him or her; and

(b) personal injury includes injury to mental health only if it amounts to a medical condition.”

Draft Art. 162.1 para 2 Civil Code

25. With regard to draft Art. 162.1 para 2 Civil Code, also in conjunction with draft Art. 1087.2 para 8 Civil Code, the Venice Commission highlights at the outset that the right to compensation for non-pecuniary damage must, if introduced, be given practical effect in the Armenian legal order. Draft Art. 162.1 para 2 Civil Code attaches the right to claim compensation to a potential outcome of judicial proceedings, i.e. the finding of a violation of Arts 2, 3 and 5 ECHR. It does not deal with at least two necessary prerequisites for such an outcome to be achievable. This is, first, the existence of a right to invoke the ECHR provisions before Armenian courts in proceedings against the state. And, second, a practically effective "right to be heard" with allegations that ECHR provision were violated as well as a corresponding obligation on the court to deal with such allegations and to make a finding on them in its decision. The Commission urges the Armenian government and judiciary to ensure that both of these prerequisites are practically guaranteed.

26. Draft Art. 162.1 para 2 Civil Code restricts the right of action for non-pecuniary damage in the cases there mentioned to damage caused by a state body or an official. This raises the question of whether such action also lies if the damage is caused by a private person but a state body or official has been negligent in one of his or her positive obligations under Article 2 or 3 of the ECHR to prevent or investigate the harm causing act. The use of the word "omission" alludes to that, and the Rationale which accompanies the draft law expressly mentions "failure to carry out a proper investigation into the fact of alleged torture/ill-treatment or the death of a person in result of alleged actions or omissions of state bodies or officials". However, the fact that there "failure" and "omission" are mentioned separately, leads to the conclusion that the meaning and scope of the word "failure" in the draft law itself is not clear. It is submitted that this aspect of responsibility for non-pecuniary damage is so important that it should be regulated more explicitly.

27. The Venice Commission further recommends in respect of draft Art. 162.1 para 2 to include close family members - spouses, children, parents - among the potential claimants. This would achieve three purposes: First, it would bring the claim for non-pecuniary damages more fully in line with pertinent ECtHR case-law concerning Art. 13 ECHR - cases.²⁰ Secondly, including close family members among potential claimants would align the Armenian claim for non-pecuniary damages more closely with the practice of the ECtHR in cases where it has afforded just satisfaction pursuant to Art. 41 ECHR.²¹ Thirdly, it would align Armenian legislation more closely with the Committee of Ministers' Resolution (75)7 on Compensation for Physical Injury or Death which suggests a claim for non-pecuniary damages for spouses, children, parents and fiancés in the case of death²² and a claim for non-pecuniary damages for the parents and spouses in the case of physical injury.²³ The Commission also draws attention to the DCFR²⁴:

“Section 2:202: Loss suffered by third persons as a result of another’s personal injury or death

(1) Non-economic loss caused to a natural person as a result of another’s personal injury or death is legally relevant damage if at the time of injury that person is in a particularly close personal relationship to the injured person.

(2) Where a person has been fatally injured:

(a) legally relevant damage caused to the deceased on account of the injury to the time of death becomes legally relevant damage to the deceased’s successors;

(b) reasonable funeral expenses are legally relevant damage to the person incurring them; and

(c) loss of maintenance is legally relevant damage to a natural person whom the deceased maintained or, had death not occurred, would have maintained under statutory provisions or to whom the deceased provided care and financial support.”

28. Further with regard to draft Art. 162.1 para 2, it is not clear why the right of action is restricted to the cases of violations of Articles 2, 3 and 5 ECHR mentioned in paragraph 5 supra, since according to the Rationale, the draft law aims not only to implement the two judgments of the ECtHR, but also “to increase the legal protection of citizens of the Republic of Armenia and the responsibility of state bodies and officials” and to “reduce the number of judgments delivered by the ECtHR against the Republic of Armenia”. Article 13 ECHR also requires an effective remedy in case there is an arguable claim of a violation of any of the other substantive provisions of the ECHR and its Protocols. This requirement may therefore include compensation for non –pecuniary damage resulting from the alleged violation also in other cases than the ones addressed in the draft law. Indeed, States Parties have not only the

²⁰ See ECtHR, *Kaya v. Turkey*, no. 158/1996/777/978, Judgment of 19 February 1998, § 122 (widow and children); see also above footnote 7, *Keenan v. The United Kingdom*, para 131 (mother); *Paul and Audrey Edwards v. The United Kingdom*, § 106 (parents).

²¹ See, e.g., above footnote 7, *Keenan v. The United Kingdom*, paras 135 et seq.; *Paul and Audrey Edwards v. The United Kingdom*, para 164; *McGlinchey and others v. The United Kingdom*, paras 69, 71.

²² Council of Europe, Committee of Ministers' Resolution (75)7 on Compensation for Physical Injury or Death, Annex - no. 19, available at wcd.coe.int; according to the resolution, compensation should only be granted to these persons if they maintained close bonds of affection with the victim at the time of death.

²³ Council of Europe, Committee of Ministers' Resolution (75)7 on Compensation for Physical Injury or Death, Annex - no. 13, available at wcd.coe.int; according to the resolution compensation should only be granted to these persons if the suffering is of an exceptional nature.

²⁴ See above footnote 15.

obligation to implement decisions of the ECtHR, but first and foremost to prevent future violations of their obligations under the ECHR.

Draft Art. 1087.2 paras. 5 and 6 Civil Code

29. In its Interim Opinion on the Draft Law on Amending the Civil Code of the Republic of Armenia from 2009, the Venice Commission remarked

It is positive that contrary to the first version of the draft amendment, the second version²⁵ [...] 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

30. Against this background, the Commission endorses that draft Art. 1087.2 paras 5 and 6 Civil Code leave significant room for Armenian courts to determine the appropriate amount of damages in individual cases.

31. The Commission suggests, however, to include "equitableness" among the list of "principles" (reasonableness, fairness and proportionality) in draft Art. 1087.2 para 5 Civil Code. This would open the article to a reception of how the amount of non-pecuniary damages is determined in other European legal orders based on "equitableness".²⁷

32. Further with regard to draft Art. 1087.2 para 6 Civil Code, the Venice Commission notes that the draft law ascribes a retributive/compensatory purpose to the compensation for non-pecuniary damage through pointing to the "nature, degree and length of physical or mental anguish". Through ascribing such retributive/compensatory purposes to the compensation, the draft law is in line with the ECtHR's views on the purpose of just satisfaction pursuant to Art. 41 ECHR and the legal regimes for compensation of non-pecuniary damage in a number of other Council of Europe Member States.²⁸

33. However, the draft law also points to the presence of fault ("guilt") in draft Art. 1087.2 para 6 Civil Code as an aspect that needs to be taken into account when determining the amount of compensation. The draft law thus attributes purposes to the compensation that go beyond retribution. Compensation under the new law seems to be intended to also have preventive or even penal effects. The Venice Commission is of the opinion that ascribing such wider purposes

²⁵ "First version" and "second version" in this passage refer to the two versions of the 2009 amendment that the government of the Republic of Armenia provided to the Venice Commission; see above footnote 10, CDL-AD(2009)037, Interim Opinion on the Draft Law on Amending the Civil Code of the Republic of Armenia, § 1.

²⁶ See above footnote 10, CDL-AD(2009)037, Interim Opinion on the Draft Law on Amending the Civil Code of the Republic of Armenia, § 26.

²⁷ See, e.g., section 198 para 2 last sentence of the German Courts Constitution Act, available in English at available in English at www.gesetze-im-internet.de/englisch_gvg/index.html.

²⁸ Both on the ECtHR's views on the purpose of compensation for non-pecuniary damages under Art. 41 ECHR and on other European countries see *Claudia Schubert*, Die Wiedergutmachung immaterieller Schäden im Privatrecht, 2013, p. 301 et seq., 387, 412.

to the compensation is commendable with a view to the effective implementation of the ECHR. The decision to ascribe such wider purposes to the compensation falls into the margin of appreciation of the Republic of Armenia. The Commission draws attention to Art. 10:301 para 2 sentence 2 of the PETL²⁹ according to which [t]he degree of the tortfeasor's fault is to be taken into account only where it significantly contributes to the grievance of the victim".

34. Finally, as regards the last part of draft Art. 1087.2 para 6 Civil Code ("as well as other relevant conditions"), the Commission draws attention to Art. 10:301 para 2 sentence 1 PETL³⁰ according to which "all circumstances of the case, including the gravity, duration and consequences of the grievance, have to be taken into account". While the "gravity" and "duration" of the grievance have an equivalent in draft Art. 1087.2 para 6 Civil Code ("degree" and "length" in the English version submitted), the "consequences" of the grievance could currently only be taken into account under the heading "other relevant conditions". The Commission suggests to delete the reference to "all circumstances of the case", as it would seem evident that courts will take all relevant circumstances and conditions into account in deciding on the amount, and to make the list of relevant aspects in the determination of non-pecuniary damage non-exhaustive by adding the words "amongst others". The "consequences" of the grievance could be added to this non-exhaustive list of relevant factors. Such an addition may be helpful in the future application of the law.

Draft Art. 1087.2 para.7 Civil Code

35. The Venice Commission understands the need to supply courts with benchmarks for compensation of non-pecuniary damage. Such reference points assure legal certainty and equality of claimants before the law.³¹ The Commission is therefore not principally opposed to the setting of maximum compensation amounts in draft Art. 1087.2 para 7 Civil Code. However, the Commission suggests including an exception for particular cases in which the maximum amounts provided for are insufficient from the viewpoint of equitableness.³² Such an exception would add flexibility to the provision without compromising the overall aim of draft Art. 1087.2 para 2 Civil Code.

VI. Conclusions

36. The Venice Commission greatly welcomes the draft law as it signals the intention of Armenia to give full effect to its obligations under the ECHR and to implement the judgments of the ECtHR in the cases Poghosyan and Baghdasaryan v. Armenia and Khachatryan and Others v. Armenia.

²⁹ See above footnote 14.

³⁰ See above footnote 1415

³¹ See already above footnote 18.

³² Germany follows a similar approach: §§ 198 et seqq. Courts Constitution Act foresees a compensation for non-pecuniary losses in the amount of EUR 1.200 p.a. in case of excessively long court proceedings in violation of Art. 13 ECHR. It allows, however, for departures from the EUR 1.200-rule in particular cases, i.e. if equitableness demands a higher/lower compensation; the Courts Constitution Act is available in English at www.gesetze-im-internet.de/englisch_gvg/index.html.

37. The draft law presents several important points into that direction. It would, however, benefit from a number of additions and from increased clarity and specifications of certain provisions, notably in respect of the notion of non-pecuniary damage.

38. The Commission remains at the disposal of the Armenian authorities for any further assistance.