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COMMENTS

**ON THE DRAFT LAW
ON MAKING AMENDMENTS
TO THE CIVIL CODE**

OF THE REPUBLIC OF ARMENIA

by

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Introduction

On March 30th, 2009, the President of the Republic of Armenia requested the Venice Commission to give an opinion on the Draft Law on amending the Civil Code of the Republic of Armenia (hereinafter referred to as "the Amendment"). The first reading of the Amendment in the Armenian Parliament took place on April 6th, 2009.

The Amendment concerns the protection of honour, dignity, and business reputation. Its alleged purpose is to enable a decriminalization of the offences of libel and insult by ensuring a stronger protection of the respective rights by means of the Civil Code. With respect to this it has to be noted that the Amendment does not provide any (de)regulation for the Penal Code. Nevertheless the intention has been confirmed in an explanatory note to the Amendment.

The distinction of insult and defamation as defined in its articles 2.2 and 2.3. forms the basis of the concept of the Amendment. Persons harmed by insult or defamation may demand an apology respectively a retraction in addition to a financial indemnity for the moral harm and compensation for other harm caused. The amount of the financial indemnity for the moral harm suffered rises from "150-250 times the minimum monthly salary" for insult to defamation to both in public. Finally in article 2.8 of the Amendment an amount of "500-1000 times the minimum monthly salary" is stipulated for insult being disseminated via mass media and respectively "1000-2000 times the minimum monthly salary" in case of defamation. According to its article 2.14 the Amendment will be applied correspondingly to legal persons.

Relevant provisions

Article 10 of the European Convention on Human Rights and Fundamental Freedoms (hereinafter referred to as "ECHR") is worded as follows:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article (art. 10) shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

Consideration of the Amendment

Preliminary remarks

Since the Amendment holds regulations on libel and insult it affects the freedom of expression as supplied in article 10 of the ECHR. According to the Council of Europe's Committee of Ministers this freedom "constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for the development

of every individual”.¹ This approach derives from the well-established case law of the European Court of Human Rights (hereinafter referred to as “ECtHR”).²

The freedom of expression is a major freedom and is granted in article 19 of both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights as well as in numerous national constitutions worldwide. Its significance is expressed by the Inter-American Court of Human Rights as follows:

*“Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. It is also a condition sine qua non for the development of political parties, trade unions, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free.”*³

The Constitutional Court of South Africa can be quoted on the same issue:

*“Freedom of expression is integral to a democratic society for many reasons. It is constitutive of the dignity and autonomy of human beings. Moreover, without it, the ability of citizens to make responsible political decisions and to participate effectively in public life would be stifled.”*⁴

However, the freedom of expression is not absolute but may be subject to limitations. To meet the criteria set forth in article 10.2 of the ECHR these limitations have to be prescribed by law, pursue a legitimate aim and be “necessary in a democratic society”. The ECtHR formulates as follows:

*“This freedom is subject to the exceptions set out in Article 10 § 2, which must, however, be construed strictly. The need for any restrictions must be established convincingly.”*⁵

It has to be emphasized that norms compatible with the criteria named in article 10.2 of the ECHR are not sufficient; especially law enforcement has to respect the idea of the freedom of expression. It is for this very reason, that the supervision of the ECtHR embraces “both the legislation and the decisions applying it, even those given by an independent court”.⁶ Citing the ECtHR:

*“The Court has to satisfy itself that the national authorities did apply standards which were in conformity with these principles (...).”*⁷

Referring to the necessity of an open debate in democratic, pluralistic societies, the ECtHR can be quoted:

*“[Freedom of expression] is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness, without which there is no ‘democratic society’.”*⁸

¹ Recommendation Rec(2003)13 On the Provision of Information through the Media in Relation to Criminal Proceedings.

² *E.g. Tammer v. Estonia*, judgment of February 26th, 2001, para. 59.

³ *E.g. Claude Reyes et al. v. Chile*, judgment of September 19th, 2006, para. 85.

⁴ *Fred Khumalo et al. v. Bantubonke Harrington Holomisa*, judgment of June 14th, 2002, para. 21.

⁵ *Tammer v. Estonia*, judgment of February 26th, 2001, para. 59.

⁶ *Cf. ibid.*, para. 60.

⁷ *Oberschlick v. Austria*, judgment of May 23rd, 1991, para. 60.

⁸ *Tammer v. Estonia*, judgment of February 26th, 2001, para. 59.

In such societies the expression of opinions/value judgments has to be free in principle. Restrictions have to be justified in view of both the need of an open debate and of the prevention of chilling effects. As far as factual statements are concerned attention must be paid to the burden of proof: It is not appropriate to always place it on the author of the particular statement.⁹

Regulations on the freedom of expressions have been specified in the case law of the ECtHR in many ways. Establishing new legislation in this field gives an opportunity to incorporate these specifications. Therefore, the Amendment should provide implementations of the standards of good practice on regulations of the freedom of expression in explicit terms.

Standards of good practice

When dealing with cases concerning defamation and insult the ECtHR takes into account several factors such as the character of the impugned expression, the function fulfilled by both the author and the subject and the severity of the penalty. In the following the underlying principles of those factors will be revealed and applied to the Amendment.

Character of the impugned expression

The approach of the ECtHR in valuing the character of the respective expression is to quote the ECtHR itself:

“In its practice, 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 infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10.

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.”¹⁰

In Germany – and a number of other countries – mere value judgments are not dealt with as forming an insult, unless the main objective of the utterance of the opinion was to malign the person concerned.¹¹ Furthermore: If value judgments/expressions of opinions do not have any factual basis, they cannot offend anyone as far as facts are concerned. In cases like these no sanctions will be applied.

As far as an insult rests on a factual basis or defamation is concerned, sanctions may only be applied, if the facts are not based on the truth. In principle, the burden of proof lies with the author. Nevertheless certain exceptions must be provided for:

If it is impossible for the defendant to prove the truth or if it requires unreasonable efforts though the plaintiff has access to relevant facts in these cases, the burden of proof will devolve upon the plaintiff.

⁹ Cf. *infra* para. 16.

¹⁰ Feldek v. Slovakia, judgment of July 12th, 2001, paras. 75 et seq.

¹¹ Cf. German Federal Constitutional Court, Official Journal (BVerfGE) 61, 1 (12); 82,272 (283 et seq.); 93, 266 (293).

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 allegation¹² as well as presenting it in a reasonably balanced manner¹³.

Applying these criteria depends as much on the nature and degree of defamation as on the opportunity of the subject of defamation to defend itself.¹⁴ Moreover, it has to be considered whether the applicant could have formulated his criticism without resorting to insulting expressions.¹⁵

As to the Amendment the definition of insult in article 2.2 of the Amendment in both options does not provide any exceptions for insulting value judgments, even for those with a factual basis, turning out to be necessary. Furthermore, the definition of defamation in article 2.3 of the Amendment holds the requirement “not in accord with reality” which would always require the author alone to prove its truth. This is not in accordance with the principles outlined above.

Function of the author of defamation

With regard to the function fulfilled by the author of the defamation the vital role of the media as a “public watchdog”¹⁶ in a democratic society is taken into the ECtHR’s consideration:

“The Court further recalls the essential function the press fulfils in a democratic society. Although the press must not overstep certain bounds, particularly as regards the reputation and rights of others and the need to prevent the disclosure of confidential information, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest. In addition, the Court is mindful of the fact that journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation.”¹⁷

“It should be pointed out in this connection that the exercise of freedom of expression carries with it duties and responsibilities, and the safeguard afforded by Article 10 to journalists is subject to the proviso that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism.”¹⁸

“Although the Contracting States are permitted, or even obliged, by their positive obligations under Article 8 of the Convention 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 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 impossible for unjustified attacks on the reputation of private individuals, of being sentenced to imprisonment or to a prohibition on the exercise of their profession.”¹⁹

¹² Cf. Prager and Oberschlick v. Austria, judgment of April 26th, 1995, para. 37.

¹³ Cf. Bergens Tidende and Others v. Norway, judgment of May 2nd, 2000, para. 57.

¹⁴ Cf. Bladet Tromsø and Stensaas v. Norway, judgment of May 20th, 1999, para. 66.

¹⁵ E.g. Tammer v. Estonia, judgment of February 26th, 2001, para. 67.

¹⁶ E.g. ECtHR, Goodwin v. United Kingdom, judgment of March 27th, 1996, para. 39.

¹⁷ Tammer v. Estonia, judgment of February 26th, 2001, para. 62.

¹⁸ Cumpăna and Mazăre v. Romania, judgment of December 17th, 2004, para. 102.

¹⁹ *Ibid.*, para. 113.

“Bearing in mind the legitimate and important role that campaign groups can play in stimulating public discussion” similar standards have to be applied in this field.²⁰

Therefore, the principle can be worked out that those who impart information and ideas on all matters of public interest must, in doing so, be allowed a certain degree of exaggeration and even provocation as long as they act in good faith and exercise due diligence in order to provide accurate and reliable information, even if they do not succeed to prove the truth in court.

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 at 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 that proceeding as long as the statements are connected to it.²¹

In the Amendment such exceptions or at least guidelines for exceptions to be further developed by the courts cannot be found. Their implementation is highly recommended.

Function of the subject of defamation

When considering sanctions on defamation and insult the function of the subject of defamation in society is also of high importance. In principle, the ECtHR distinguishes private citizens on the one hand from politicians and large companies on the other:

“The Court further recalls that there is little scope under Article 10 § 2 of the Convention 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 than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his words and deeds by journalists and the public at large, and he must consequently display a greater degree of tolerance.”²²

“It is true that large public companies inevitably and knowingly 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 in the case of such companies.”²³

“The Court emphasises that the promotion of free political debate is a very important feature of a democratic society. It attaches the highest importance to the freedom of expression in the context of political debate and considers that very strong reasons are required to justify restrictions on political speech. Allowing broad restrictions on political speech in individual cases would undoubtedly affect respect for the freedom of expression in general in the State concerned.”²⁴

An analysis of this case law reveals as a basic principle that those who lay themselves open to close scrutiny of their words and deeds by the public at large must show a higher degree of tolerance towards criticism. There is hardly any scope for restrictions on political speech.

²⁰ Cf. *Steel and Morris v. United Kingdom*, judgment of February 15th, 2005, para. 95.

²¹ Cf. Federal Constitutional Court of Germany, Official Journal (BVerfGE) 76, 171 (192 *et seq.*); *Neue Juristische Wochenschrift (NJW)* 1991, 2074 (2075).

²² *Feldek v. Slovakia*, judgment of July 12th, 2001, para. 74.

²³ *Steel and Morris v. United Kingdom*, judgment of February 15th, 2005, para. 94.

²⁴ *Feldek v. Slovakia*, judgment of July 12th, 2001, para. 83.

As to the Amendment such a principle cannot be found. Its implementation is highly recommended.

Nature and severity of the penalty

Concerning the severity of the penalty the ECtHR can be quoted as follows:

“The nature and severity of the penalties imposed are factors to be taken into account when assessing the proportionality of an interference with the freedom of expression guaranteed by Article 10. The Court must also exercise the utmost caution where the measures taken or sanctions imposed by the national authorities are such as to dissuade the press from taking part in the discussion of matters of legitimate public concern.”²⁵

“There are common standards which this Court has to ensure with the principle of proportionality. These standards are the gravity of the guilt, the seriousness of the offence and the repetition of the alleged offences.”²⁶

Criminal sanctions will in principle be valued as more severe than awards of damages. Therefore the approach of the Amendment to decriminalize defamation and insult has to be welcomed. Nevertheless, the award of damages in a civil proceeding can on occasion appear as a sanction of great severity. Hence, to meet the criteria of article 10.2 of the ECHR “an award of damages for defamation must bear a reasonable relationship of proportionality to the injury to reputation suffered.”²⁷

Furthermore, the chilling effect on the freedom of expression as a consequence of the sanction applied must be taken into account:

“The chilling effect that the fear of such sanctions has on the exercise of journalistic freedom of expression is evident. This effect, which works to the detriment of society as a whole, is likewise a factor which goes to the proportionality, and thus the justification, of the sanctions imposed (...).”²⁸

Since the media fulfil an important task in society it will lead to a chilling effect if they have to face sanctions more severe than others would in their place as it is foreseen in articles 2.8 and 2.9 of the Amendment. On the other hand, there are no objections against obligations of 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.

It has to be noted that the amount of the minimum monthly salary in Armenia has not been provided for. Therefore, a judgment on the proportionality of the leeway of the fixed compensation sums cannot be afforded. Nevertheless it must be mentioned that the sanctions provided for in articles 135 and 136 of the current Penal Code are fines of an amount up to 200 times the minimum salaries, correctional labour for up to 2 years and arrest of up to 2 months. Hence the maximum compensation sums are 10 times higher than the highest fine currently possible.

²⁵ Cumpănă and Mazăre v. Romania, judgment of December 17th, 2004, para. 111.

²⁶ Skalka v. Poland, judgment of May 27th, 2003, para. 41.

²⁷ Cf. Steel and Morris v. United Kingdom, judgment of February 15th, 2005, para. 96.

²⁸ Cumpănă and Mazăre v. Romania, judgment of December 17th, 2004, para. 114.

The property status of the defendant as mentioned in article 2.13 option 1 of the Amendment is of no importance for the indemnity as long as the aim of the granted sums is only a lump-sum compensation of the harm suffered. This changes if indemnity turns to punitive damages. The function of punitive damages is not to compensate harm but to sanction misbehaviour. If the function of the “indemnity for the moral harm” was one of punitive damages the amount would always have to be proportional to the income and property status of the defendant.

Observations on selected provisions

Considering article 1 of the Amendment it has to be noted that the protection of honour, dignity, and business reputation is restricted to (Armenian) “citizens” only. Notwithstanding, article 2.1 of the Amendment has a wider scope as it supplies protection for any “person”. The latter is the more common approach and thus preferable.

The proposed definitions need further deliberation. The difference between insult (it should be restricted to the expression of an opinion respective a value judgment) and defamation (*i.e.* a statement of facts) has to be made clear. Option 1 of article 2.2 of the Amendment is preferable though not sufficient.

The time limit in article 2.10 of the Amendment is rather flexible and thus may be considerable. Considering the fact that one might for the first time become aware of the insult or defamation a long time after the fact a reasonable maximum time limit of say one year or two is recommended.

With respect to the alleged aim of the Amendment its article 3 should provide for the amendment of the Penal Code.

Conclusion

The number of factors that have to be taken into account when considering cases of defamation and insult shows that the approach of the Amendment has to be regarded as too rigid insofar as it leaves no respectively insufficient room for flexible solutions. All in all a fair balance between the freedom of expression of the author and the honour, dignity, and reputation of the person affected, which also takes into account the public interest in an open and robust debate, has to be granted by the law itself. Besides this the law must provide for solutions which are based on the special circumstances of each single case. This demands less rigid provisions than the ones provided for in the Amendment, which especially show more consideration for the value of free expression in a democratic society.

In essence, the major concerns can be summarized as follows:

The definitions of insult and defamation need further clarification.

As far as facts are concerned, in principle the burden of proof lies with the defendant, but certain exceptions must be supplied.

Those who impart information and ideas or value judgments on matters of public interest must be allowed a certain degree of exaggeration and provocation, as long as they act in good faith and exercise due diligence.

Those subjects of defamation, who lay themselves open to close scrutiny of their words and deeds by the public at large must show a higher degree of tolerance towards criticism.

There is hardly any scope for restrictions on political speech in a democratic state ruled by law.

Higher sanctions for the media will lead to chilling effects which must be avoided. Nevertheless, certain obligations may be placed on the media, concerning corrections and publishing of replies or court judgments.