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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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1. Introductory remark

The following observations are based upon the unofficial translation of the draft law, provided to the Venice Commission by the Armenian authorities. It may well be that some of the observations are prompted by a misunderstanding of the intentions laid down in the official text.

2. General observation

According to the proposal, the protection of honour, dignity and business reputation will be regulated in detail in the Civil Code of the Republic of Armania. The Venice Commission was informed that it is the intention of the legislature to at the same time decriminalize libel and insult by withdrawing Articles 135 and 136 from the Penal Code, once the new Article 19 of the Civil Code will have entered into force. However, the Venice Commission has not (yet) received a draft law to that effect.

In several legal systems the protection of honour, dignity and reputation finds regulation both in criminal and in civil law. If libel and insult are offences under criminal law, that means that these acts are unlawful and may for that very reason give cause for an action for rehabilitation and/or compensation. Depending on the legal system concerned, a claim to that effect may be put forward by the alleged victim in the course of the criminal procedure and/or through a tort action under civil law. In the dual system as ascribed here, the regulation under criminal law is usually in detail, while under civil law the general rules concerning tort action apply, possibly with special provisions about rehabilitation and compensation for moral damage.

The criminal procedure and the civil procedure differ substantially. First of all, a criminal charge may be initiated by the alleged victim but, in general, he or she will not have control over the subsequent prosecution, while in a civil procedure the private party who brings an action remains master of that action and may withdraw it at any time. The role of the court is also a different one in both procedures.

There is a certain tendency in Europe to decriminalize libel and insult in view of the fundamental right of freedom of expression, except in cases where these acts are of the nature that they incite to hate, violence or discrimination.[1] No information was provided to the Venice Commission on whether the latter forms of libel or insult will keep or get a place in the Penal Code of the Republic of Armenia.

From the foregoing it becomes clear that the question of where, in what way and to what extent the protection against defamation, libel and slander, and the entitlement to restoration and compensation are regulated is of primary importance. In any case doublures in different legal codes without harmonization or at least coordination should be avoided, but also the creation of serious lacunas.

The Armenian legislature will have to take this into consideration.

[1] More in general about criminal legislation as a basis for interference with freedom of expression, see European Commission for Democracy through Law (Venice Commission), *Report on the Relationship between Freedom of Expression and Freedom of Religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to hatred*, CDL-AD(2008)026, 23 October 2008, paras 43-87.

3. Some specific observations and recommendations

The rapporteur, in his observations, follows the order of the proposed Article 19.

Paragraph 1
This provision, in its English translation, is formulated as a general principle. On the one hand, it is formulated in too loose a way since it says "will be subject to protection" whereas a legal norm should use the phrase "shall be protected". On the other hand, it is formulated in too absolute a way, since in fact there are cases and situations where the honour, dignity and business reputation are not protected by law; therefore in addition to "in the cases and by the procedure" the words "under the conditions" should be added.

> *"Other legal acts" leaves open the possibility that the protection concerned is also, and even primarily, regulated in the criminal code (see General observation above).*

Paragraph 2
It should be clarified that a statement is a "public statement" only, if it is meant by its author to be public or if it is public by the mere choice of the way or channel of communication.

"A definite person" seems to exclude insult against a group of persons or a certain class, while this is generally considered to be the most reproachable form of insult. This restriction may be explained by the choice for the civil code. But even then, it should not be excluded that a civil class action, or an action by a religious institution, a minority group or any other group against which the insult is directed is instituted.

The formulation should be clarified on these points.

Paragraph 3
This paragraph deals with the lack of proof of truthfulness as a *conditio sine qua non* for the defamatory nature of the statement. It is submitted that this formulation does not take into account situations where the proof does not have to be provided by the person who made the statement or by the mass media which disseminated it. One of these situations is the case where the insult concerns an act or behaviour for which the person concerned has been convicted by final court decision. Even if the allegation appears not to be true, the one who makes the public statement does not have to prove its truthfulness. On the other hand, if a person is accused for an act or behaviour of which he was acquitted by a final court decision, the accusation is of a defamatory nature even if the author of the accusation is able to prove its truthfulness; in that context, reference could also be made to the horizontal aspects of the principle of *presumptio innocentiae*, laid down in the second paragraph of Article 6 of the European Convention on Human Rights.[2]

In addition, the burden of proof should not be formulated in too absolute a way, since in certain cases the author of an accusation will not be able to prove its truthfulness but may succeed in making its truthfulness sufficiently likely. It will then be for the court to decide whether the conditions of insult have been fulfilled.

On the basis of the above remarks, the formulation should be placed somewhat more in perspective.

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[2] European Court of Human Rights (ECtHR) *Pedersen and Baadsgaard v. Denmark,* judgment of 17 December 2004, paras 91-92.

Paragraph 4
This paragraph could be very well combined with paragraph 2.

It is not obvious why the number of fifty persons as a minimum should be a determinant criterion for publicity. A person may feel very hurt by a statement publicly made in a smaller group of persons whose opinions specifically matter, e.g. a superior or a small group of colleagues at work. This criterion should be reconsidered or at least explained.

Paragraph 5
For the restriction to “individual”, see the observation about “definite person” under paragraph 2.

The second and third sentence under a) are formulated in too absolute terms; whether and in what way rehabilitation should take place, should be left to negotiation/mediation or to the decision by the competent court.

The provision under b) concerning “1500 times minimal salaries” is not very clear, but also too absolute. It is not clear whether it is meant to indicate a maximum, nor is it clear whether the reference is to a daily, a weekly, a monthly or an annual salary. It is too inflexible, because the amount of compensation should be left to negotiation or to the decision by the competent court.

The same observation holds good for the provision under c), although it might be advisable to provide for certain criteria to fix the moral damage since moral damage usually cannot be calculated on the basis of factual data.

It is not clear how the provisions under b) and d) relate to each other. If d) concerns material damage and c) relates to moral damage, then what is the compensation under b) meant to compensate for?

Does “recognition of the information” under e) only means a declaratory statement by the court that the information concerned is of a defamatory character, or does it also imply an order by the court for rectification? If the latter is the case, it should be specified which media the court may choose for that purpose and how the costs will be arranged.

Paragraph 6
The period of 50 years needs further clarification. Is that period as a maximum also valid if the allegedly defamatory act is discovered during the life of the person concerned or shortly after his or her death? And even after the alleged author of the act complained of has him- or herself died? Such a long period of imprescriptability may create serious problems of proof on the part of the claimant but also serious problems of defence on the part of the defender; in general it raises an issue of legal certainty. For that reason, the period should be well reasoned and, if necessary, differentiated.

Paragraph 7
This provision raises the issue of the responsibility of mass media. It may well be that they publish information *bona fide* that is provided to them by a person who intends to have defamatory information be distributed. In addition, there is the issue of the protection of journalistic sources “as one of the basic conditions for press freedom”.[3]. Moreover, the special division of responsibility between the editors and the owners of mass media has to be taken into account.

In principle, the mass media are under the obligation to verify factual statements that are defamatory of private individuals, but there may be special grounds on the basis of which they are dispensed from that obligation, depending in particular on the nature and degree of the defamation in question and the extent to which they may reasonably regard their sources as

[3] ECtHR *Goodwin v. United Kingdom*, judgment of 27 March 1996, para. 40

reliable.[4] For these reasons it would seem desirable to have the court decide on who is responsible and whether that responsibility should justify higher amounts of compensation for material and immaterial damage.

Paragraph 8
This provision is not very clear and does not meet its pretension to provide guidance to the competent court. On the one hand, it is correct that a public figure must tolerate opinions which may be defamatory with respect to him or her, but only if they have a public interest connotation or if they are expressed in the framework of a public debate,[5] and unless they lack any factual basis.[6] On the other hand, in several legal systems insulting a public servant during the latter's exercise of his or her duty forms an aggravating circumstance that may justify a heavier sanction as they must be able to perform their task free of undue perturbation.[7]

Therefore, the provision should be more clearly formulated and be accompanied by an explanatory note, or it should be fully left to the competent court to decide on any appropriate differentiation.

Paragraphs 9 and 10
In their specification these provisions create the wrong impression that the right to freedom of expression may be a mitigating factor in relation to the prohibition of defamation, libel and slander, while, in fact, freedom of expression must be considered the basic principle, which freedom "since it carries with it duties and responsibilities" may be restricted in special circumstances and under special conditions, e.g. "for the protection of the reputation or rights of others".[8] Consequently, the courts of the Republic of Armenia will in all cases have to take into account the fundamental right to freedom of expression and, in deciding on whether a certain expression may be sanctioned for its defamatory character, will have to follow the very restrictive case law of the European Court of Human Rights on the matter.

Therefore, paragraphs 9 and 10 may, in fact, be said to be superfluous, since the courts will have to respect the constitutional and international guarantee of the freedom of expression, while paragraph 10 creates the wrong impression that the court may only decide to reduce the sanction, while in fact the right of freedom of expression of the mass media may in several cases require that the court does not impose any sanction at all. Moreover, the mass media are not the only category that should be allowed a high level of freedom of expression in this respect. What counts is the contribution to the public debate on matters of public interest. Consequently, also campaign groups must be able to carry out their activities effectively,[9] and the same holds good *a fortiori* for elected representatives of the people, whose freedom of expression calls for the closest scrutiny. [10]

It is recommended that the two provisions are reconsidered.

Paragraph 11
The provision is formulated too restrictively. As was observed above, in relation to paragraph 3, there are other situations which may exculpate the author of an expression, such as a final conviction by a court of the person who feels insulted. Therefore, the provision should be broad enough to leave the court sufficient room for deciding that, although the expression concerned is of a defamatory character, there is no ground for imposing a sanction.

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[4] ECtHR *Busuioc v. Moldova,* judgment of 21 December 2004, paras 66-96.
[5] ECtHR *Von Hannover v. Germany,* judgment of 24 June 2004, paras 61-75.
[6] ECtHR *Nilsen and Johnsen v. Norway,* judgment of 25 November 1999, paras 49-50.
[7] ECtHR *Yankov v. Bulgaria,* judgment of 11 December 2003, para. 129.
[8] Article 10, paragraph 2, of the European Convention on Human Rights.
[9] ECtHR *Steel and Moris v. United Kingdom,* judgment of 15 February 2005, para. 89.
[10] ECtHR *Pakdemirli v. Turkey,* judgment of 22 February 2005, para. 33.

Paragraph 12
Again, the provision is formulated in too absolute a wording, not leaving the court sufficient room to decide on the basis of all facts and circumstances. Different from what the provision seems to imply, in certain respects a value judgment deserves broader protection than a factual statement, because the truthfulness of a factual statement is easier to be determined.[11] Expressing a value judgment, even if that in itself is of a defamatory character, may constitute a legitimate exercise of the freedom of expression, for instance because it forms part of a public debate

It is recommended to integrate the provision into paragraph 11 as a possible exception under certain circumstances to be judges by the competent court.

Paragraph 13
This provision would be superfluous if the recommendation is followed to extend the protection of Article 19 as a whole, *mutatis mutandis*, to groups of persons and legal persons.

4. Conclusion

Although the shift in the legislation of the Republic of Armenia concerning the protection of honour, dignity and reputation, from criminal to civil law has to be welcomed in general, the legislature has to be careful to avoid both doublures and lacunas.

If the legislature wishes to shift the protection of honour, dignity and reputation more into the direction of civil law, it has to decide whether and to what extend these acts should also, under certain forms, remain offences under criminal law. If the criminal route is not chosen, the regulation under civil law will require more detail. This relationship and the corresponding coordination have to be taken into account when amending Article 19 of the Civil Code of the Republic of Armenia.

On the one hand, it would seem questionable whether the most serious forms of insult, such as those that incite to hate, violence or discrimination, should also be decriminalized. On the other hand, there would not seem to be any justification to restrict the right to bring a civil claim for rehabilitation and damages to individual victims, and not the extend the possibility to bring such claim to groups of individuals and to legal persons. The courts should be given enough room for making an adequate distinction, to the extent necessary or appropriate, between different forms of insult, between individuals and groups as victims, between natural and legal persons as victims, but also among individuals, groups and legal persons.

It is recommended that the Armenian legislature takes the above observations and recommendations into account. The Venice Commission remains available to assist the competent Armenian authorities to propose any amendments needed or desirable.

[11] ECtHR *Steel and Moris v. United Kingdom,* judgment of 15 February 2005, para. 87.