Organization for Security and Co-operation in Europe

Office of the Representative on Freedom of the Media

Analysis of the Draft Laws Amending the Defamation Legislation in the Republic of Armenia

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KEY RECOMMENDATIONS

Definitions

- The term "statement" should be replaced by term "public expression" in item 2 of proposed Article 1087.1 para 2 of the Civil Code to avoid the impression that not all forms of expression relating to public interests are protected by the law.

- Proposed Article 1087.1 para 3 of the Civil Code should be revised to eliminate the redundant words.

- The Draft Amendment should include a definition of public interest specifying that it includes matters relating to all branches of government, politics, public health and safety, law enforcement and the administration of justice, consumer and social interests, the environment, economic interests, the exercise of power, art and culture.

Insult

- The definition of insult should be harmonised with the standards of the European Court of Human Rights concerning value judgments; or, at best, liability for insult should be completely eliminated.

System of Legal Defences

- The protection to statements afforded by proposed Article 1087.1 para 5 a) of the Civil Code should be extended.

- The requirement for presentation of the statements in a balanced manner should be removed from the Draft Amendment.

- The Draft Amendment should explicitly recognise the defence of truth, the defence of opinion and the defence of reporting words of others.

Regime of Remedies

- The purpose of remedies should be explicitly set out in the Draft Amendment, stating that it is limited to redressing the immediate harm done to the reputation of the individual who has been defamed.

- The Draft Amendment should explicitly require that all remedies for damages meet the necessity-prong of the three-part test set out by Article 10 of the European Convention.

- The Draft Amendment should adopt the following rule in order to strengthen the regime of remedies and provide safeguards for the right to freedom of expression:
    - Courts should be obliged to take into account whether non-judicial remedies - including voluntary or self-regulatory mechanisms – have been requested and used to limit the harm caused to plaintiff's honour or reputation.
    - Courts should prioritise the use of available non-pecuniary remedies to redress

any harm to reputation caused by defamatory statements.
    - When ordering pecuniary remedies courts should have due regard to the potential chilling effect of the award on freedom of expression.

- Courts should be obliged to propose to the parties to reach a settlement and assist them in this regards. Offers for settlements should be regarded as mitigating factors with respect to damages.

- The ceiling of pecuniary remedies should be significantly lowered.

- The Draft Amendment should specify that defendant's limited means should be a factor in determining the proportionality of a damage award.

- The Draft Amendment should contain an explicit provision that pecuniary awards should be proportionate to the harm done and that the maximum level of compensation should be applied only in the most serious cases.

- One ceiling for remedies should apply to all defamatory statements. The involvement of the media should not be regarded per se as a ground for higher liability.

Procedural Safeguards

- Proposed wording of Article 1087.1 para 4 should be revised stating that the plaintiff bears the burden of proving the falsity of any statement of fact alleged to be defamatory if the latter relates to matters of public concern.

- The Draft Amendment should include a provision setting out that the interpretation of the provisions concerning protection of honour, dignity and public reputation should be carried out in accordance with the guarantees of the European Convention on Human Rights as elaborated in the case-law of the European Court of Human Rights.

- The Draft Amendment should specify that the time limit for initiating of defamation cases starts from the first date the statement in question was published at that location and in that form.

- The Draft Amendment should exclude from the scope of liability for defamation people who are not authors, editors or publishers of statements who did not know and could not know that they were contributing to the dissemination of defamatory statements.

- Courts should be able to strike out unsubstantiated claims at an early stage of the proceedings in order to prevent malicious plaintiffs from suppressing media criticism by initiation of defamation cases with no prospect of success.

I. INTRODUCTION

This Memorandum contains ARTICLE 19's analysis of three draft laws of Armenia aiming to reform the legal framework on defamation. These include the Amendment to the Civil Code of the Republic of Armenia, the Amendment to the Criminal Code of the Republic of Armenia, and the Amendment to the Criminal Procedural Code of the Republic of Armenia ("Draft Amendments").[1] The Armenian Parliament adopted the Draft Amendments in the first reading in March 2010.

ARTICLE 19 is an international, non-governmental human rights organisation which works with partner organisations around the world to protect and promote the right to freedom of expression. We have previously provided legal analyses in the area of media law to government and civil society organisations in over 30 countries.[2] Regarding Armenia, we have analysed a number of the freedom of expression and freedom of information laws and draft laws, including the 2000 version of the Television and Radio Broadcasting Law, the 2002 Draft law on Access to Information, the Law on Mass Media (in 2003), 2005 proposal for the amendment of the Law on Mass Communication and others.

ARTICLE 19 broadly welcomes the proposed Draft Amendments, in particular the decision to decriminalise defamation by the Amendment to the Criminal Code. By decriminalising defamation, Armenia will join the group of progressive states where fair balance between the right to freedom of expression and the right to reputation is sought without recourse to criminal sanctions.[3] Further, the proposed Draft Amendment to the Civil Code includes progressive provisions, such as the introduction of several defences against claims for defamation, the limiting persons who can sue for insult and defamation, the fixed maximum levels of pecuniary awards, the establishment of a short time limit for legal actions; and the provision of non-pecuniary awards such as public apology, refutation and publication of the court decision.

At the same time, ARTICLE 19 has serious concerns with regard to the high pecuniary awards for damages, the lack of adequate and effective safeguards against disproportionate awards, the regulation of liability for insult and the failure to recognise a comprehensive system of defences that can be invoked against defamation claims. Further, the Draft Amendments fail to provide sufficient procedural safeguards for the right to freedom of expression and as a result can act as serious deterrent to free speech in the country.

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[1] The Republic of Armenia Law on Making Amendments to the Republic of Armenia Civil Code - the proposed new part of the Civil Code is entitled *§2.1 The Order and Terms of Compensation for Harm Caused to the Honour, Dignity and Business Reputation*; The Republic of Armenia Law on Making Amendments to the Republic of Armenia Criminal Code; and The Republic of Armenia Law on Making Amendments to the Republic of Armenia Criminal Procedural Code. Copy of an unofficial translation of the Draft Amendments is attached in Annex 1 to this Memorandum. ARTICLE 19 takes no responsibility for the accuracy of the translation or for comments based on mistaken or misleading translation.

[2] These analyses can be found on the ARTICLE 19 website, at http://www.article19.org/publications/law/legal-analyses.html.

[3] Other countries in Europe which have decriminalised defamation include Bosnia and Herzegovina, Cyprus, Estonia, Georgia, Ireland, Moldova, Ukraine and the UK.

The detail of our analysis is contained in Section III of this Memorandum. Section II summarises the body of international law on freedom of expression and defamation that the analysis draws on, focusing on the jurisprudence of the United Nations Human Rights Committee and the European Court of Human Rights. The analysis additionally draws on a set of standards on freedom of expression and defamation articulated in the ARTICLE 19 publication, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputations* ("Defining Defamation").[4] These principles, which draw on comparative constitutional law as well as European and UN human rights jurisprudence, have attained significant international endorsement, including that of the three official mandates on freedom of expression, the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression.[5]

II. INTERNATIONAL STANDARDS

II.1. The Guarantee of Freedom of Expression

Freedom of expression is a key human right, in particular because of its fundamental role in underpinning democracy. Article 19 of the *Universal Declaration on Human Rights* ("UDHR"),[6] a United Nations General Assembly resolution, guarantees the right to freedom of expression in the following terms:

> Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers.

The *International Covenant on Civil and Political Rights* ("ICCPR"),[7] ratified by the Republic of Armenia in 1993, elaborates on many of the rights set out in the UDHR, imposing formal legal obligations on State Parties to respect its provisions. Article 19 of the ICCPR guarantees the right to freedom of expression in terms very similar to those found in Article 19 of the UDHR. Freedom of expression is also protected in the three regional human rights systems, Article 10 of the *European Convention on Human Rights* (European Convention)[8], which was ratified by the Republic of Armenia in 2002, Article 13 of the *American Convention on Human Rights*[9] and Article 9 of the *African Charter on Human and Peoples' Rights*.[10]

Article 10(1) of the European Convention states, in part:

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[4] London: ARTICLE 19, 2000.

[5] See their Joint Declaration of 30 November 2000. Available at: http://www.unhchr.ch/huricane/huricane.nsf/view01/EFE58839B169CC09C12569AB002D02C0?opendocument

[6] UN General Assembly Resolution 217A(III), adopted 10 December 1948.

[7] UN General Assembly Resolution 2200A(XXI), adopted 16 December 1966, in force 23 March 1976.

[8] Adopted 4 November 1950, in force 3 September 1953.

[9] Adopted 22 November 1969, in force 18 July 1978.

[10] Adopted 26 June 1981, in force 21 October 1986.

> 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.

Freedom of expression is a key human right, in particular because of its fundamental role in underpinning democracy. The European Court of Human Rights ("the European Court") has repeatedly stated:

> Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man.[11]

The European Court has also made it clear that the right to freedom of expression protects offensive speech. It has become a fundamental tenet of its jurisprudence that the right to 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 the State or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'."[12]

It has similarly emphasised that "[j]ournalistic freedom … covers possible recourse to a degree of exaggeration, or even provocation."[13] This means, for example, that the media are free to use hyperbole, satire or colourful imagery to convey a particular message.[14] The choice as to the form of expression is up to the media. For example, the European Court has protected newspapers choosing to voice their criticism in the form of a satirical cartoon.[15] The context within which statements are made is relevant as well. For example, in the second *Oberschlick* case, the European Court considered that calling a politician an idiot was a legitimate response to earlier, provocative statements by that same politician while in the *Lingens* case, the European Court stressed that the circumstances in which the impugned statements had been made "must not be overlooked."[16]

The European Court attaches particular value to political debate and debate on other matters of public importance. Any statements made in the conduct of such debate can be restricted only when this is absolutely necessary: "There is little scope … for restrictions on political speech or debates on questions of public interest."[17] The European Court has rejected any distinction between political debate and other matters of public interest, stating that there is "no warrant" for such distinction.[18] The European Court has also clarified that this enhanced protection applies even where the person who is attacked is not a 'public figure'; it is sufficient if the statement is made on a matter of public interest.[19] The flow of information on such matters is so important that, in a case involving newspaper articles making allegations

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[11] *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72, para. 49.
[12] *Ibid*. Statements of this nature abound in the jurisprudence of courts and other judicial bodies around the world.
[13] *Dichand and others v. Austria*, 26 February 2002, Application No. 29271/95, para. 39.
[14] *See Karatas v. Turkey*, 8 July 1999, Application No. 23168/94, paras 50-54.
[15] See, for example, *Bladet Tromsø and Stensaas v. Norway*, 20 May 1999, Application No. 21980/93, para. 63 and *Bergens Tidende and Others v. Norway*, 2 May 2000, Application No. 26131/95, para. 57.
[16] *Oberschlick v. Austria (No. 2)*, 1 July 1997, Application No. 20834/92, para. 34 and *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, para. 43.
[17] See, for example, *Dichand and others v. Austria*, note 13, para. 38.
[18] *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 64.
[19] See, for example, *Bladet Tromsø and Stensaas v. Norway*, note 15.

against seal hunters, a matter of intense public debate at the time, the journalists' behaviour was deemed reasonable, and hence protected against liability, even though they did not seek the comments of the seal hunters to the allegations.[20]

The guarantee of freedom of expression applies with particular force to the media. The European Court has consistently emphasised the "pre-eminent role of the press in a State governed by the rule of law"[21] and has stated:

> Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.[22]

In nearly every case before it concerning the media, the European Court has stressed the "essential role [of the press] in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest. Not only does it have the task of imparting such information and ideas, the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of 'public watchdog'." [23] In the context of defamation cases, the European Court has emphasised that the duty of the press goes beyond mere reporting of facts; its duty is to interpret facts and events in order to inform the public and contribute to the discussion of matters of public importance. [24]

II.2. Restrictions on the Right to Freedom of Expression

International law permits limited restrictions on the right to freedom of expression in order to protect various interests, including reputation. The parameters of such restrictions are provided for in Article 10(2) of the European Convention, which states:

> 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.

Any restriction on the right to freedom of expression must meet a strict three-part test. This test, which has been confirmed by both the Human Rights Committee[25] and the European Court,[26] requires that any restriction must be (1) provided by law, (2) for the purpose of safeguarding a legitimate interest (including, as noted, protecting the reputations of others, relevant to the comments contained herein), and (3) necessary to secure this interest. In

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[20] *Ibid*.
[21] *Thorgeirson v. Iceland*, note 18, para. 63
[22] *Castells v. Spain*, 24 April 1992, Application No. 11798/85, para. 43.
[23] See, for example, *Dichand and others v. Austria*, note 13, para. 40.
[24] *The Sunday Times v. The United Kingdom*, 26 April 1979, Application No. 6538/74, para. 65.
[25] For example, in *Laptsevich v. Belarus*, 20 March 2000, Communication No. 780/1997.
[26] For example, in *Goodwin v. United Kingdom*, 27 March 1996, Application No. 17488/90.

particular, in order for a restriction to be deemed necessary, it must restrict freedom of expression as little as possible, it must be carefully designed to achieve the objective in question and it should not be arbitrary, unfair or based on irrational considerations.[27] Vague or broadly defined restrictions, even if they satisfy the "provided by law" criterion, are unacceptable because they go beyond what is strictly required to protect the legitimate interest.

The European Court has held that this represents a high standard which any interference must overcome:

> Freedom of expression, as enshrined in Article 10, is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.[28]

III. ANALYSIS OF THE DRAFT AMENDMENTS/DRAFT AMENDMENT TO THE CIVIL CODE

This section analyses in detail the Draft Amendments against international legal standards on freedom of expression. The Draft Amendment of the Criminal Code consists of provisions abolishing criminal defamation, we focus on the analysis of the Amendment of the Civil Code. We support the decision to decriminalize defamation and recommend the Armenian Parliament to adopt the Amendment to the Criminal Code.

As stated in the introduction, the Draft Amendment to the Civil Code includes some progressive provisions and should be adopted by the Armenian Parliament. It introduces defences that can be invoked against claims for defamation; limits the scope of persons who can sue for insult and defamation; introduces the ceiling on pecuniary compensations; establishes a time limit for legal actions; provides for non-pecuniary awards such as a public apology, refutation and publication of the court decision; eliminates possibilities for relatives of deceased persons to sue for defamation and insult of the latter; and eliminating the possibility of public entities (such as government bodies, local self-government bodies and judicial bodies legal persons) to bring action for defamation or insult. At the same time, a number of provisions may unnecessarily restrict of the right to freedom of expression.

We elaborate on these general recommendations in the following paragraphs.

III.1. Definitions

Overview

The new wording of Article 1087.1 of the Civil Code defines insult and defamation. According to Article 1087.1 para 2, insult is "a *public expression* [emphasis added] by means of speech, picture, voice, sign or by any other form of publicity with the intention of causing

[27] See *The Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, para. 49 (European Court of Human Rights).
[28] See, for example, *Thorgeirson v. Iceland*, note 18, para. 63 (European Court of Human Rights).

harm to honour, dignity and business reputation (opinion or value judgement)." According to Article 1087.1 para 3, defamation is "a public expression of false facts in regard to a person, which infringe his/her honor, dignity or business reputation and do not correspond to the reality."

Article 1087.1 para 2 further elaborates that the *statement* can not be deemed to have been made with the purpose of discrediting a person if that statement in the given situation and content is made due to an overweighing public interest. Also, proposed Article 1087.1 para 5b, states that statement of facts shall not be considered as defamation "if stating it, in the given situation and content, contributes to an overweighing public interest and if its author proves that he/she has made reasonable efforts to find out the truthfulness and substantiality of the statements and has presented them in a balanced manner and in good faith".

Analysis

The use of the term "statement" in Article 1087.1 in addition to "public expression" creates an impression that the Draft Amendment does not protect all forms of public expression relating to overweighing public interests. In order to avoid this confusion, we recommend to use instead the term "public expression" when defining expression that cannot constitute insult and defamation. This wording would be in line with international law which protects all expression concerning public interests.

In respect to definition of defamation as "a public expression of *false* facts…. *that do not correspond to the reality"* [emphasis added], we note that the last part of the definition seems to be redundant because it is obvious that false facts do not correspond to the reality.

We also note that the Draft Amendment contains no definition of "public interest". This is a significant shortfall. For the purpose of clarity, we recommend that the Draft Amendment includes a provision defining public interests. The definition should state that of public interest are matters relating to all branches of government, politics, public health and safety, law enforcement and the administration of justice, consumer and social interests, the environment, economic interests, the exercise of power, art and culture.

Recommendations:

- The term "statement" should be replaced by term "public expression" in item 2 of proposed Article 1087.1 para 2 of the Civil Code to avoid the impression that not all forms of expression relating to public interests are protected by the law.

- Proposed Article 1087.1 para 3 of the Civil Code should be revised to eliminate the redundant words.

- The Draft Amendment should include a definition of public interest specifying that it includes matters relating to all branches of government, politics, public health and safety, law enforcement and the administration of justice, consumer and social interests, the environment, economic interests, the exercise of power, art and culture.

III.2. Protection against insult

Overview

As noted in the previous section, Article 1087.1 para 2 of the Draft Amendment of the Civil Code differentiates between insult and defamation. Insult is defined "a public expression by means of speech, picture, voice, sign or by any other form of publicity with the intention of causing harm to honour, dignity and business reputation (opinion or value judgement)." The provisions also provide for exculpation in cases of "an overweighing public interest."

Analysis

ARTICLE 19 is concerned about the protection against insult afforded by the Draft Amendment. *First*, the definition of insult implies that expression of every negative opinion or value judgment with intention to harm an individual's honour is prohibited by the law. The wording of the part of Article 1087.1 para 2 suggests that there is always presumption of intention to harm. The presumption can be refuted by proving that the expression of opinion was made due to overweighing public interests.

This regulation of opinion or value judgment runs against the position of the European Court that affords protection of expression of negative opinions as long as they are based on established or admitted facts and made in good faith.[29] Moreover, while the definition of insult implies that at least the rebuttal of the presumption of intention to harm is susceptible of proof, the European Court emphasised that no proofs were required for expression of value judgments.[30]

[29] *Lingens v Austria*, Judgment of 8 July 1986, Application No. 9815/82, para. 46, and De Haes & Gijsels v Belgium, Judgment of 24 February 1997, Application No. 7/1996/626/809 at para. 47

[30] Ibid. *Lingens v Austira*, at para. 46.

In view of the foregoing, it is recommended to harmonise the definition of insult with the European Court standards concerning value judgment.

At the same time, mindful of the reluctance of the European Court to allow restrictions of value judgments and opinions, ARTILCE 19 believes it is reasonable and practical to decide against providing for legal liability for insult. The European Court has repeatedly held that tolerance and broadmindedness are at the heart of democracy, and that the right to freedom of expression protects not just those forms of speech that are broadly considered acceptable, but exactly those statements that others may find shocking, offensive or disturbing.[31] Moreover, there are disturbing examples from around the world about the use of insult laws to punish truth or unfavourable opinions.

Recommendations:

- Harmonise the definition of insult with the standards of the European Court concerning value judgments; or, at best, eliminate completely the opportunity to seek legal responsibility for insult.

III.3. Weak System of Legal Defences

Overview

The Draft Amendment recognises explicitly two legal defences which can be invoked against defamation claims. According to the proposed Article 1087.1 para 5 a) of the Civil Code, a statement of facts shall not be considered as defamation if it was made in court proceedings on the circumstances of the case under hearing. Article 1087.1 para 5 b) provides that there is no defamation if the statement of facts in the given situation and content, contributes to an overweighing public interest and if its author proves that he/she has made reasonable efforts to find out the truthfulness and substantiality of the statements and has presented them in a balanced manner and in good faith.

Analysis

The system of legal defences against defamation claims in the Draft Amendment is weak.

First, Article 1087.1 para 5 a) provides a very limited scope of the absolute privilege to speak out freely and without fear of legal action. These should include, at minimum, for example statements made in the course of proceedings at legislative bodies, any statements made in the course of proceedings at local authorities, by members of those authorities; any statements

[31] E.g. *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72. Statements of this nature abound in the jurisprudence of courts and other judicial bodies around the world. Another example is the case of *Oberschlick v Austria (no.2)*, in which the applicant had been convicted by domestic courts for referring to a politician as an 'idiot'; the ECtHR held that this conviction violated his right to freedom of expression because he was expressing an opinion.

made in the course of any stage of judicial proceedings (including interlocutory and pre-trial processes) by anyone directly involved in that proceeding (including judges, parties, witnesses, counsel and members of the jury) as long as the statement is in some way connected to that proceeding; any statement made before a body with a formal mandate to investigate or inquire into human rights abuses; any document ordered to be published by a legislative body; a fair and accurate report of the material related to the above mentioned proceedings; described in points (i) – (v) above; and a fair and accurate report of material where the official status of that material justifies the dissemination of that report, such as official documentation issued by a public inquiry, a foreign court or legislature or an international organisation.[32] Moreover, certain types of statements should be exempt from liability unless they can be shown to have been made with malice, in the sense of ill-will or spite. These should include statements made in the performance of a legal, moral or social duty or interest.[33]

Hence, ARTICLE 19 recommends expanding exemptions from liability to cover these instances.

Second, even though the recognition of the defence of reasonable publication proposed in Article 1087.1 para 5 b) is commendable, the proposed provision is problematic for two reasons. The Draft Amendment requires that the statements are presented in "a balanced manner." This requirement amounts to an interference with the right to free expression that is not necessary in a democratic society. If people are obliged to present their statements in a balanced way, they are by definition impeded to express their own opinion.

Presumably, the requirement for presentation of the statements in a balanced manner was intended to ensure responsible journalism. However, the regulation is still too restrictive. The standards of the European Court require only that journalists act in good faith and provide reliable and precise information.[34]

Therefore, ARTICLE 19 recommends to remove the requirement for presentation of the statements in a balanced manner from the Draft Amendment.

Third, in addition to the two recognised defences of absolute privilege (as set out in Article 1087.1 para 5 a)) and reasonable publication (Article 1087.1 para 5 b)), international and comparative jurisprudences also recognise other defences. These are defence of truth, defence of opinion and defence of reporting words of others.

While the *defences of truth and opinion* can be drawn from the definition of defamation set out in the proposed Article 1087.1 para 3 of the Civil Code, it is recommended to explicitly specify these defences in the Draft Amendment because a true statement of fact and an opinion (value judgment) are not considered as defamation under international law.

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[32] Principle 11, *Defining Defamation.* See also, for example, *A v. the United Kingdom*, Judgment of 19 December 2002, Application no. 35373/97.
[33] Principle 11, *Defining Defamation.*
[34] See *Pedersen and Baadsgaard v Denmark*, Judgment of 1 7 December 2004, Application No. 4901 7/99.

However, the *defence of reporting words of others* cannot be drawn from the definition of defamation. We note that the European Court previously recognised this defence in order to protect journalists against legal actions for publishing or broadcasting defamatory allegations of others. In *Jersild v. Denmark*, the European Court found that interviews "whether edited or not, constitute one of the most important means whereby the press is able to play its vital role of 'public watchdog'."[35] Therefore, the European Court held that journalists should be protected against punishment for dissemination of matters of public interest.

ARTICLE 19, therefore, recommends that the Draft Amendment includes a provision recognising the defence of reporting words of others.

Recommendations:

- The protection to statements afforded by proposed Article 1087.1 para 5 a) of the Civil Code should be extended.
- The requirement for presentation of the statements in a balanced manner should be removed from the Draft Amendment.
- The Draft Amendment should explicitly recognise the defence of truth, the defence of opinion and the defence of reporting words of others.

III.4. Problematic Regime of Remedies

Purpose of remedies

Article 1087.1 para 6 – 8, deal with remedies for insult and defamation. The Draft Amendment, however, does not explicitly define the purpose of remedies. As a result, there is a risk of using the remedies to the detriment of the right to freedom of expression.

We note that the European Court has established that the purpose of a remedy for defamatory statement should be limited to redressing the immediate harm done to the reputation of the individual who has been defamed.[36] Using remedies to serve any other goal would exert an unacceptable chilling effect on freedom of expression which could not be justified as necessary in a democratic society.

To safeguard freedom of expression and ensure that remedies are awarded in compliance with the aforementioned principle, ARTICLE 19 recommends that the purpose of remedies be explicitly set out in the Draft Amendment.

[35] See *Jersild v. Denmark,* Judgment of 23 September 1994, Application No. 15890/89, para. 35.
[36] *Tolstoy Miloslavsky v. United Kingdom*, Judgment of 13 July 1995, para. 51

Necessity of remedies

ARTICLE 19 is very concerned about the regime of remedies set out by the Draft Amendment. In particular, Article 1087.1 para 6 – 8 of the Draft Amendment grants a wide discretion to judges without providing them with sufficient guidance in this regard.

First, the Draft Amendment fails to incorporate the principle of the European Court of Human Rights that "any order to pay damages, regardless of their type and amount, constitute 'interference' with the speaker's Article 10 rights so that the imposition of liability must be justified in accordance with the principle of Article 10 (2)."[37] *Second*, the rules on provision of remedies are not sufficient and there is a danger that orders to pay damages may violate the right to freedom of expression. *Third*, the lack of precise rules will very likely make it difficult to ensure consistence application of the law in the country and equal treatment of all defendants. *Fourth*, there is a danger that maximum levels of compensations might be abusively and discriminately used to punish journalists and media.

We point out that the European Court has previously established that defamation laws should provide for adequate and effective safeguards against awards that are disproportionately large in relation to the actual damage sustained. [38] Further, *Defining Defamation* in Principles 14 and 15, include extensive guidance on rules for remedies. They recommend that courts should prioritise the use of available non-pecuniary remedies to redress any harm to reputation caused by defamatory statements.[39] Pecuniary damages should be awarded only where non-pecuniary remedies are insufficient to redress the harm caused by defamatory statements.[40] Moreover, the following rules should be considered when awarding pecuniary damages:

> (b) In assessing the quantum of pecuniary awards, the potential chilling effect of the award on freedom of expression should, among other things, be taken into account. Pecuniary awards should never be disproportionate to the harm done, and should take into account any non-pecuniary remedies and the level of compensation awarded for other civil wrongs.
>
> (c) Compensation for actual financial loss, or material harm, caused by defamatory statements should be awarded only where that loss is specifically established.
>
> (d) The level of compensation which may be awarded for non-material harm to reputation – that is, harm which cannot be quantified in monetary terms – should be subject to a fixed ceiling. This maximum should be applied only in the most serious cases.
>
> (e) Pecuniary awards which go beyond compensating for harm to reputation should be highly exceptional measures, to be applied only where the plaintiff has proven that the defendant acted with knowledge of the falsity of the statement and with the specific intention of causing harm to the plaintiff.[41]

ARTICLE 19 recommends that these standards are reflected in the Draft Amendment and a detailed guidance on the use of damage awards is introduced. Such guidance will ensure consistent application of the law and serve as a safeguard for freedom of expression.

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[37] *Bladet Tromso and Stensaas v. Norway*, Judgment of 20 May 1999, Application no. 21980/93.
[38] *Tolstoy Miloslavsky v. United Kingdom*, Judgment of 13 July 1995, para. 51.
[39] Principle 14, *Defining Defamation.*
[40] Principle 15 para 1, *Defining Defamation.*
[41] Principle 15, *Defining Defamation.*

In addition to these rules, it is recommended to consider that the European Court has indicated that defendant's limited means could be a factor in determining the proportionality of a damage award. In *Steel and Morris v United Kingdom*, the European Court of Human Rights held that awards of thirty-six and forty thousands pounds against the defendants were considered excessive "when compared to [their] modest incomes and resources."[42]

Pecuniary remedies

Although the Draft Amendment can be commended for subjecting the level of compensation to fix ceilings, the lump sums suggested in Article 1087.1 para 7 c) for different types of insults and defamations are very high. In the most extreme cases, the award for moral damages can be up to 2000 times the minimum salary.[43]

ARTICLE 19 believes that the proposed high ceilings of pecuniary remedies will inevitably exert a chilling effect on freedom of expression even if they remain only on the books. In addition, if awarded the compensations of such considerable amounts are very likely to be excessive when compared with the significantly lower incomes in the country.

ARTICLE 19, therefore, recommends that the ceiling of pecuniary remedies be significantly decreased.

Dissemination of insult and defamation by media

The proposed Article 1087.1. para 6 d) and Article 1087.1. para 7 c) (respectively) provide for higher pecuniary awards if insult and defamation were "disseminated through mass media" or were made/published through a mass medium.

By allowing a higher liability for insult and defamation disseminated by media or made through mass media, the Draft Amendment suggests that the involvement of the media increases the damage to one's honour, dignity and reputation. Although it may seem correct at a first sight, this perception is in fact inaccurate. For example, a defamatory statement can cause a smaller harm if published in a newspaper with a small circulation rather than in an election flier with a large circulation, which is obviously not media.

Moreover, the regulation affects journalists because due to the nature of their profession their views are disseminated by the media. Higher sanctions against journalists are discriminatory and will have a chilling effect on them and the media. In addition, the regulation runs against the position of the European Court that journalists should be protected from legal actions for disseminating statements of public interest.[44]

Therefore, ARTICLE 19 recommends not to formally differentiate between statements on the basis of whether they were disseminated or not by media. Even if the media may facilitate wide dissemination of a defamatory statement awards should always depend on the circumstance of an individual case and should not be higher than the actual harm.

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[42] *Steel and Morris. v United Kingdom* , Judgment of 15 February 2005, Application no. 68416/01.
[43] Minimum salaries are regulated by RA law "On minimum monthly salary", which sets out the amount of this salary and safeguards, that it can be altered by law.
[44] *Jersild v. Denmark,* Judgment of 23 September 1994, Application No. 15890/89, para. 35.

Recommendations:

- The purpose of remedies should be explicitly set out in the Draft Amendment, stating that it is limited to redressing the immediate harm done to the reputation of the individual who has been defamed.

- The Draft Amendment should explicitly require that all remedies for damages meet the necessity-prong of the three-part test set out by Article 10 of the European Convention.

- The Draft Amendment should adopt the following rule in order to strengthen the regime of remedies and provide safeguards for the right to freedom of expression:
    - Courts should be obliged to take into account whether non-judicial remedies - including voluntary or self-regulatory mechanisms – have been requested and used to limit the harm caused to plaintiff's honour or reputation.
    - Courts should prioritise the use of available non-pecuniary remedies to redress any harm to reputation caused by defamatory statements.
    - When ordering pecuniary remedies courts should have due regard to the potential chilling effect of the award on freedom of expression.

- Courts should be obliged to propose to the parties to reach a settlement and assist them in this regards. Offers for settlements should be regarded as mitigation factors with respect to damages.

- The ceiling of pecuniary remedies should be significantly lowered.

- The Draft Amendment should specify that defendant's limited means should be a factor in determining the proportionality of a damage award.

- The Draft Amendment should contain an explicit provision that pecuniary awards should be proportionate to the harm done and that the maximum level of compensation should be applied only in the most serious cases.

- One ceiling for remedies should apply to all defamatory statements. The involvement of the media should not be regarded per se as a ground for higher liability.

III.5. Weak Procedural Safeguards

With the exception of the short time limit for initiating defamation and insult cases in proposed Article 1087.1 para 9, the Draft Amendment is short of procedural safeguards for freedom of expression.[45] Hence, the Draft Amendment makes it easy to sue for defamation and insult. Below, we analyse some procedural rules and make recommendations for adoption of additional ones in view of the need to strengthen the protection the right to freedom of expression.

Burden of Proof

According to proposed Article 1087.1 para 4, the burden to prove that the facts are true lies with the defendant. It shifts upon the plaintiff if "it would require unreasonable efforts on the part of the defendant to prove the truth, while the plaintiff possesses necessary proofs."

This provision is problematic for two reasons. *First* it opens the floor for new arguments between the parties as a result of which the proceedings can be protracted. Due to their conflicting interests, defendants and plaintiffs would fight on the issue of burden of proof. While the defendant would wish to shift the burden of proof, the plaintiff would fight that it remains with the defendant. The arguments would complicate the proceedings which may result in protraction. The proceedings might be further prolonged if the decision of the court on the issue of burden of proof is appealed before the appellate court.

Second, the proposed provision is not consistence with international standards. In particular, *Defining Defamation Principles* recommend that in cases involving statements on matters of public concern, the plaintiff should bear the onus of proving the falsity of any statements or imputations of fact alleged to be defamatory.[46]

This re-states the general principle developed by constitutional courts that placing the burden of proof on the defendant will have a significant chilling effect on the right to freedom of expression. For example, in the case of *New York Times v Sullivan*, the US Supreme Court held

> Allowance of the defence of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. Even courts accepting this defence as an adequate safeguard have recognised the difficulties of adducing legal proof that the alleged libel was true in all its factual particulars. ... Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which 'steer far wider of the unlawful zone'.[47]

ARTCLE 19 recommends revising the proposed Article 1087.1 para 4 in accordance with the above principles.

Time Limit for Suing for Defamation and Insult

Proposed Article 1087.1 para 9 of the Draft Amendment sets out the time limit for lodging a claim for compensation for defamation and insult. The time limit is one month from the

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[45] A good rule of protection of sources is formulated in Article 5 of the Law of Mass Media[45]
[46] Principle 7, *Defining Defamation*
[47] *New York Times Co. v. Sullivan*, 376 US 254 (1964), p. 279.

moment the person becomes aware of the dissemination of the insult or defamation but not later than 6 months after publication.

Even though the Draft Amendment can be commended for the short time limit for initiating of court proceedings for insult and defamation, the regulation is incomplete inasmuch as it does not take into account that statements are often published on continuous basis, such as websites on the internet.

ARTCLE 19 recommends that the Draft Amendment specifies that the date of publication shall be the first date when the statement in question was published at that location and in that form.

Interpretation

The Draft Amendment does not contain a specific provision ensuring that the interpretation of its provisions is made in accordance with the European Convention on Human Rights.

The case-law of the European Court establishes principles and standards which should guide national judges in the examination of defamation cases. The incompliance of domestic case law with the European Convention leads to applications to the European Court decisions against the government responsible for violations of human rights.

Bearing in mind that compensations to victims of violations increase the financial burden of the government, it is recommended that an explicit provision of the Civil Code ensures that the interpretation of the provisions concerning protection of honour, dignity and public reputation be carried out in accordance with the guarantees of the European Convention as elaborated in the case-law of the European Court.

Limits of Liability for Defamation

The Draft Amendment does not impose any limit of the liability for defamation.

The failure of the Draft Amendment to impose limits of the liability for defamation is worrisome because a large number of people risk being sued for defamation due to their "innocent dissemination" of defamatory statements. For example, internet service providers may be held responsible for dissemination of defamatory statements even though they lack any direct link to them. In this respect, it is worth pointing as an example to Article 16 of the Law of Georgia on the Freedom of Speech and Expression which states that "[a] person shall not be imposed a liability if he did not and could not know that he disseminated defamation."

ARTCLE 19 recommends that the Draft Amendment exclude from the scope of liability for defamation people who are not authors, editors or publishers of statements who did not know and could not know that they were contributing to the dissemination of defamatory statements.

Summary dismissal of unfounded claims

The Draft Amendment does not provide effective remedies against abuse of the judicial process by plaintiffs who bring unsubstantiated defamation cases with a view to stifling criticism rather than vindicating their reputation.

Defendants should have legal means against plaintiffs who bring clearly unsubstantiated defamation cases, without prospect of success, to try to prevent media criticism of their actions. Like any other court action, unsubstantiated defamation cases have a chilling effect on freedom of expression. The latter is actually sought by plaintiffs.

ARTICLE 19 recommends that a procedural mechanism is set up to strike out claims early on in the proceedings unless the plaintiff can show some probability of success.

Recommendations:

- Proposed wording of Article 1087.1 para 4 should be revised stating that the plaintiff bears the burden of proving the falsity of any statement of fact alleged to be defamatory if the latter relates to matters of public concern.

- The Draft Amendment should include a provision setting out that the interpretation of the provisions concerning the protection of honour, dignity and public reputation should be carried out in accordance with the guarantees of the European Convention as elaborated in the case-law of the European Court.

- The Draft Amendment should specify that the time limit for initiating defamation cases starts from the first date the statement in question was published at that location and in that form.

- The Draft Amendment should exclude from the scope of liability for defamation people who are not authors, editors or publishers of statements who did not know and could not know that they were contributing to the dissemination of defamatory statements.

- Courts should be able to strike out unsubstantiated claims early on in the proceedings in order to prevent malicious plaintiffs from suppressing media criticism by initiation of defamation cases with no prospect of success.

ANNEX 1: DRAFT AMENDMETNS

First Reading
□-774-23.11.2009,15.03.2010-□□-010/1

REPUBLIC OF ARMENIA LAW
On making amendments and supplements to the RoA Civil Code

Article 1.

Rephrase Article 19 of the Civil Code of the Republic of Armenia (as of May 5, 1998) in the following wording:

"Article 19. Protection of Honor, Dignity and Business Reputation

The honor, dignity and business reputation of a person is subject to protection from insult and defamation manifested by another person in the cases and order set forth under this code and other laws.

Article 2. Supplement Chapter 60 with a new 2.1 paragraph containing the following:

"2.1 The Order and Terms of Compensation for Harm Caused to the Honor, Dignity and Business Reputation

Article 1087.1. The Order and Terms of Compensation for Harm Caused to the Honor, Dignity and Business Reputation

1. A citizen, whose honor, dignity or business reputation has been infringed by way of insult or defamation, can file a lawsuit against the person having insulted or defamed.

2. In the context of this code, insult is deemed to be a public expression by means of speech, picture, voice, sign or by any other form of publicity with the intention of causing harm to honour, dignity and business reputation (opinion or value judgement).

Within the context of this article a statement can not be deemed to have been made with the purpose of discrediting a person if that statement in the given situation and content is made due to an overweighing public interest.

3. In the sense of this code defamation is deemed to be the public expression of false facts in regard to a person, which infringe his/her honor, dignity or business reputation and do not correspond to the reality.

4. The burden of proof that the facts are true lies with the defendant. It will devolve upon the plaintiff if it would require unreasonable efforts on the part of the defendant to prove the truth, while the plaintiff possesses necessary proofs.

5. The statement of facts within the meaning of part 3 of this Article shall not be considered as defamation if:
   a) it was made by a participant in a court proceeding on the circumstances of the case under hearing;

   b) if stating it, in the given situation and content, contributes to an overweighing public interest and if its author proves that he/she has made reasonable efforts to find out the truthfulness and substantiality of the statements and has presented them in a balanced manner and in good faith.

6. In the case of insult as a moral compensation the aggrieved party has the right to demand in court from the person having insulted him/her one or several of the measures listed below:
   a. Public apology. The manner of apologising shall be determined by court.

   b. Refutation, if this is possible, taking into account the nature of insulting statements.
   The manner of refutation shall be determined by court.

   c. Publication of the court decision by the media having published the insult. The manner and volume of such publication shall be determined by court.

   d. a lump sum payment of compensation
      - in the amount of up to 250 times the minimum monthly salary.
      - In the amount of upto 500 times of minimum salary if the insult has been disseminated by mass media due to gross negligence and intention of a person.
      - In the amount of 1000 times of the minimum salary from the mass medium if the insult is made through mass medium. The amount shall be determined by court taking into account the peculiarities of a given case.

7. In the case of defamation, as a moral compensation the aggrieved party has the right to demand in court from the person having defamed him/her one or several of the measures listed below:
   a) A public refutation of defamatory facts. The manner refutations shall be determined by court as per the law on Mass Media.
   b) Publication of the court decision by media having published the defamation. Manner and volume of publication shall be determined by court.
   c) A lump-sum payment of compensation:
      - in the amount of up to 500 times the minimum monthly salary.
      - In the amount of upto 1000 times of minimum salary if the defamation has been disseminated by mass media due to a person's gross negligence and intention;
      - In the amount of 2000 times of the minimum salary from the mass medium if the defamation is published through mass medium. The amount shall be determined by court taking into account the peculiarities of a given case.

8. Along with receiving moral compensation defined in close 6-7 of this article, a person has the right to demand in court from the person having insulted or defamed him/her material damages, including reasonable court expenses and reasonable expenses made by him/her for restoring his/her violated rights.

9. A claim under the present article shall be submitted to the court within one month from the moment the person becomes aware of the dissemination of the insult or defamation but no later than within 6 months after publication.

Article 3: Replace the words "Article 19" of Article 22 of the Code with the words "1087.1st Article".

Article 4: Concluding provisions: This law shall enter into force on the 10th day following its publication.

First Reading

□-774²-23.11.2009,15.03.2010-□□-010/1

REPUBLIC OF ARMENIA LAW
On making amendments to the RoA Criminal Code

Article 1: To consider invalid articles 135 and 136 of the Criminal Code of the Republic of Armenia (April 18, 2003).

Article 2: This law shall enter into force on the 10th day following its official publication.

REPUBLIC OF ARMENIA LAW
On making amendments to the RoA Criminal Procedural Code

Article 1: To remove the words "paragraphs 1 and 2 of Article 135, paragraphs 1 and 2 of Article 136" from paragraph 1 of Article 183 of the RoA Criminal Procedural Code (01 July 1998).

Article 2: This law shall enter into force on the 10th day following its official publication.