

XIX

ARTICLE 19

GLOBAL CAMPAIGN FOR FREE EXPRESSION

Defamation Law Proposal for Georgia

by

ARTICLE 19

Global Campaign for Free Expression

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Introduction

Earlier this month, ARTICLE 19 published a Memorandum analysing the Georgian defamation laws, both criminal and civil.¹ ARTICLE 19 considers that all criminal defamation laws breach the right to freedom of expression, in part because civil defamation laws are perfectly adequate to protect reputations, and, as a result, we recommended complete repeal of the provision dealing with criminal defamation in the Criminal Code. Our analysis revealed several serious problems with the single provision on defamation in the Civil Code. This is a complex area of law and it simply cannot be addressed by a single provision.

Some of the more serious concerns voiced in our analysis with the civil defamation provision included the following: it appears to envisage defamation actions being brought by public bodies; it fails to provide protection against defamation actions for opinions; the burden of proof is inappropriate for cases involving matters of public concern; it does not protect certain types of statements from defamation; it includes inadequate defences against defamation; and it fails to provide appropriate limits on sanctions for defamation.

To assist freedom of expression advocates and decision-makers, we have produced this Defamation Law Proposal for Georgia. It takes the concerns we raised with the existing laws and addresses them in the form of a legal proposal. We have tried to draft this taking into account Georgian legal practice, with the assistance of our partner organisation, Liberty Institute.² It also incorporates some good comparative practice from other countries, particularly in the area of trying to counteract the tendency of damage awards to escalate and of promoting alternative remedies.

¹ Available at: <http://www.article19.org/docimages/1722.doc>.

² ARTICLE 19, however, takes full responsibility for the standards established in this Proposal, as well as the approach adopted.

DEFAMATION ACT, 2004

GEORGIA

Chapter I – General Provisions

Article 1. Objects of the Law

The objects of this law are to ensure that the rules relating to defamation do not place unreasonable limits on freedom of expression and, in particular, the publication and discussion of matters of public interest and importance, and to provide for effective and appropriate remedies for persons whose reputations are harmed by the publication of defamatory matter.

Article 2. Definitions

In this Act, unless the context otherwise requires: -

- (a) “defamatory statement” is a substantially false statement that lowers the esteem in which a natural or legal person is held in the community;
- (b) “matters of public concern” includes all matters of legitimate public interest including, but not limited to, all branches of government, politics, public health and safety, law enforcement and the administration of justice, consumer and social interests, the environment, economic issues, the exercise of power, art and culture, and matters relating to public figures and public officials;
- (c) “opinion” is a statement which either does not contain a factual connotation which could be proved to be false or cannot reasonably be interpreted as stating actual facts given all the circumstances, including the language used, for example because it can be characterised as rhetoric, hyperbole, satire or jest;
- (d) “public official” includes anyone who is elected and/or appointed to public office, and anyone who works for any branch of government or any other body which performs public functions, whether as an employee or on some other basis; and
- (e) “publish” means to disseminate a statement to one or more persons, not including a person about whom the statement is defamatory.

Article 3. Interpretation of the Law

Interpretation of this law should be carried out in accordance with the guarantees of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as elaborated in the case-law of the European Court of Human Rights.

Article 4. Judicial Guarantees

1. Subject to the provisions of this law, every natural or legal person about whom a defamatory statement has been published, which clearly identifies him or her, shall have the right to apply to the civil courts for a remedy against anyone who made or published the statement.
2. The following persons and entities cannot bring an action in defamation:
 - (a) deceased persons;

- (b) inanimate objects, including religious symbols, the flag or national insignia;
- (c) the State;
- (d) Parliament, all governmental bodies, local self-government bodies and judicial bodies; and
- (e) legal persons as defined by public law.

Article 5. Process Guarantees

1. Any application pursuant to Article 4 must be initiated within one year of the publication of the defamatory statement.
2. For publication media which can be said to publish on a continuous basis, such as websites on the Internet, the date of publication for purposes of paragraph 1 of this Article shall be the first date the statement in question was published at that location, in that form.

Article 6. Summary Dismissal of Unfounded Claims

1. A defendant shall have the right to apply to the court for summary dismissal of a claim that he or she made a defamatory statement unless the plaintiff can establish some probability of success.
2. A plaintiff shall have the right to apply to the court for summary judgment in a defamation case where it is clear that the statements were made by the defendant and are defamatory, and the defendant has no defence with a reasonable prospect of success, unless there is another reason why the matter should be tried.

Article 7. Resolution of Doubt

1. Where there is any reasonable doubt about whether a statement is one of fact or of opinion, the statement shall be interpreting as being an opinion.
2. Where there is any reasonable doubt as to whether a statement is on a matter of public concern, the statement shall be interpreting as being on a matter of public concern.

Article 8. Protection of Sources

1. No defendant in a defamation action shall be required to reveal a confidential source of information.
2. No adverse inference shall be drawn from the fact that a defendant in a defamation action refuses to reveal a confidential source of information.

Chapter II – Defences

Article 9. Proof of Truth

1. In all actions for defamation, a finding that an impugned statement of fact is substantially true shall absolve the defendant of any liability.
2. In defamation actions involving statements on matters of public concern, any statements or imputations of fact alleged to be defamatory shall be presumed to be true unless and until the plaintiff proves they are false.

Article 10. Reasonable Publication

No one shall be liable in defamation for a statement on a matter of public concern if they establish that it was reasonable in all the circumstances for a person in their position to have disseminated the material in good faith and in the manner and form he or she did, taking into account the importance of freedom of expression with respect to matters of public concern and the right of the public to receive timely information relating to such matters.

Article 11. Opinions

No one shall be liable in defamation for the expression of an opinion.

Article 12. Absolute Privilege

The following statements shall not attract liability under defamation law: -

- (a) any statement made in the course of proceedings at legislative bodies, including by elected members both in open debate and in committees, and by witnesses called upon to give evidence to legislative committees;
- (b) any statement made in the course of proceedings at local authorities, by members of those authorities;
- (c) any statement 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 – unless it can be shown that the statement in question is totally unrelated to that judicial proceeding;
- (d) any statement made before a public defender;
- (e) any document ordered to be published by a legislative body;
- (f) any notice or matter issued for the information of the public by an international organisation or international conference;
- (g) any notice or matter issued for the information of the public by any authority performing governmental or statutory functions, including the police;
- (h) a fair and accurate report of any material described in paragraphs (a) – (g) of this Article; and
- (i) a fair and accurate report of any material which is contained in an official document where the status of that document justifies the dissemination of the material, such as official documentation issued by a public inquiry, or a foreign court or legislature.

Article 13. Qualified Privilege

No one shall be liable in defamation for the following types of statements, unless the statement can be shown to have been made with malice, in the sense of ill-will or spite: -

- (a) a statement made in the performance of a legal, moral or social duty or interest;
- (b) a fair and accurate report of proceedings at any legal public meeting in Georgia;
- (c) a fair and accurate report of official proceedings or documents of a public company; or
- (d) a fair and accurate of any finding or decision of an association with formal powers of adjudication and/or control with the purpose of

promoting art, science, religion, learning, trade, business, industry, any profession, sports, pastimes or charitable objects.

Article 14. Scope of Liability

1. No one shall be liable in defamation for a statement of which he or she was not the author, editor or publisher and where he or she did not know, and had no reason to believe, that what he or she did contributed to the dissemination of a defamatory statement.
2. Natural or legal persons whose sole function in relation to a particular statement is limited to providing technical access to the Internet, to transporting data across the Internet or to storing all or part of a website shall not be liable in defamation in relation to that statement unless, in the circumstances, they can be said to have adopted the relevant statement.
3. A person shall not be deemed to have adopted a statement for purposes of paragraph 2 of this Article simply because someone has alleged that the statement is defamatory.
4. Paragraph 2 of this Article shall not apply, in the context of a defamation action, to any court order which covers the person in question and requires it to take action to prevent further publication of a statement.
5. For publication media which can be said to publish on a continuous basis, such as websites on the Internet, publication at one location, in one form shall be considered to be a single publication.

Chapter III – Remedies

Article 15. Purpose of Remedies

1. Any remedy for a defamatory statement should be based on the principle that the purpose of the remedy is to redress the harm done to the reputation of the plaintiff.
2. To give effect to paragraph 1 of this Article, courts shall, when ordering remedies, take into account, among other things, the application of any other measures – including through voluntary or self-regulatory mechanisms – which have been used to limit the harm the defamatory statement has caused to the plaintiff's reputation.
3. When ordering remedies for defamation, courts shall prioritise non-pecuniary remedies, such as a requirement to print a correction, retraction or the court's order, whenever such remedies will mitigate the harm to the plaintiff's reputation.

Article 16. Obligation to Request Voluntary Remedy

1. No one shall bring an action for defamation unless they have first requested a retraction, correction, apology or similar remedy from the defendant and a reasonable period of time has elapsed since that request.
2. Courts shall, when ordering remedies, take into account, among other things, the request pursuant to paragraph 1 of this Article and any response to that request.

Article 17. Pecuniary Remedies

1. Compensation for actual financial loss, or material harm, caused by a defamatory statement shall be awarded only where that loss is specifically established.
2. Compensation for non-material harm, or harm which cannot be quantified in monetary terms, caused by a defamatory statement shall be subject to the fixed ceiling of one hundred of minimum monthly wages, which ceiling shall be applied only in the most serious cases.
3. Compensation which goes beyond compensating for harm to reputation for a defamatory statement shall be a highly exceptional measure, which may 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.
4. Courts shall, in assessing the quantum of compensation pursuant to paragraphs 2 and 3 of this Article, have due regard to any voluntary or non-pecuniary remedies, as well as the potential chilling effect of the award on freedom of expression.

Article 18. Injunctions

1. Courts shall not order injunctions prohibiting publication prior to the initial publication of an allegedly defamatory statement.
2. Courts shall order interim injunctions prohibiting further publication of an allegedly defamatory statement prior to a full hearing of the matter on the merits only in highly exceptional cases where all of the following conditions are met: -
 - (a) the plaintiff can show that he or she would suffer irreparable damage, which could not be compensated by subsequent remedies, should further publication take place; and
 - (b) the plaintiff can demonstrate a virtual certainty of success, including proof that the statement was clearly defamatory and that any potential defences are manifestly unfounded.
3. Courts shall order permanent injunctions only after a full and fair hearing of the merits of the case and such injunctions shall be limited in application to the specific statements found to be defamatory and to the specific people found to have been responsible for the publication of those statements.

Article 19. Settlement

1. A person who has published an allegedly defamatory statement may offer to make amends, including by offering: -
 - (a) to make a correction and/or apology;
 - (b) to publish the correction and/or apology; and/or
 - (c) to pay such compensation as may be agreed.
2. An offer pursuant to paragraph 1 of this Article must be in writing and state clearly that it is an offer under this section and the particular defamatory meaning to which it relates.
3. If an offer pursuant to paragraph 1 of this Article is accepted, the party accepting the offer may not bring or continue defamation proceedings in respect of the defamatory meaning covered by the offer, but he or she shall be entitled to enforce the offer and the following provisions shall apply: -

- (a) if the parties do not agree either as to the sufficiency of the correction and/or apology, or the amount of compensation, the disagreement shall be settled by the court; and
 - (b) in case of a failure by one party to fulfil its obligations under the offer, the other party may apply to the court for an order requiring the obligations to be fulfilled.
4. If an offer pursuant to paragraph 1 of this Article is not accepted, this shall be a defence to defamation proceedings in respect of the defamatory meaning to which the offer relates unless the defendant knew or had reason to believe that the statement in question was defamatory of the plaintiff.
5. An offer pursuant to paragraph 1 of this Article may be relied on in mitigation of damages whether or not it was relied on as a defence.

Chapter IV – Concluding Provisions

Article 20. Entry into force

The law enters into force immediately after its publication.

Article 21. Repeals

1. Upon the coming into force of this law, Article 148 of the Criminal Code of Georgia shall be repealed.
2. Upon the coming into force of this law, Article 18(6) of the Civil Code of Georgia shall be repealed.