

**LEGAL ANALYSIS OF DRAFT AMENDMENTS TO THE CIVIL CODE  
OF THE REPUBLIC OF ARMENIA**

Commissioned by the Office of the OSCE Representative on Freedom of the Media  
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## **Executive summary**

The present analysis aims at exploring draft amendments to the Civil Code of the Republic of Armenia concerning liability of media outlets for defamatory or insulting comments, especially when posted by anonymous users.

Whereas the law should be regarded as a good initiative for combating the dissemination of offensive statements that is perceived, not only in the Republic of Armenia, as one of the most common problems that have arisen out of the development of the Internet, some critical points have to be made regarding the content of this proposal.

The mechanism established under the amendments to the Civil Code provides for a liability exemption in favour of media outlets in case they provide data identifying the author of the publication. Such a provision may pose a threat to protection of personal data and is likely to be determined to be a violation of Article 8 of the European Convention on Human Rights.

Furthermore, the amendments shift the liability for defamatory or insulting comments on media outlets where the owner of the website does not comply with a request of removal of defamatory or insulting comments within the very short term of 12 hours as of receiving the same. This is very problematic since, depending on the structure and the organization of the media under scrutiny, such a term would prove inappropriate, requiring efforts that cannot be fulfilled by the owners of certain websites.

From a general point of view, apart from the merits of the aforesaid provisions, the amendments seem to be affected by lack of clarity and a certain degree of vagueness.

The implementation of the supplements is likely to discourage Internet operators from carrying out business in the Republic of Armenia, since the risk of being charged with liability for defamation is apparently doomed to increase.

## **Specific recommendations**

1. The Republic of Armenia should carefully reconsider the scope of application of the provisions under examination, which presents certain degree of vagueness. The definition of implementer of media activity seems to leave room for discussion. Even the Justification provided in addition to the amendments mentions, among others, social network (to which posting of fake users' comments is common), while the attached provisions seems to refer to media outlets and, therefore, to (although not expressly mentioned) the performing of editorial control. A similar point can be made with respect to the notion of "anonymous content", which seems to rely on the efforts that the concerned person, depending on his/her ability or other skills. The identification of the scope covered by these provisions should be more accurate.
2. The exemption clause afforded to media outlets should be revisited. There is no connection between the revelation of personal data relating to the (supposed) author of a message and the immunity of the relevant media outlet from liability. The assumption behind it is that a sort of "exchange" of personal data is capable of removing liability of the website, whereas the revelation of personal data should be ordered by the competent administrative or judicial authority.

3. The term of 12 hours upon the receiving of a specific request established for websites to remove defamatory or insulting comments is not reasonable. We suggest extending it to an actually reasonable one.
4. The amendments seem to be driven by the purpose of granting “at any costs” more protection to victims of defamation or insults by shifting the liability for the same, in case of anonymous messages, on the owner of the website. This approach should be rejected and, even taking into consideration the role played by media outlets and Internet providers in respect of freedom of information, legislators should refrain from extending the liability of such operators. In fact, burdening media with such a liability would “via the back door” rely on the unverified assumption that all the websites considered actually exercise editorial control over contents posted by users and discourage these actors from carrying out their activity that qualifies as an essential part of freedom of information.

## Analysis

### 1. Introduction

The proposed amendments do pose some critical issues with respect to the standard of protection of fundamental rights set by international law, especially freedom of expression and individual right to personal data.

With regard to the right of freedom of expression, it is protected by international instruments like the Universal Declaration of Human Rights to which OSCE participating States have declared their commitment<sup>1</sup>. This right is further specified and made legally binding in Article 19 of the International Covenant on Civil and Political Rights<sup>2</sup> and in Article 10 of the European Convention on Human Rights.<sup>3</sup>

With regard to right of personal data, it should be recalled, on the one hand, the “static” dimension of privacy, related to respect for private life, enshrined in Article 8 of the European Convention of

<sup>1</sup> Article 19 of the Universal Declaration says: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”

<sup>2</sup> According to which: “Everyone shall have the right to hold opinions without interference.2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.

<sup>3</sup> 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 shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprise 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 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.”

Human Rights<sup>4</sup> and, on the other hand, the “dynamic” dimension with specific regard to data protection encapsulated in the Council of Europe’s Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data, which went into effect on 1 October 1985 and whose purpose is “to secure in the territory of each Party for every individual [...] respect for his rights and fundamental freedoms, and in particular his right to privacy, with regard to automatic processing of personal data relating to him” (Article 1), such personal data being defined as “any information relating to an identified or identifiable individual” (Article 2).

The proposed amendments are designed to combat the dissemination of insulting or defamatory content through public websites. It is worth noting at the outset that whereas the amendments expressly refer to public electronic sites, meant as “those websites which are available to unlimited number of persons via internet”, the attached opinion labeled as “justification on the necessity to adopt draft amendments” seems to define a broader scope of application, including comments posted on social networks. Or at least it seems to refer to a problem which is common to both “public electronic sites” and social networks, i.e. the posting of anonymous comments, even by fake users.

As a recent statement of Armenian journalism association has pointed out<sup>5</sup>, despite the positive effects that may arise from the regulation of users’ behavior, the proposal is bringing threats first of all for the protection of freedom of expression. In this connection, besides the international obligations before mentioned which bind Armenia, the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE<sup>6</sup> should be considered. On this occasion the participating States reaffirmed that “[E]veryone will have the right to freedom of expression.... This right will include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. The exercise of this right may be subject only to such restrictions as are prescribed by law and are consistent with international standards.”

The proposed amendment seems problematic also for the development of communication technologies. Internet operators, in fact, which are part of one of the most dynamic business nowadays, may reasonably be discouraged by the potential negative impact that such a legal framework would have because of its ambiguity and the recurrent lack of clarity in the proposed amendments. This is the reason why it is worthy, although Armenia is not member of the EU, to look at the legislation in question also in light of the legal framework adopted herein.<sup>7</sup>

## 2. Definitions and scope of application

The proposed supplement to Part 9 of Article 1087.1 of the Civil Code sets forth the conditions upon which the author of information shall be considered unknown. Notwithstanding the

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<sup>4</sup> According to Article 8 ECHR: 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

<sup>5</sup> Statement of Journalistic Associations in Armenia, regarding the Amendments to the Article 1087.1 “Order and Conditions of Compensation of Damage to the Honor, Dignity and/or Business Reputation” of the RA Civil Code, March 14, 2014.

<sup>6</sup> Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 1990.

<sup>7</sup> Even though it is not binding legislation to Armenia, Directive 2000/31/EC adopted by the European Union establishes common principles governing liability of Internet service providers and it could be considered to be a proper source of inspiration.

legislature's discretion to regulate such aspects, the aforesaid provision does not contain criteria that properly circumscribe the scope of the definition. An author of information is regarded as unknown, in fact, when "the person concerned, after making reasonable efforts, is not able to identify the author." Thus, the qualification of a comment as anonymous (which is the ground for determining significant consequences in terms of liability of the media outlets) is depending upon the concerned persons' ability to make attempts to identify the author of the defamatory or insulting comment.

This way, the legal obligation for the website owner to communicate personal data arises in connection to the ability of the aggrieved person and with no specific reference to the "efforts" that are to be made by him/her for the author of information to be considered anonymous. This provision is likely to bring consequences for media outlets, which are exposed to the risk of being charged with unlawful disclosure of personal data that they carry out on the grounds of unreasonable and unclear criteria.

The proposed supplement to Part 9.1 introduces a very critical provision which affords an exemption from liability to the "implementer of media activity" which reproduces information containing insult or defamation in case it produces "data identifying the author of information which contains insult or defamation." This amendment is likely to raise a number of legal issues as it considers the "exchange" of personal data as a condition for the websites' owners to avail themselves of a liability exemption.

It should be noted that the definition refers to "implementer of media activity" without specifying any criteria or requirement to be met for operators. The legal background of the Republic of Armenia in force leads to consider this definition limited to the subjects disseminating media products, but a further clarification should be desirable. Then, it is not clear whether this immunity covers only the owner of the websites where defamatory or offending contents are posted or even those which performs some activities, including a search engine.

The definition of "public electronic sites" established under the amendment to Part 9.3 relies upon certain criteria, including the availability to an unlimited number of persons, the fact that the site has a specific address and that it contains news and other type of information. This way it is circumscribed the scope of application of the relevant provisions, but the provision fails to adopt a key factor in this regard: the amendments, in fact, do not mention at all the exercise of editorial activity that occurs when the owner of the website has control over the contents thereof.

Nor does it support, indirectly, the existence of said requirement the text of the supplement to Part 9.4 where the owner of a public electronic site corresponds to "those persons who have the right and technical possibility for removing comments." This definition, on the contrary, is likely to trigger very problematic consequences, as it potentially includes even the providers which only supply the owner of the website with the services necessary for the publication of the same (hosting services, e.g.). Hosting providers, of course, have, from a technical point of view, the material possibility of removing comments from a website. But it is clear that requiring an ISP to remove a comment from the content of the web pages owned by the recipient of its services would amount to requiring an unreasonable obligation and even to a serious interference with the freedom of expression of the owner of the site. Clarification of this definition is desirable.

### 3. The unjustified nature of the liability exemption

The very critical point of the amendment concerns the condition upon which the implementer of media activity benefits of the liability exemption: the implementer is required to provide “data identifying the author of information”. Several problems may rise in this respect:

- The provision does not specify at all how the communication of data relating to the author of information must be articulated. Nor does it clarify (i) which data must be disclosed, (ii) to whom must they be communicated, (iii) for which purposes and in which manner the communication must be done.

Since the provision refers to “data identifying the author of information,” it is assumed that personal data are at stake, meaning “any data permitting, even indirectly, the identification of the concerned person.” Although the Republic of Armenia is not a member state of the European Union, the Directive on Data Protection in force constitutes a sound legal parameter to which refer for evaluating any legislative effort in this area. Despite the Republic of Armenia is not legally bound by Directive 95/46, there is a reasonable expectation that such data, which of course amount to “personal data” benefit from a special protection compared to other types of information.<sup>8</sup> This requirement is consistent, among others, with the participation of the Republic of Armenia to the Council of Europe. As a contracting state, in fact, it must provide protection of an appropriate degree to personal data as an essential part of the right to private life enshrined to Article 8 of the European Convention on Human Rights.<sup>9</sup> The right to anonymity of internet users is also enshrined in the Council of Europe Declaration on the Freedom of Communication on the Internet, adopted on 28 May 2003<sup>10</sup>. The amendment does not consider that personal data must be processed in accordance with certain basic principles. Disclosure of personal data to third parties should be allowed, normally as an exception, upon request of the competent judicial authority and for the purpose of permitting the aggrieved person of the defamatory or insulting conduct to bring a lawsuit against the offender. However, the concerned amendment does not specify these requirements and considers the sole communication in question as a “safe harbor” which is ensuring the media platform is exempt from liability. Nor do these provisions specify which personal data must be revealed.

- Additionally, apart from a strict legal perspective, it is not desirable to allow operators to benefit of an exemption from liability under the condition that it “exchanges” personal data. Even assuming that the communication of personal information is aimed at permitting the

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<sup>8</sup> See, for instance, the judgment rendered by the Court of Justice of the European Union in the Case C-275/06, Productores de Música Espana (Promusicae) v Telefónica de España SAU, 29 January 2008. The problem at stake, in the case in question, was that third parties’ personal data shall not be communicated in the absence a legal provision that expressly authorizes the data controller, as third parties’ rights must be balanced with the right to data protection.

<sup>9</sup> See ECtHR, 26 March 1987, no. 9248/81, Leander v Sweden; 16 February 2000, np. 27798/95, Amann v Switzerland; 2 December 2008, no. 2872/02, KU v Finland. Particularly, the last case concerned the lacking of a provision that in Finland authorized judges to order an ISP to communicate to the aggrieved person the personal data of the author of an unlawful message posted on the Internet in order to start a separate lawsuit against the same.

<sup>10</sup> See CoE Committee of Ministers Declaration on <https://wcd.coe.int/ViewDoc.jsp?id=37031>: Principle 7: Anonymity: In order to ensure protection against online surveillance and to enhance the free expression of information and ideas, member states should respect the will of users of the Internet not to disclose their identity. This does not prevent member states from taking measures and co-operating in order to trace those responsible for criminal acts, in accordance with national law, the Convention for the Protection of Human Rights and Fundamental Freedoms and other international agreements in the fields of justice and the police.

aggrieved person to file a lawsuit, it could be questionable whether the data disclosed by the implementer of media activity corresponds to the person who is the actual author of the information.

- Finally, there is no connection between the liability exemption afforded to media outlets and the communication of personal data. It should be questioned whether such an act does constitute a sound basis for exempting the implementer of media activity from the liability arising in connection to defamatory or insulting expressions.

#### 4. Lack of respect of the proportionality principle with regard to the notice and take down procedure

The amendment to Part 9.2 provides that the owner of a website shall promptly remove, within 12 hours as of receiving the request, the relevant subject, defamatory or insulting comments. If not, according to the amendment to Part 9.5, the media outlet shall bear responsibility for those comments.

The provision only refers to a “request” noticed by the concerned individual to the owner of the website. Even though this notice and take down procedure constitutes in theory a proportionate remedy, since it provides the removal of specific contents to the extent the same are defamatory or insulting, in this case at stake, due to the vagueness of the proposed provision, the envisaged mechanism is able to lead to a disproportionate restriction of freedom of expression on the Internet.

It should be taken in consideration, as a main benchmarking parameter, the Joint Declaration on Freedom of Expression and the Internet adopted on 1 June 2011<sup>11</sup>. According to art, 1, lett. a and b of the above mentioned Declaration: a) Restrictions on freedom of expression on the Internet are only acceptable if they comply with established international standards, including that they are provided for by law, and that they are necessary to protect an interest which is recognized under international law (the ‘three-part’ test). b. When assessing the proportionality of a restriction on freedom of expression on the Internet, the impact of that restriction on the ability of the Internet to deliver positive freedom of expression outcomes must be weighed against its benefits in terms of protecting other interests.

I suggest requiring the applicant to substantiate his claim by indicating certain mandatory requirements, including e.g. the time the comment was posted, the author (or the “nickname” thereof). Especially in those websites hosting a number of comments, which may not provide for a “flagging systems” which automatically gives notice to the owner that an improper comment has been posted, the mandatory provision of these elements would facilitate the removal.

These requirements would appear all the more appropriate in light of the obligation imposed on the owner to remove the comment immediately and “not later than within 12 hours following” the request. The provision of such term seems to be inappropriate and disproportionate. I understand that the assumption behind the choice of a very short term is that the more the comment remains accessible on the website, the more the harm to reputation and honor is perpetrated on the aggrieved person. However, since even from a technical perspective blocking certain contents, especially in

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<sup>11</sup> The United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information

the more popular websites, could request some steps, such a short term could in certain cases turn unreasonable. I therefore suggest extending this to a more reasonable one.

##### 5. Remedies for the aggrieved person

Finally, I also note that the amendment to Part 9.6 entitles the aggrieved person to bring a lawsuit against the owner of the site to request certain measures. Although it falls within the discretion of the legislature to determine which remedies are to be provided to the victims of defamation and insults, a request of public apology could raise several legal concerns. First, it should not be for the owner of the website to publically apologize (although it did not comply with the obligation to promptly remove defamatory or insulting comments), rather for the author of a comment that is supposed to be, in certain cases, anonymous. The provisions is deemed to be inappropriate attempt to shift on the owner of the site the responsibility for the harm suffered by the victim of defamation or insults in cases the comment has not been removed (or removed in a timely manner?). Rather, the owner of the site could be charged with a request of rectification, that is quite common in most of the EU countries but this remedy normally applies to inaccurate facts, not to other possible attacks on reputation. An obligation to publish the Court's decision can also be a good remedy.

##### 6. Finding someone guilty at any costs?

Shifting on media outlets the responsibility for defamatory and insulting comments in the cases where the author is anonymous, attaching to media an “objective responsibility” (e.g. a liability which does not depend on the voluntary or negligent causation of a harm to reputation, but on the sole circumstance that such harm has occurred) by virtue of the sole fact that the comment has been posted on a website. The legislation seems to be in search of someone guilty to grant the victims of defamation or insults legal redress.

In the enclosed Justification, additionally, there are improper references to the mentioned cases of the European Court of Human Rights. In the cited *Renaud* case,<sup>12</sup> the Court found that some defamatory and insulting comments posted by the owner of a website in the context of a political debate did fall within the scope of protection granted by Article 10 of ECHR and then declared the conviction for defamation delivered in France to conflict with the applicant's right to freedom of expression. The case proves that not all the allegedly defamatory or insulting expressions actually constitute an offence and then a judicial assessment concerning whether an unlawful conduct has actually occurred may in certain cases turn a necessary stage.. Also the case of *Delfi v. Estonia* does not offer any argument to support the legislation in question. First, the judgment rendered by the Court has been appealed before the Grand Chamber on 17 February 2014, and the decision may likely be reversed.

Apart from that, the case was very specific and concerned the media responsibility for having failed to remove several defamatory comments which had been accessible for about six weeks. The Court found that the order to pay damages (€320) issued by the domestic judge did not constitute a disproportionate interference with the right to freedom of expression. The amendments to the Civil Code that the Republic of Armenia is going to implement, instead, would lead media to bear a responsibility in case of failure to remove comments within 12 hours as of the receiving of a claim; provided that the owner does not communicate to the victim the personal data of the offender, that is likely to amount to a significant interference with individuals' right to personal data.

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<sup>12</sup> ECtHR, 25 February 2010, no. 13290/07, *Renaud v France*.