



Criminal liability for insulting a public official

Abolition of Article 318 of the Armenian Criminal
Code

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INTRODUCTION

ARTICLE 19 supports the proposal to abolish Article 318 of the Armenian Criminal Code, made by a coalition of NGOs formed of the Yerevan Press Club, the Journalists Union of Armenia, Internews Armenia, the Committee to Protect Freedom of Expression, the Investigative Journalists Association, TEAM Research Centre and Asparez Journalist's Club of Gyumri.¹ Article 318 establishes criminal liability for insulting a public official. Such enhanced protection for the reputation of public officials is incompatible with basic tenets of democracy and runs counter to long-established law under the European Convention on Human Rights. Furthermore, the term 'insult' is an ill-defined and subjective notion, and the criminal law is a disproportionate tool to protect reputation.

The following paragraphs elaborate on our support for the proposal.

CRIMINAL LIABILITY FOR INSULTING A PUBLIC OFFICIAL

ARTICLE 19 firmly believes that all criminal provisions on defamation and insult should be abolished and replaced with appropriate civil defamation laws. The criminalisation of a particular activity implies a clear State interest in controlling it and imparts a social stigma to it, neither of which we believe to be justified in relation to the protection of private reputations. Furthermore, experience in many countries shows that the powerful can abuse criminal defamation laws to restrict criticism of their activities, contrary to the public interest in the free flow of information and ideas. In recognition of this, international courts have stressed the need for governments to exercise restraint in applying criminal remedies when restricting fundamental rights.

Article 318 of the Armenia Criminal Code is particularly pernicious because it criminalises insult, a highly vague and subjective term, and because it provides enhanced protection for public officials, contrary to established jurisprudence of the European Court of Human Rights.

Criminal defamation

International law recognises that freedom of expression may be limited to protect individual reputations. However, defamation laws, like all restrictions on freedom of expression, must be proportionate to the harm done and not go beyond what is necessary in the particular circumstances. Criminal defamation provisions breach the guarantee of freedom of expression both because less restrictive means, such as the civil law, are adequate to redress the harm and because the sanctions they envisage are not proportionate to the harm done.

A number of international bodies have repeatedly called for the abolition of criminal defamation. The UN Human Rights Committee, the body with responsibility for overseeing implementation of the ICCPR, which Armenia is a state party to, has repeatedly expressed

¹ The same coalition has also produced other legislative amendments aiming to enhance the protection of freedom of expression in Armenian law. We comment on these in separate memoranda, available from <http://www.article19.org>.

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concern about the possibility of custodial sanctions for defamation.² The UN Special Rapporteur on Freedom of Opinion and Expression, appointed by the UN Commission on Human Rights, has called on States to repeal all criminal defamation laws in favour of civil defamation laws.³ Every year, the Commission on Human Rights, in its resolution on freedom of expression, notes its concern with “the abuse of legal provisions on criminal libel”.⁴ And, in their joint Declarations of November 1999, November 2000 and again in December 2002, the three special international mandates for promoting freedom of expression – the UN Special Rapporteur, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression – called on States to repeal their criminal defamation laws. The December 2002 Joint Declaration stated:

Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.⁵

The European Court of Human Rights has never actually ruled out criminal defamation, but it also recognises that there are serious problems with criminal defamation. It has frequently reiterated the following statement, originally made in a defamation case:

[T]he dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media.⁶

One of the most serious problems with criminal defamation laws is that a conviction may lead to the imposition of a serious sanction and that the journalist concerned (it is often the media who fall victim to these laws) will gain a criminal record. This is by no means a trivial sanction and may have serious repercussions in terms of that journalist’s future work and employment. Even a suspended sentence can have a serious chilling effect on the right to freedom of expression, since the person concerned will in the future think twice before akin critical or controversial statements. This hinders the media’s functioning as a ‘public watchdog’ which is clearly not in the public interest. In the very first defamation case before the European Court of Human Rights, the Court considered that even a minor fine was a serious matter:

[T]he penalty imposed on the author... amounted to a kind of censure, which would be likely to discourage him from making criticisms of that kind again in future... In the context of political debate such a sentence would be likely to deter journalists from contributing to public discussion of issues affecting the life of the community. By the same token, a sanction such as this is liable to hamper the press in performing its task as purveyor of information and public watchdog.⁷

² For example, in relation to Iceland and Jordan (1994), Tunisia and Morocco (1995), Mauritius (1996), Iraq (1997), Zimbabwe (1998), Cameroon, Mexico, Morocco, Norway and Romania (1999), Kyrgyzstan (2000), Azerbaijan, Guatemala and Croatia (2001), and Slovakia (2003).

³ See *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, 18 January 2000, para. 52 and *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2001/64, 26 January 2001.

⁴ See, for example, Resolution 2000/38, 20 April 2000, para. 3.

⁵ Joint Declaration of 10 December 2002. Available at:

<http://www.cidh.oas.org/Relatoria/English/PressRel02/JointDeclaration.htm>.

⁶ *Castells v. Spain*, 23 April 1992, Application No. 11798/85, para 46.

⁷ *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, par. 44.

Protecting public officials

It is well-established that the right to freedom of expression requires public officials to tolerate more criticism than ordinary persons. In one of the very first freedom of expression cases before it, the European Court of Human Rights thoroughly denounced the idea that public figures such as politicians should receive enhanced protection under defamation law. The Court said:

The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance. No doubt Article 10 para. 2 (art. 10-2) enables the reputation of others - that is to say, of all individuals - to be protected, and this protection extends to politicians too, even when they are not acting in their private capacity; but in such cases the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues.⁸

In a later case, the Court made it clear that the same principle applies to public officials:

Civil servants acting in an official capacity are, like politicians, subject to wider limits of acceptable criticism than private individuals.⁹

It is clear, therefore, that a provision that establishes a separate category of protection for public officials and provides for graver forms of punishment for ‘insulting’ or ‘defaming’ public officials, such as Article 318 of the Armenian Criminal Code, is *prima facie* in violation of Article 10 of the European Convention on Human Rights.

Insult

ARTICLE 19 believes that defamation laws are legitimate only if their aim is to protect the reputations of individuals – or of entities with the right to sue and be sued – against real injury. Defamation laws should not protect people from language that is merely offensive or shocking. It is worth noting in this regard the European Court’s maxim 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”.¹⁰

We are therefore highly concerned by the criminalisation of ‘insult’ in Article 318. Although left undefined, we assume this to refer to statements of opinion which do not contain allegations of fact – as opposed to “defamation”, which is specifically defined to refer to spreading “false information”. ARTICLE 19’s *Defining Defamation*,¹¹ a set of principles on the protection of reputation and freedom of expression that has been endorsed by the UN Special Rapporteur on Freedom of Expression, rules out defamation restrictions on statements of opinion:

No one should be liable under defamation law for the expression of an opinion.¹²

⁸ *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, par. 42.

⁹ *Thoma v. Luxembourg*, 29 March 2001, Application No. 38432/97, para. 47.

¹⁰ See, amongst others, the Court’s judgment in *Dichand and Others v. Austria*, 26 February 2002, Application No. 29271/95, para. 37.

¹¹ London: 2001.

¹² *Ibid.*, Principle 10(a).

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Even where liability may ensure for the expression of an opinion, it is recognised that this should be the case only for the most serious defamatory statements, devoid of any factual basis and specifically intended to cause harm to reputation.¹³ Without such limitations, any rule prohibiting statements of opinion is almost certain to be abused by those seeking to avoid criticism. Such a broad interpretation almost certainly goes beyond what may permissibly be restricted under Article 10 of the European Convention. This has been recognised in other European countries. For example, the Paris *Tribunal de Grande Instance* has indicated that the French ‘insult’ provisions – now no longer applied – are in breach of Article 10 of the European Convention.¹⁴

Recommendation:

- Article 318 of the Armenian Criminal Code should be abolished.

¹³ See, for example, *Unabhängige Initiative Informationsvielfalt v. Austria*, 26 February 2002, Application No. 28525/95, para. 46 (European Court of Human Rights).

¹⁴ This judgment was referred to in the European Court of Human Rights’ judgment in *Colombani and others v. France* (25 June 2002, Application No. 51279/99), which indicated that the French provisions are no longer applied.