



STATEMENT

ON

PROPOSED AMENDMENTS TO

MOLDOVAN DEFAMATION PROVISIONS

by

ARTICLE 19
Global Campaign for Free Expression

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1. Introduction

The Moldovan authorities recently considered amendments to their defamation provisions, following a proposal by President Vladimir Voronin at the end of March 2004, to amend the Criminal and Civil Codes so as to decriminalise defamation in the first case and to reinstate a ceiling for pecuniary damages for defamation in the second. This follows the entering into force of new Civil and Criminal Codes on 12 June 2003.¹

On 22 April 2004, in a development very much welcomed by ARTICLE 19, the Moldovan Parliament voted to remove from the Criminal Code Article 170 (Slander).² However, the issue of an upper limit for fines in defamation cases remains contentious.

¹ The Civil Code was adopted on 6 June 2002 and the Criminal Code on 18 April 2002. The old (1964) Civil Code included a ceiling for defamation.

² See our press release. Available at: www.article19.org.

This Statement is intended to aid the discussion on the proposed amendments, so as to ensure that Moldovan legislation is, as much as possible, in line with its responsibilities under international law. It sets out general standards relating to the issue of sanctions for defamation.

2. International Guarantees

Moldova ratified the *International Covenant on Civil and Political Rights* (ICCPR)³ in 1993 and the *European Convention on Human Rights* (ECHR)⁴ in 1997. The Constitution of Moldova proclaims the supremacy of international law over domestic law at Article 4.

In addition, the Moldovan Constitution guarantees freedom of expression at Article 32(1):

All citizens are guaranteed freedom of opinion as well as the free public expression of their thoughts and opinions by way of word, image or any other possible means.

In its ruling of 19 June 2000, the Supreme Court of Moldova provided explanations regarding the enforcement of defamation legislation.⁵ The Supreme Court held that principles of international law – in that case, Article 10 of the ECHR) had to be applied directly by all Moldovan courts.

3. Civil Defamation and Proportionality

Article 16 of the 2003 Civil Code stipulates that defamation consists of the dissemination of false and harmful information. The burden of proof is placed on the defendant to prove that the information was true and there is no defence of reasonable publication.⁶

Both a ceiling and floor for pecuniary damages were removed when the new Civil Code was adopted in 2003.⁷ The abolition of a floor is to be welcomed, since in principle courts should be free to assign any or no damages depending on their assessment of the seriousness of the defamation, along with any measures taken to address it. In addition, non-pecuniary measures, such as a timely apology or reply, may well be sufficient to restore any harm to reputation.⁸

However, the abolition of the ceiling is problematical. ARTICLE 19 has received communications indicating that the elimination of the upper limit has already led to cases where prohibitively high fines have been imposed. These may result in severe, often crippling, financial losses for media outlets or at least act as a severe deterrent to the

³ Adopted and opened for signature, ratification and accession by UN General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force 3 January 1976.

⁴ Adopted 4 November 1950, E.T.S. No. 5, entered into force 3 September 1953.

⁵ Article 7 of the 1964 Civil Code as it was then.

⁶ See *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*, ARTICLE 19 (London: ARTICLE 19, 2000), Principle 9.

⁷ According to Article 7(1) of the 1964 Civil Code, penalties could not exceed 3,600 Moldovan lei (US\$270). The ceiling was abolished despite wide-spread protests and this was followed by immediate calls for its re-introduction.

⁸ See *Defining Defamation*, note 6, Principles 13-15.

dissemination of critical statements. This is particularly problematical given the lack of a defence of reasonable publication (see below).

Under international law, the requirement of proportionality clearly applies to sanctions. In *Tolstoy Miloslavsky v. United Kingdom*⁹ the European Court of Human Rights (the Court) accepted that “a considerable degree of flexibility may be called for to enable juries to assess damages tailored to the facts of the particular case”.¹⁰ At the same time, the Court noted that the “discretion enjoyed by the jury... [i]s not unfettered”.¹¹ Factors that are to be taken into consideration include “injury to feelings, the anxiety and uncertainty undergone in the litigation, the absence of apology...”, among others. Furthermore, “decisions on awards [must be] subject to a number of limitations and safeguards”.¹²

In the Miloslavsky case, the Court held that the imposition of a £1,500,000 damage award (approximately US\$2,300,000) could not be justified as ‘necessary in a democratic society’ and therefore constituted a violation of Article 10. The Court noted:

Under the Convention, an award of damages for defamation must bear a *reasonable relationship of proportionality* to the injury to reputation suffered [italics added].¹³

The Court also noted that, under English law, there was no sufficient “adequate and effective safeguards against a disproportionately large award”.¹⁴ This clearly implies that, pursuant to international law, there must be systems in place to ensure that damage awards in defamation cases are not excessive; courts and juries may not simply be free to impose disproportionate awards. A ceiling is an effective way for States to ensure compliance with this international law obligation, although there may also be other ways of addressing the problem.

In addition to the question of sanctions, it is essential that penalties are imposed in defamation cases only when there are clear grounds for liability, that is, when the defendant is found guilty of having disseminated false facts which lowered somebody’s reputation and does not benefit from one or another of the defences provided for under international law. It is also important that the genuine purpose and demonstrable effect of a defamation law is to protect somebody’s reputation and not, for example, to protect public figures from embarrassment.

An extremely important defence in defamation cases, which has been recognised by both international and national courts around the world, is what has been termed a defence of reasonable publication. As noted above, Moldovan law does not provide for this defence. This defence is established if it is reasonable in all the circumstances for a person in the position of the defendant to have disseminated the material in the manner and form he or

⁹ 13 July 1995, Application No. 18139/91.

¹⁰ *Ibid.*, para. 41.

¹¹ *Ibid.*, para. 42.

¹² *Ibid.*

¹³ *Ibid.*, para. 49.

¹⁴ *Ibid.*, para. 50.

she did, even where a statement of fact on a matter of public concern has been shown to be false. In determining whether dissemination was reasonable in the circumstances of a particular case, a court shall take 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.

This defence is necessary to mitigate the harshness of traditional rules whereby defendants are liable whenever they disseminated false statements, or statements which they cannot prove to be true. This traditional rule is particularly unfair for the media, which are under a duty to satisfy the public's right to know and often cannot wait until they are sure that every fact alleged is true before they publish or broadcast a story. Even the best journalists make honest mistakes and to leave them open to punishment for every false allegation would be to undermine the public interest in receiving timely information.

Recommendations:

- A system should be put in place to ensure that damage awards in defamation cases are strictly proportional to the harm caused by the defamatory statement, taking into account the potential 'chilling effect' of any such award on the media community as a whole. Careful consideration should be given in this regard to re-establishing a ceiling for such awards.
- Pecuniary damages should be imposed only when non-pecuniary remedies are insufficient to redress the harm caused by the defamatory statements and when they can be justified as necessary in a democratic society.
- No one should be subject to defamation liability unless an independent court has found him or her to be guilty of having disseminated false facts which lowered somebody's reputation and he or she cannot rely on one of the defences required by international law.
- The defence of reasonable publication should be provided for under Moldovan law.