Organization for Security and Co-operation in Europe
The Representative on Freedom of the Media
Dunja Mijatović

LEGAL ANALYSIS OF THE DRAFT LAW OF THE REPUBLIC OF LITHUANIA AMENDING THE TITLE OF CHAPTER XXII AND ARTICLE 154 AND REPEALING ARTICLES 155, 232 AND 290 OF THE CRIMINAL CODE AND THE DRAFT LAW OF THE REPUBLIC OF LITHUANIA AMENDING ARTICLE 187 OF THE CODE OF ADMINISTRATIVE OFFENCES

Commissioned by the Office of the OSCE Representative on Freedom of the Media from Boyko Boev, Senior Legal Officer, ARTICLE 19 Global Campaign for Free Expression

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Table of contents

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Executive Summary

This Comment analyzes the Draft Law of the Republic of Lithuania Amending the Title of Chapter XXII and Article 154 and Repealing Articles 155, 232 and 290 of the Criminal Code and the Draft Law of the Republic of Lithuania Amending Article 187 of the Code of Administrative Offences. The proposed amendments relate to libel, insult and contempt of court. The draft law was prepared and submitted to the Lithuanian Seimas (Parliament) by its member Loreta Graužinienė.

The Defamation Law can be lauded for a number of changes which will have a positive impact on freedom of expression and media freedom in Lithuania. These include:

- The draft criminal law decriminalizes insult, including acts degrading the honour of judges and civil officials;
- The draft criminal law decimalizes the crime of libellous accusation of commission of a serious or grave crime or in the media or in a publication;
- The draft criminal law restricts the scope of criminal libel by abolishing liability for words that arouse contempt for this person or humiliate him or undermine trust;
- The draft criminal law abolishes imprisonment for libel.

At the same time some aspects of the Defamation Law are not in favour of freedom of expression; these include:

- The proposed criminal defamation reform does not provide for full decriminalization of libel;
- The retention of the power of the public prosecutor to initiate criminal proceedings for libel;
- The retention of the penalty of administrative arrest for insulting public officials and for bailiffs;
- The protection of public officials against insult is not explicitly restricted to the performance of their duties.

Summary of recommendations

1. Libel should be fully decriminalized;
2. If libel is retained, prosecutors should be stripped of their power to launch criminal cases for libel;
3. The penalty of administrative arrest for insulting public officials should be removed;
4. The protection of public officials against insult should be explicitly restricted to the performance of their duties.

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Introduction

The present comment was prepared by Boyko Boev, Senior Legal Officer at *ARTICLE 19*,[1] at the request of the Office of the OSCE Representative on Freedom of the Media.

This Comment analyzes the Draft Law of the Republic of Lithuania Amending the Title of Chapter XXII and Article 154 and Repealing Articles 155, 232 and 290 of the Criminal Code ("the CC") and the Draft Law of the Republic of Lithuania Amending Article 187 of the Code of Administrative Offences ("the CAO"). The proposed amendments relate to criminal defamation and administrative liability for defamation. The draft law was prepared and submitted to the Lithuanian Seimas (Parliament) by its member Loreta Graužinienė.

The structure of the comment is guided by tasks formulated by the Office of the OSCE Representative on Freedom of the Media. These include to comment on the current version of the draft law by comparing provisions against international media standards and OSCE commitments; to indicate provisions which are incompatible with the principles of freedom of expression and media; and to provide recommendation on how to bring the legislation in line with the above-mentioned standards.

The Comment first outlines the international standards with respect to the right to freedom of expression and libel and insult. These standards are defined in international human rights treaties and in other international instruments authored by the United Nations, the OSCE and the Council of Europe. Part II includes an overview of the proposed defamation reform. In Part III the amendments to the CC and CAO are analyzed for their compliance with international freedom of expression standards. The Comment lists the positive aspects of the draft laws and elaborates on the negative ones, with a view of formulating recommendations for the review.

[1] Established in 1988, ARTICLE 19 advocates for the development of progressive standards on freedom of expression and access to information at the international level, and their implementation in domestic legal systems. It has produced a number of standard–setting publications which outline international and comparative law and best practice in areas such as defamation law, access to information and broadcast regulation. ARTICLE 19's Defining Defamation: Principles on Freedom of Expression and Protection of Reputations (London: ARTICLE 19, 2000) 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 (see their Joint Declaration of 30 November 2000)

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Part I. International Standards relating to the Right to Freedom of Expression and Defamation

The right to freedom of expression

Article 10 of the European Convention on Human Rights provides:

> 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 enterprises.

In the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE[2] the OSCE 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.[3]

Restrictions on the right to freedom of expression

The right to freedom of expression is not absolute. Both international law and most national constitutions recognize that freedom of expression may be restricted. However, any limitations must remain within strictly defined parameters. Article 10(2) of the ECHR lays down the benchmark, stating:

> 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.

[2] Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, June 1990.
[3] *Ibid.*, para. 9.1.

This article envisages restrictions on freedom of expression but only where they meet the following a strict three-part test:[4]

- First, the interference must be provided for by law. The European Court has stated that this requirement will be fulfilled only where the law is accessible and "formulated with sufficient precision to enable the citizen to regulate his conduct."
- Second, the interference must pursue a legitimate aim. The lists of aims at Article 10(2) of the ECHR and Article 19(3) of the ICCPR are exclusive in the sense that no other aims are considered to be legitimate grounds for restricting freedom of expression. The listed aims include the protection of national security, prevention of disorder and the rights of others.
- Third, the restriction must be necessary to secure one of those aims. The word "necessary" means that there must be a "pressing social need" for the restriction. The reasons given by the State to justify the restriction must be "relevant and sufficient" and the restriction must be proportionate to the aim pursued.[5]

Criminal defamation under international law

There is an international consensus that criminal defamation is unnecessary for protection of reputation and must be abolished in view of its chilling effect on free expression. In General Comment No. 34 concerning Article 19 of the International Covenant on Civil and Political Rights (ICCPR), the UN Human Rights Committee stated:

> States parties should consider the decriminalization of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty.[6]

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 – have met each year since 1999 and each year they issue a joint Declaration addressing various freedom of expression issues. In their Joint Declarations of November 1999, and again in December 2002, they called on States to repeal their criminal defamation laws. The 2002 statement read:

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

[4] *The Sunday Times v. UK*, Application No. 6538/7426 Judgment of April 1979, para. 49.
[5] *Lingens v. Austria*, Application No. 9815/82, Judgment of 8 July 1986, paras. 39-40.
[6] General Comment No. 34, adopted on 29 June 2011, CCPR/C/GC/34, available online at http://goo.gl/CyYeBo.

> appropriate civil defamation laws.[7]

Along the same lines, the Joint Declaration of 2010 reiterated that:

> Laws making it a crime to defame, insult, slander or libel someone or something, represent threat to freedom of expression.[8]

The Parliamentary Assembly of the OSCE has repeatedly called on participating States to "repeal laws which provide criminal penalties for the defamation of public figures, or which penalise the defamation of the State, State organs or public officials as such".[9]

In 2007 the Parliamentary Assembly of Council of Europe invited states to repeal or amend criminal defamation provisions.[10] The Council of Europe Commissioner for Human Rights also stated that defamation should be decriminalized and that unreasonably high awards should be avoided in civil cases relating to the media.[11]

The European Court, however, has never ruled out criminal defamation, and there are a small number of cases in which it has allowed criminal defamation convictions, but it clearly recognizes that there are serious problems with criminal defamation. It has frequently reiterated the following statement, including in defamation cases:

> [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.[12]

Part II. Overview of the Proposed Defamation Reform in Lithuania

The proposed reform of the defamation legislation in Lithuania is triggered by two draft laws, submitted to the Lithuanian Parliament (Seimas) by its member Loreta Graužinienė. The draft laws envisage amendments to the Criminal Code ("the CC") and Code of Administrative Offences ("the CAO") relating to liability for libel, insult and contempt of court.

[7] Joint Declaration of 10 December 2002, available online at http://www.osce.org/fom/39838.
[8] Tenth Anniversary Joint Declaration: Ten Key Challenges to Freedom of Expression in the Next Decade, available online at http://www.osce.org/fom/41439
[9] Warsaw Declaration, 1997; Bucharest Declaration, 2000; Paris Declaration, 2001.
[10] Recommendation 1814 (2007) and Resolution 1577 (2007) of the Parliamentary Assembly "Towards decriminalisation of defamation", available online at http://goo.gl/2UCvk2. See also Recommendations 1506(2001) and 1589 (2003) of the Parliamentary Assembly.
[11] T Hammarberg, Human Rights and a changing media landscape, Council of Europe, 2011.
[12] *Castells v. Spain*, *op.cit.*, para 46.

Current regulation of libel and insult in the CC and the CAO

At present libel and insult are criminal offences in Lithuania.[13] Both are punishable by custodial sentences. The crimes are part of Chapter XXII of the CC relating to crimes and misdemeanours against a person's dignity and honour.[14]

According to Article 154 of the CC libel is defined as an act of spreading false information about another person that could arouse contempt for this person or humiliate him or undermine trust in him. The penalties for libel are a fine[15], arrest[16] or imprisonment for a term of up to one year.

The offence of libel is capable of being aggravated. The aggravated offence concerns accusations of commissioning of a serious or grave crime or in the media or in a publication. The sanctions for the crime are of same type as ordinary libel, however in view of the aggravated nature, imprisonment can be up to two years.[17]

The offence of insult can be either a crime or a misdemeanour.[18] As a crime, insult is a public humiliation in an abusive manner by an action, word of mouth or in writing. The penalties are fine, restriction of liberty[19], arrest or imprisonment for a term of up to one year. If the insult is done in a manner other than publicly, it is a misdemeanour and can be punished by community service or by a fine[20] or by arrest.

Criminal responsibility for both libel and insult is sought following a complaint by the victim, a statement by his/her representative or a prosecutor's request.[21]

The CC defines additional crimes relating to specific cases of insult. Article 232 sets out that everyone who publicly in an abusive manner by an action, word of mouth or in writing, humiliates a court or a judge executing justice by reason of their activities is liable for contempt of court. The crime can be punished by a fine or arrest or imprisonment for a term of up to two years.

[13] Criminal Code of the Republic of Lithuania, http://goo.gl/vU4e8B
[14] Crimes and misdemeanours are both criminal offences, however crimes are punishable with custodial penalties (Article 11 of the CC), whereas misdemeanours with non-custodial with the exception of arrest. (Article 12 of the CC).
[15] According to Article 47 of the CC fines are calculated in the amounts of minimum standard of living (MSL). The amounts of a fines for the crimes of libel and insult can be up to 100 MSLs.
[16] According to Article 49 of the CC, arrest can be imposed for a period from 15 up to 90 days for a crime and from 10 to up to 45 days for a misdemeanour. It is served in a short-term detention facility. If arrest is imposed for a period of 45 days or less, a court may order to serve it on days of rest.
[17] Article 154 (2).
[18] See ibid. 12.
[19] According to Article 48 of the CC restriction of liberty may be imposed for a period from three months up to two years. The persons sentenced to restriction of liberty are under a specific obligation. The obligations can be: 1) not to change their place of residence without giving a notice to a court or the institution executing the penalty; 2) to comply with mandatory and prohibitive injunctions of the court; 3) to give an account, in accordance with the established procedure, of compliance with the prohibitive and mandatory injunctions.
[20] When an insult is a misdemeanour the fine is up to the amount of 50 MSLs (Article 47 (3) of the CC).
[21] Article 154 (3) and Article 155 (3) of the CC.

Article 290 incriminates the insulting of civil servants "or a person performing the functions of public administration". The penalties for the crime can be a fine or arrest or imprisonment for a term of up to two years.

Besides criminal liability, the Lithuanian legislation provides for administrative liability for certain forms of insult. Article 186[1] of the COA sets out that a person who interferes with court in delivering justice, and undermines the authority of court or judge is subject to a fine in the amount from five hundred up to one thousand litas. Article 186[2] of COA protects bailiffs from insults. Article 187 (1) of COA provides protection against insult to police officers, officers of the Special Investigations Service, the State Boarder Guard Service, the Public Security Service, the Financial Crime Investigation Service, the VIP Protection Department, the State Security Department and of the State Fire and Rescue Service. The penalty for this administrative offence is a fine in the amount of three hundred to five hundred thousand or administrative arrest for fifteen to thirty days.

Proposed changes to the CC and CAO

The proposed penal reform envisages the repeal of Articles 155, 232 and 290 of the CC. This means abolishment of criminal liability for insult, contempt of court and for insulting of civil servants.

It is also proposed to limit the liability for libel only to cases of false accusations of commissioning a crime. The aggravated crime of libel under Article 154 (2) concerning the accusations of a serious or grave crime or in the media is abolished. The reform abolishes prison penalties for libel. The criminal liability for libel continue to be sought following a complaint filed by the victim or a statement by his authorized representative or at the prosecutor's request.

The proposed change to the COA includes an expansion of the scope of Article 187 (2). The new version of the Article adds civil servants or a person performing the functions of public administration to the list of officials which the law protects against insult. The penalties for the administrative offence are retained.

Reasons for the Reform

The Explanatory note to the draft laws points out that the proposed legislation aims at enhancing the right to freedom of expression and the implementing the idea of criminal liability as a last resort (ultima ratio). According to this legal doctrine recognized by in both in the jurisprudence of the Constitutional Court and the Supreme Court of Lithuania, the criminal responsibility should be reserved for the most blameworthy acts as well as when the intended result cannot be

achieved by less intrusive or costly means.[22] The authors of the draft law reason that the criminal law provisions which are proposed to be repealed are not necessary because they overlap with provisions of the Code of Administrative Offences.

The Explanatory note also points out that Article 186[1] of the COA and Article 232 of the CC as well as Article 187 of the CAO and Article 290 serve the same purpose and taking note of the idea of criminal liability as a last resort concludes that it is "expedient" to limit liability for such acts to a single area of public law.

The expansion of the scope of persons to which Article 187 (2) of the COA offers protection against insult is explained with the abolishment of Article 290 of the CC relating to insult of civil servants and persons performing the functions of public administration.

The Explanatory note points out that the reform is expected to lead to a decrease of the workload of criminal courts and to recourse in administrative courts where the proceedings are speedier and more cost effective. As a result the implementation of the new legislation will save budget funds.

Part III. Analysis of the Draft Legislation

A. Positive aspects

The Draft Defamation Legislation can be lauded for the following changes which will have a positive impact on freedom of expression and media freedom in Lithuania:

- **The draft criminal law decriminalizes insult, including acts degrading the honour of judges and civil officials**: The decision to decriminalize insult is in line with the recommendations of Council of Europe and of the OSCE Representative on Freedom of the Media.[23] By decriminalising insult Lithuania follows the current "trend towards abolition of sentences restricting freedom of expression and a lightening of the sentences in general".[24] At present 14 OSCE participating States have partially or fully decriminalized defamation: Armenia, Bosnia and Herzegovina, Cyprus, Estonia, Georgia, Ireland, Kyrgyzstan, Moldova, Montenegro, Romania, Tajikistan, Ukraine, the United Kingdom and the United States. Besides there is no need to seek criminal liability for this crime in view of the opportunities for protection against insult provided by the COA and civil laws. Moreover the proceedings before administrative courts are speedier

[22] Nils Jareborg, Criminalization as Last Resort (Ultima Ratio), 2 OHIO ST.J.CRIM. L. 521, 523 (2004)
[23] See international standards in Part I above.
[24] Study on the alignment of laws and practices concerning defamation with the relevant case-law of the European Court of Human Rights on freedom of expression, particularly with regard to the principle of proportionality, Council of Europe, Information Society Department, CDMSI(2012)Misc 11Rev.

and more cost effective;

- **The draft criminal law decimalizes the crime of libellous accusation of commissioning of a serious or grave crime or in the media or in a publication:** This change will have a positive impact on media freedom and public debate because journalists, the media and those interviewed by the media will no longer carry a greater responsibility for their expression;

- **The draft criminal law restricts the scope of criminal libel by removing liability for words that arouse contempt for this person or humiliate him or undermine trust:** According to the new Article 154 (1) the liability is retained only for libellous accusation of commission of a crime. The proposal for removal of most of the elements of the current crime can be praised as a step toward full decriminalization of libel. In practice the retention of only one type of libel removes many of the existing possibilities for seeking criminal liability in defamation cases.

- **The draft criminal law abolishes imprisonment for libel:** This change is in line with the univocal consensus within the international human right community that imprisonment is disproportionate sanction for defamation and violates the right to freedom of expression. The UN Human Rights Committee has repeatedly expressed concern, in the context of its consideration of regular country reports, about the possibility of custodial sanctions for defamation.[25] The UN Special Rapporteurs on the Right to Freedom of Opinion and Expression repeatedly stated in their annual reports that "penal sanctions, in particular imprisonment, should never be applied."[26] The Parliamentary Assembly of Council of Europe also invited states to ensure that in the future defamatory acts will no longer be punishable by imprisonment.[27]

B. Negative Aspects

The following provisions of the proposed defamation legislation are problematic from the freedom of expression point of view:

- **The proposed criminal defamation reform does not provide for full decriminalization of libel:** The retention of criminal liability for libellous accusation of

[25] For example in relation to Iceland and Jordan (1994), Tunisia and Morocco (1995), Mauritius (1996), Iraq (1997), Zimbabwe (1998), and Cameroon, Mexico, Morocco, Norway and Romania (1999), Italy (2006) and Former Yugoslav Republic of Macedonia (2008).
[26] Promotion and protection of the right to freedom of opinion and expression, UN Doc. E/CN.4/1999/64, 29 January 1999, para. 28, available online at http://goo.gl/h8MqGY.
[27] See ibid. 10.

commissioning of a crime is not necessary because victims have civil law means of addressing unwarranted attacks on reputation. The fact that many states no longer have criminal defamation demonstrates that reputation can be protected without recourse to criminal law. Moreover, only the full decriminalization of libel can implement the idea of criminal liability as a last resort. Finally, the use of criminal laws for defamation always has a chilling effect on freedom of expression.[28] It is recommended that full decriminalization of libel be proposed.

- **The retention of the power of the public prosecutor to initiate criminal proceedings for libel:** Libel affects personal reputation and as such the liability for it should be sought only after a complaint by the victim or his representative. There is no justification for spending public money for the prosecution of defamation cases. Besides there is always a danger that prosecutors' powers to launch criminal cases may be used for protection of public order or for stifling debates on public bodies. In view of this, ARTICLE 19's Defining Defamation: Principles on Freedom of Expression and Protection of Reputations[29], sets out that "public authorities, including police and public prosecutors, should take no part in the initiation or prosecution of criminal defamation cases, regardless of the status of the party claiming to have been defamed, even if he or she is a senior public official".[30] It is recommended that should libel remain a criminal offence, prosecutors be stripped of their powers to launch criminal proceedings for libel.

- **The retention of the penalty of administrative arrest for insulting public officials under Article 187 (2) and for bailiffs under Article 186² of COA:** As it was stated above, there is universal consensus within the international human rights community that deprivation of liberty for defamation is a disproportionate interference with the right to freedom of expression and therefore amounts to a violation thereof. In *Cumpãnã and Mazãre v. Romania*, the European Court of Human Rights stated:

  > Although sentencing is in principle a matter for the national courts, the Court considers that the imposition of a prison sentence for a press offence will be compatible with journalists' freedom of expression as guaranteed by Article 10 of the Convention only in exceptional circumstances, notably where other

[28] The European Court has repeatedly criticised the imposition of criminal sanctions for defamation holding that a sanction of criminal nature has in itself a chilling effect. See *Cumpãnã and Mazãre v. Romania*, Application No. 33348/96 Judgment of 17 December 2004, para. 114; Belpietro v. Italy, ibid. para. 61

[29] Principles are based on international law and standards, evolving state practice (as reflected, inter alia, in national laws and judgments of national courts), and the general principles of law recognized by the community of nations. They are the product of a long process of study, analysis and consultation overseen by ARTICLE 19, including a number of national and international seminars and workshops. See ibid. 1.

[30] Ibid. Principle 4 (b) (iii).

fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence. [31]

In view of the above, it is recommended that administrative arrest be abolished for insult.

- **The protection of public officials against insult under Article 187 (2) of the COA is not explicitly restricted to the performance of their duties**: When public officials are not performing their duties, it is unjustified and unnecessary to offer them special protection. Thus, it is recommended that Article 187 (2) of the COA explicitly link the protection of public officials with the performance of their duties.

[31] *Cumpănă and Mazăre v. Romania*, Application No. 33348/96 Judgment of 17 December 2004,. para. 96. See also *Mahmudov v Azerbaijan*, Application No 35877/04, Judgment of 18 December 2008, paras 37, 49.