



## COMMENT

on the

# Moldovan President's Proposal on Moral Damages for Defamation

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### **Introduction**

This Comment examines President Voronin's recent legislative proposal to abolish pecuniary remedies for moral damages from defamation. The comment contains 3 parts. Part 1 presents the current provision of Civil Code concerning infringements of person's honour, dignity and business reputation and the proposed amendments to it. Part 2 analyses the changes from point of view of international standards of freedom of expression. Several recommendations concerning civil liability for moral damages from defamation are outlined in Part 3.

This Comment is provided in response to a request from the Independent Journalism Centre in Moldova, which invited ARTICLE 19 to analyse the President's proposal and elaborate on how redress for moral damages from defamation is addressed under international law.

## Part 1: Facts

On 13 June Moldova's president, Mr. Vladimir Voronin, exercising his powers to initiate legislation, proposed a bill to Parliament to modify Article 16(8) of the Civil Code of the Republic of Moldova.<sup>1</sup>

The text of the current Article 16(8) reads as follows:

Every person whose honour, dignity and business reputation has been affected by defamatory information is entitled to seek, along with the refutation of the information, reparation for the losses and compensation for material and moral damages. The amount of compensation for moral damages should be reasonable and should be determined with consideration of:

- a) the character of the information
- b) the scope of the information distribution
- c) the social consequences for affected persons
- d) the severity and duration of psychological and physical suffering of affected persons
- e) the proportion of the offered reparation with respect to the damaged reputation
- f) the degree of responsibility of the persons causing the damage
- g) the degree of the possible satisfaction of the affected person from the offered reparation
- h) the publication of corrections, reply or refutation until the lodging of the civil action
- i) other circumstances relevant to the present case

The president proposes that the word 'moral' in the first sentence and the whole second sentence be deleted. Accordingly, if passed by Parliament the new provision would read as follows:

Every person whose honour, dignity and business reputation have been affected by defamatory information is entitled to seek, along with the refutation of the information, reparation for the losses and compensation for material damages.

According to an official statement by the presidency, the aim of the bill is to protect the exercise of the right to freedom of expression by limiting damages in defamation cases. In particular, the proposal is a response to judicial cases in which excessively large damage awards have been made in defamation cases, taking into account the prejudice caused.<sup>2</sup> The statement by the presidency also claims that the modification is in accordance with the jurisprudence of the European Court of Human Rights. We note that the new civil code of Moldova, which entered into force on 12 June 2003, abolished the previous rules whereby there was a floor and ceiling for damage awards for civil defamation.

## Part 2: Analysis of the legal issues, in particular remedies

President Voronin's proposal would lead to a situation where pecuniary remedies, in other words damages for moral harm arising from defamation would no longer be

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<sup>1</sup> Nr. 1107-XV of 6 June 2002.

<sup>2</sup> Commenting these changes, ARTICLE 19 expressed concern about the possibility of excessive awards. See *Defamation Law and Practice in Belarus, Moldova and Ukraine*, p. 9 (London: ARTICLE 19, June 2006). Available at: <http://www.article19.org/pdfs/publications/the-right-to-criticise.pdf>.

available. In other words, although victims of defamation will still have certain remedies available to them, they will not be able to claim monetary damages.

A large number of defamation cases have been considered by international courts, including the European Court of Human Rights, as well as by national constitutional courts. These courts have had to balance the importance of respect for reputation against the fundamental right to freedom of expression. In July 2000, ARTICLE 19 published *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation* (Defining Defamation),<sup>3</sup> setting out the appropriate balance between these two important social values. The Principles are based on the cases noted above, as well as other authoritative statements of international standards in this area. *Defining Defamation* has been endorsed by, among others, the UN Special Rapporteur on Freedom of Opinion and Expression and the OSCE Representative on Freedom of the Media. Principles 13-19 relate to remedies for defamation.

ARTICLE 19 recognises that it is appropriate to limit freedom of expression to protect reputations. One's reputation is closely linked to one's dignity, not to mention one's ability to live and work in society. At the same time, defamation laws have historically been over protective of reputations and have been abused to unduly limit freedom of expression. Many of the international and national cases on defamation noted above, including a majority of those before the European Court of Human Rights, have held that existing national laws are overly restrictive of freedom of expression.

A key problem with many defamation laws is that they allow for excessive sanctions for defamation which, on their own, represent a breach of the right to freedom of expression. The European Court, for example, has clearly stated that "the award of damages and the injunction clearly constitute an interference with the exercise [of the] right to freedom of expression."<sup>4</sup> As a result, sanctions for defamation must bear a "reasonable relationship of proportionality to the injury to reputation suffered" and this should be specified in national defamation laws.<sup>5</sup>

Defining Defamation outlines the following principles for defamation remedies:

1. Different types of remedies should be available to respond to different types of harm from defamation. Legal remedies should be available but the system overall may also include voluntary or self-regulatory remedies, for example adopted by individual publisher's houses, broadcasters or their organisations and/or journalists' unions. The existence of different types of remedies implies that no particular type of remedy, for example pecuniary remedies, should necessarily apply in any given situation.

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<sup>3</sup> (London: ARTICLE 19, July 2000). Available at: <http://www.article19.org/pdfs/standards/definingdefamation.pdf>.

<sup>4</sup> *Tolstoy Miloslavsky v. the United Kingdom*, 13 July 1995, Application No. 18139/91, para. 35.

<sup>5</sup> *Ibid.*, para. 49.

2. The overriding goal of providing a remedy for defamatory statements should be to redress the harm done to the reputation of the plaintiff, not to punish those responsible for the dissemination of the statement.<sup>6</sup>
3. In applying remedies, regard should be had to any other mechanisms – including voluntary or self-regulatory systems – which have been used to limit the harm the defamatory statements have caused to the plaintiff’s reputation. Regard should also be had to any failure by the plaintiff to use such mechanisms to limit the harm to his or her reputation.<sup>7</sup>
4. Courts should prioritise the use of available non-pecuniary remedies to redress any harm to reputation caused by defamatory statements.<sup>8</sup>

In accordance with these principles, ARTICLE 19 does not believe that it is appropriate to rule out entirely the possibility of monetary damages in civil law for moral harm to reputation. At the same time, we understand the problem that President Voronin’s proposal seeks to address and believe that measures are warranted to ensure that damages are not excessive. One solution to this problem would be to reintroduce a ceiling on damages, such as was in place before the new civil code was introduced.

We also note that strong positions in support of freedom of expression may create a backlash over time. In this regard, we note that defamation is still a crime in Moldova, although it has been recently abolished in most instances.<sup>9</sup> In many Member States of the Council of Europe, civil defamation laws are now the primary or only means by which reputation is protected. Criminal defamation laws in many countries have either fallen into disuse – in the United Kingdom, for example, there has not been a public prosecution for many years<sup>10</sup> – or their use has come under heavy criticism, including from the European Court of Human Rights.<sup>11</sup> One of the most serious problems with criminal defamation laws is that a breach may lead to a harsh sanction, such as a heavy fine or suspension of the right to practice journalism. Even where these are not applied, the problem remains, since the severe nature of these sanctions means they cast a long shadow.

Decriminalisation of defamation is a modern trend. A number of countries – including some of Moldova’s neighbours – have abolished criminal defamation entirely. These include, among others, Ukraine, Georgia, Estonia, Bosnia-Herzegovina, Cyprus, Sri Lanka, New Zealand, Ghana and Mexico. We recommend that criminal defamation in Moldova be abolished entirely.

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<sup>6</sup> Principle 13(b) of Defining Defamation.

<sup>7</sup> Principle 13(c) of Defining Defamation.

<sup>8</sup> Principle 14 of Defining Defamation.

<sup>9</sup> Despite some the positive changes noted above, Moldova has still not fully decriminalized defamation, with the following provisions still on the books: Article 304, on ‘libel of judges, criminal investigators and enforcers of justice’; Article 347, prohibiting the ‘profanation of national and State symbols’; and Article 366, punishing those who are involved in the military for the offence of ‘insulting a military person’ by a subordinate.

<sup>10</sup> The UK Law Commission, as long ago as 1985, recommended the offence be abolished. See Law Commission, *Criminal Law: Report on Criminal Libel* (Law Com. No. 149, Cm. 9618, 1985).

<sup>11</sup> See, for example, *Colombani v. France*, 25 June 2002, Application No. 51279/99.

### **Part 3: Recommendations**

1. ARTICLE 19 calls on the Moldovan authorities to consider establishing a ceiling for pecuniary awards for moral damages from defamation to be applied only in the most serious cases.
2. We call on the authorities to completely abolish criminal defamation.