

The Ways of Improving Defamation Law in Armenia

Introduction

Defamation law is very important especially in this new era of human rights protection, when freedom of speech, right to privacy, right to life, liberty, property, right to dignity are of vital importance and are promoted in most countries of the world. Such laws as defamation law take an important role as they can have dual effect. Defamation law is an attempt to balance at least 2 often conflicting values-right to dignity and freedom of speech. They, in turn, involve right to privacy and right to freedom of information respectively. Thus, defamation law serves to penalize these people who make untrue, inaccurate assaults on a person's reputation, on the other hand the law, if it is harsh or abusive, can serve as a serious ban on freedom of expression.

The importance of the defamation law is that it be designed in such a way that it justly serve keeping people's dignity and reputation but not violate freedom of expression and not become a tool in the hands of many authorities and governments to abuse their power and restrict and ban the criticism of journalists. Of course, the decriminalization of defamation law is very important for the promotion of freedom of speech in all countries, but it is of greater significance for such transitional countries like Armenia. Because Armenia is a newly established democracy and is a transitional country, it is more important to decriminalize defamation law here than in such developed countries as France and Germany. The reason is clear. In France the legal system is well developed and firmly established and judges have great experience in solving disputes between the parties in such a way that human rights and freedoms be maximum protected. Though there are also many exceptions in these countries but, anyway, freedom of speech is not violated in such quantities, as in transitional countries. While in such countries as Armenia, where the legal system is still in the making, proper form and structure of laws, the remedies offered for legal wrongs are extremely important to promote human rights protection as sometimes the latter is not guided by the standards adopted in international best practice and there are also many violations of people's rights, it is essential that such contradictory laws, which deal with 2 fundamental human rights (right to dignity and freedom of speech) be in the most just structure to prevent legal wrongs.

Although the above mentioned statements are not directed to prove that the person whose reputation has been damaged mustn't have redress, compensation. Of course, right to dignity, right to privacy are very important and if these rights are violated the person must have a legal remedy. The thing is that the legal remedy mustn't be excessive and abusive in the hands of several influential people, especially government authorities. In this paper I am going to argue

that in the cases when the person is defamed and his reputation is harmed, civil action in the courts in the result of which one can get a monetary compensation is better. The advantages of decriminalization of defamation law will also be discussed for trying to find ways of improving defamation law in Armenia by comparing different legal spheres, jurisdictions and by citing international best practices.

1. The Current Situation of Defamation law in Armenia and its Roots.

Freedom of speech is regarded to be fundamental right, especially in democratic societies. This, among other things, involves the right of the press to report and comment on matters of public concern, which is essential to create and maintain an informed electorate. The press is considered to be the fourth branch of Government, which with the help of freedom of expression checks and balances other branches of Government and tries to keep them from abusing their power. However, journalists must understand that freedom of expression is not absolute. No individual or media organization has the right to knowingly publish false and damaging statements about another individual without consequence. Individuals whose reputations have been harmed as a result of such publications should have the right to redress. But the question is-through civil or criminal courts?

Criminal defamation law is an outdated legacy of autocratic, totalitarian or colonial states and doesn't fit into the society that claims to protect and promote freedom of expression. It strangles dissent and debate, punishing legitimate criticism of government officials and institutions. Too often, it serves no purpose other than to provide government and government officials with the power, through intimidation or post-publication sanctions, to discourage journalists, scholars, politicians and ordinary citizens from expressing critical views that might be deemed offensive, insulting or defamatory.¹ Government can take an advantage of the defamation law being criminalized to punish journalists who speak not in the way favorable to it. Thus the Government can abuse the criminalized defamation law to keep the journalists in fear and prevent them from expressing critical opinion about Government. This can have a disastrous effect in a society where human rights protection is not developed enough.

In Armenia the defamation law is criminalized despite the fact that Armenia had taken certain obligations to fulfill by the European Neighborhood policy and Eastern Partnership plans. On July 19, 2007 the RA Government decision N 927 provides that pursuant to Armenia's obligations stipulated by the European Neighborhood Policy in the framework of European Union programs, it takes the obligation to discuss the possibility of decriminalization of Defamation law in Armenia. A few improvements have been made towards achievement of these obligations. Punishment and sanctions for defamation are less harsh now, but the ultimate aim-the decriminalization of law was not achieved.

Current Armenian defamation law in the Criminal Code is the following:

¹ Jane E. Kirtley et al, *Criminal Defamation: An "Instrument of Destruction"*, USA, University of Minnesota Minneapolis, Minnesota, , 2003, p1.

Article 135. Defamation

1. Defamation-dissemination of evidently false information humiliating the person's good reputation, dignity and honor, is punished with a fine in the amount of 100 to 500 minimal salaries.
2. Actions envisaged in parts 1 of this Article, if repeated are punished with a fine in the amount of 300 to 1000 minimal salaries or by maximum one year imprisonment.

In order to understand whether defamation law fits the purpose and objectives of criminal code, it's enough to read **Article 2** of it which stipulates that:

1. The objectives of the Criminal Code are as follows: to protect from criminal encroachment human and citizens' rights and freedoms, the rights of legal entities, property, the environment, public order and security, constitutional order, as well as to prevent crime.
2. To implement these objectives, the Criminal Code stipulates the grounds for criminal liability and the principles of criminal legislation, and determines which dangerous acts are considered criminal offences for the society and establishes the types of punishment for the committal of these acts and other penal and legal measures.

If the objective of the criminal code is to prevent crime, than we must understand what is the definition of an action which is considered to be crime and visa versa. **Article 18** of the RA Criminal code provides that:

1. The willful committal of a socially dangerous act envisaged in this Code is considered a crime.
2. The act or inaction which may formally contain the features of an act envisaged in this Code, but which, however, does not present public danger because of its little significance, i.e. it did not cause or could not have caused significant damage to an individual or a legal entity, to the society or the state, is not considered a crime.

The objectives of the criminal code and the definitions of a crime and an action not considered to be crime themselves speak against defamation law being criminalized. In RA criminal code "socially dangerous" act is considered to be a crime, while an action that "does not present public danger, ... did not cause or could not have caused significant damage to an individual or a legal entity, to the society or to the state, is not considered to be a crime". The defamation is not an action that can cause significant damage to the society, state, as by spreading false information about one person you don't cause danger for the whole society or state. Of course, there can be a counter argument that if defamation is done with malice it may

turn into a social problem, if not prevented. I agree that malice may cause damage to the society but

- 1) It is very difficult to prove whether defamation is done with malice or good faith
- 2) Besides, there are a lot of acts regulated by the Civil Code that may involve malice as well, but they are still in the Civil Code (for example causing damage to another and unjust enrichment²)

So, malice on the one hand in ordinary cases is very hard to prove and on the other hand it can yet serve as another cause to ban freedom of speech by the Government and authorities, whenever it is beneficiary for them, by stating that malice is involved. Besides, if we take into consideration the malice fact and want to be guided by it, we must criminalize a lot of provisions of the Civil Code as well which can serve not the purposes of human rights protection, but just visa versa-their violation.

Even in the US, where the defamation law is judged according to “actual malice” test (New York Times vs. Sullivan) , i.e. if malice is involved the person is held liable for defamation, the other person, who is defamed gets redress through civil litigation. Thus, carefully examining the Civil and Criminal Codes of Armenia, by studying the objectives of the Criminal Code, the definition of the term “crime” and by considering the counter arguments I can conclude that the Defamation law doesn’t fit the purposes of the Criminal Code of the Republic of Armenia. And yet without considering the other advantages of decriminalization of the defamation law this fact would be sufficient to say that the defamation law must be decriminalized in Armenia.

Defamation can’t cause a significant damage to the society in such extent as to be considered a crime. Another thing is that it can cause damage to the person who is defamed. The harm the person gets is the damage to his reputation, maybe emotional distress, i.e. mainly moral damages, though sometimes defamation can cause substantial harm as well.

For the moral damage that the person gets from defamation in many legal jurisdictions the institute of monetary compensation exists, which is absent in Armenia, while, in my opinion, this legal institute of monetary compensation (civil action) is a very proper way of compensating the person whose reputation has been harmed. For the substantial harms caused by the defamation, if such exist, the monetary compensation is even a better redress, because person may be able to recover the losses with the help of monetary compensation the quantity of which will be decided by the court pursuant to the damages suffered by the victim of the defamation. This will work better in Armenia than criminal defamation law, which seems to be mainly for government and

² RA Civil Code, Chapter 2, Article 10(6,7)

famous public people as in Armenia very few cases for defamation are brought to courts by ordinary people and one and a major reason for it is the criminalization of the defamation law.

Recently I conducted a survey among 100 people asking them if they would sue the person who defamed them when they knew that he/she would be punished by either going to jail or a large amount of money which will be paid as a sanction”. And the 70% (the absolute majority) answered-no. The reasons were different. One of the reasons was that people weren't willing to spend so much time, effort, money if they would have no substantial profit from it. The money wouldn't come back to them, it would be paid as a sanction.

The other reason was that some people considered that if their reputation was harmed they would be very much suppressed emotionally and would want a redress, but not by sending the person to jail as they considered it to be very harsh. This is also a matter of mentality and way of thinking. .

Only 8% firmly answered “yes” to my survey questions, while the other 22% wasn't sure yet.

Then I talked to a famous person in our society who had been defamed in the press and she suffered emotional distress because of it. She decided to sue. But when she learnt that the journalist would be put to prison, because the defamation was repeated, she refrained from doing that. To my answer why did she quit everything, she answered, that she had learnt that the person defaming her would be put to prison and although she would like to punish him and get a redress for being defamed, she didn't want it to be in such a harsh way- by sending the person to prison. She was of firm opinion that the redress offered by the Armenian legal system wasn't sufficient

All this survey leads to one conclusion-the criminalized defamation law in Armenia is not only dangerous in the terms that it can ban on freedom of speech and can become a tool in the hands of Government to punish Media so as to avoid criticism, but also ordinary people rarely use it to have redress for damages they get from being defamed, as remedies offered by the Armenian legal system are time, effort and money taking, instead giving nearly nothing to the person defamed. The amount paid as a sanction or imprisonment are not sufficient compensation for defamation law and to prove this we had better examine the history of the defamation law and several examples of different countries in the world.

The roots of the modern criminal defamation law go back to Roman empire where the offence could be punished by death³. By the thirteenth century, an English statute, “De Scandalis Magnatum”, threatened those who “[told] or publish[ed] any false News or Tales” with

³ Yanchukova Elena, *Criminal Defamation and Insult Laws: An Infringement on the Freedom of Expression in European and Post-Communist Jurisdictions*, 41 Colum. J. Transnat'l L. 861 (2003).

imprisonment. The infamous Court of Star Chamber developed common law criminal libel rules in 1488, contemporaneously with the development of the printing press.⁴ Common law libel rules remained in place in England for well into the nineteenth century, and were, in turn, enforced in the American colonies.⁵ Primarily, criminal defamation laws were for shielding the monarchy from criticism. And this purpose of the criminalized defamation laws is preserved in modern defamation laws of many countries.

The roots of criminal defamation law in Armenia go back more to the Soviet Union, as Armenia was part of that country for decades and the legal system of Armenia is much affected by the legal system of the Soviet Union. The freedom of speech was largely violated in Soviet Union and people were sent to prison for uttering a word that the authorities didn't approve. The Government used the harsh criminal defamation law to prevent people from criticizing it—a tendency that unfortunately exists in many countries till now.

The autocratic rapprochement to the freedom of speech and the criminal punishments for defamation has been transplanted to the newly established legal systems of newly independent Post-soviet countries. Of course, as years passed, several of them improved their defamation laws and we can't compare the general situation in Post-soviet countries to the situation that was in Soviet era, but there are further improvements that must be conducted in these countries, including Armenia, to reach the fair balance of the protection of freedom of expression and reputation.

⁴ Jane E. Kirtley et al *Criminal Defamation: An "Instrument of Destruction"*, USA, University of Minnesota Minneapolis, Minnesota, 2003

⁵ Yanchukova Elena, *Criminal Defamation and Insult Laws: An Infringement on the Freedom of Expression in European and Post-Communist Jurisdictions*, 41 Colum. J. Transnat'l L. 861 (2003), p2

2. Trends to Decriminalize Defamation Law in Different Treaties and Countries

The movement to decriminalize defamation laws in various countries became stronger during the recent years when a stronger stress was put on human rights protection and freedom of expression. The right to freedom of expression was established by many international treaties and organizations.

International Covenant on Civil and Political Rights

The ICCPR outlines three cumulative conditions for restrictions to the freedom of expression to be deemed acceptable:

1. Restrictions must be “prescribed by law”,
 2. Restrictions must be “necessary”. To meet the necessity threshold, a restriction does not have to be “indispensable” but it must be more than merely ‘reasonable’ or “desirable.” A “pressing social need” must be demonstrated, the restriction must be proportionate to the legitimate aim pursued, and the reasons given to justify the restriction must be relevant and sufficient.
 3. The justification for the restriction must reflect subparagraphs (a) and (b) of paragraph 3.
- Adherence to the core principles underlying the UDHR and ICCPR requires that when a State party imposes certain restrictions on the exercise of freedom of expression, these should not put in jeopardy the right itself.

Courts in countries bound by the treaties are also bound by tests of similar structure and severity.⁶

European Convention on Human Rights/ European Court of Human Rights

Under the European Convention on Human Rights the Freedom of Speech is protected as universal right. It reads:

1. Everyone has the right to freedom of expression. This right shall include freedom to

⁶ Keith Henderson, *A Regional Strategy for Promoting A Free Media AND FREEDOM OF EXPRESSION in the Middle East and North Africa*, 2005, pp. 9-10

hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

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 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.

To determine whether an “interference” or infringement has occurred, the ECHR utilizes a three-part test: 1) was it prescribed by law; 2) does it serve a legitimate purpose, 3) is it necessary in a democratic society. Because on several occasions the ECtHR has effectively overturned criminal libel convictions, this treaty has profoundly affected the application of criminal libel statutes in the 45 countries which, as members of the Council of Europe, have ratified it.⁷ Such examples are the following cases.

*Castells v. Spain*⁸ - a member of a Spanish Senate had accused the Government of not revealing the police who had killed the Basque separatist. The ECtHR acquitted the member of the Senate and held **that the limits of permissible criticism would be even wider for the Government than for politicians.**

*Lingens v. Austria*⁹, - a publisher who was convicted of the defamation of the Chancellor of Austria. The ECtHR overturned the criminal conviction of the publisher and held that who “inevitably and knowingly” open themselves to scrutiny by journalists and the public, can be subject to harsher criticism and the burden of proof must lie on the plaintiff and not the journalist. It stated that convictions like Lingens’ could have a chilling effect on the press and **discourage the press in its role as public watchdog.**

*Dalban v. Romania*¹⁰ - the ECtHR overturned the conviction of the journalist who had reported on fraud committed by the chief executive of a state-owned agricultural company. The ECtHR ruled that the conviction violated Article 10 of the Convention because even though the articles “did not correspond to reality,” they concerned the matters of public interest and by reporting on them the press expressed the essential function of a democratic society.

Of course, the ECtHR’s rulings aren’t always in favor of the applicants. For example in the case of *Barfork vs Denmark*¹¹ the court ruled that judges do not have to tolerate the same degree of

⁷ Jane E. Kirtley et al, *Criminal Defamation: An “Instrument of Destruction”*, USA, University of Minnesota Minneapolis, Minnesota, 2003, p6

⁸ 236 Eur. Ct. H.R. (Ser. A) (1992).

⁹ 103 Eur. Ct. H.R. (Ser. A); 8 Eur. H.R. 407 (1986).

¹⁰ No. 28114/95 (1999),

<http://www.echr.coe.int/Eng/Judgments.htm>.

¹¹ 149 Eur. Ct. H.R. (Ser. A) (1989).

criticism as the Government or political figures. Nevertheless, when we examine the decisions of the ECtHR we can conclude that they leave wide latitude to journalists to report on public officials and matters of public concern.

The United States

The most famous criminal defamation prosecution in colonial America was John Peter Zenger's case. Zenger had printed issues of the New York Weekly Journal, where he criticized the colonial governor for removing Chief Justice after the latter ruled against him. This was a criminal libel prosecution when Zenger was acquitted by the jury, despite the presiding judges objection and argument that the truth was no defense.¹²

In the Sedition Act of 1798 the publishing of false, scandalous and malicious writings about the government. Although the Act expired in 1801, it was not until the case *New York Times vs. Sullivan*(1964¹³) that the Supreme Court of the US declared that the seditious libel was incompatible with the US Constitution's guarantees of Freedom of Press and Freedom of Speech. Justice William Brennan wrote, the need for citizens to be informed in a democratic nation is based on "a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials".¹⁴

Anyway, the high court declined to rule that all criminal defamation statutes were necessarily unconstitutional, though it has disposition towards decriminalization of the law. For example, In *Garrison v. Louisiana*¹⁵ the Supreme Court struck down the criminal statute of the Louisiana state because it didn't require that malice or reckless disregard of truth be demonstrated as in civil cases like Sullivan. Thus it limited the use of truth as a defense. Justice Brennan although stated that "different interests may be involved where purely private libels, totally unrelated to public affairs, are concerned."¹⁶

Canada

Canada mainly follows common law tradition in defamation law, except Quebec, which has both Common law and French traditions. When deciding cases on defamation the judges balance

¹² Jane E. Kirtley et al, *Criminal Defamation: An "Instrument of Destruction"*, , USA, University of Minnesota Minneapolis, Minnesota, 2003, p. 3

¹³ *New York Times v. Sullivan*, 376 U.S. 254 (1964).

¹⁴ *Id.*

¹⁵ 379 U.S. 64 (1964).

¹⁶ *Id.* at 72, n. 8.

Canadian Charter and common law traditions. Cases that deal with defamation law are mainly civil suits, but the defamatory libel is a criminal act as established by the Supreme Court of Canada in the case *R. v. Lucas*.¹⁷ This is a leading Canada Supreme Court decision on defamatory libel. The case is about John Lucas-a prisoners' rights protector who had libeled the police officer and was convicted and charged under the Criminal Code of Canada. The issue before the Court was whether the Criminal Code provision violated the freedom of expression. The defendant claimed that they had freedom of expression guaranteed by the charter, but the court reasoned that protecting reputation from false attacks was a justifiable purpose of the law.¹⁸

The landmark civil case in defamation law in Canada was *R. v. Church of Scientology of Toronto*¹⁹. The largest money compensation ever decided was given to the plaintiff. Both defendants were found jointly liable for general damages of \$300,000 CAD and one of them alone was liable for aggravated damages of \$500,000 CAD and punitive damages of \$800,000 CAD. In the reasoning of the decision the court set aside "actual malice" standard established in US by *New York Times v. Sullivan*²⁰ In Canada when deciding the case judges counterbalance freedom of speech to essential need of the individuals to protect their reputation.

Germany

"Germany risks the wrath of the Council of Europe with her arbitrary and childish "Insult" laws", said Peter Briody. According to him "The laws on "insult" can be very useful for irregular elements in the administration, justice and industry for the purpose of entrapping a citizen, who has his own views on their doings. As soon as he reacts to a provocation with a forceful expression, then they have him. In a "pervertible" justice that is all that is necessary to settle matters to the satisfaction of everyone, except, of course the victim"²¹

The criminalized defamation law is widely criticized in Germany, though this law in Germany doesn't serve to ban the freedom of speech by the authorities in such quantities as it does in transitional countries.

¹⁷ <http://www.canlii.org/en/ca/scc/doc/html>

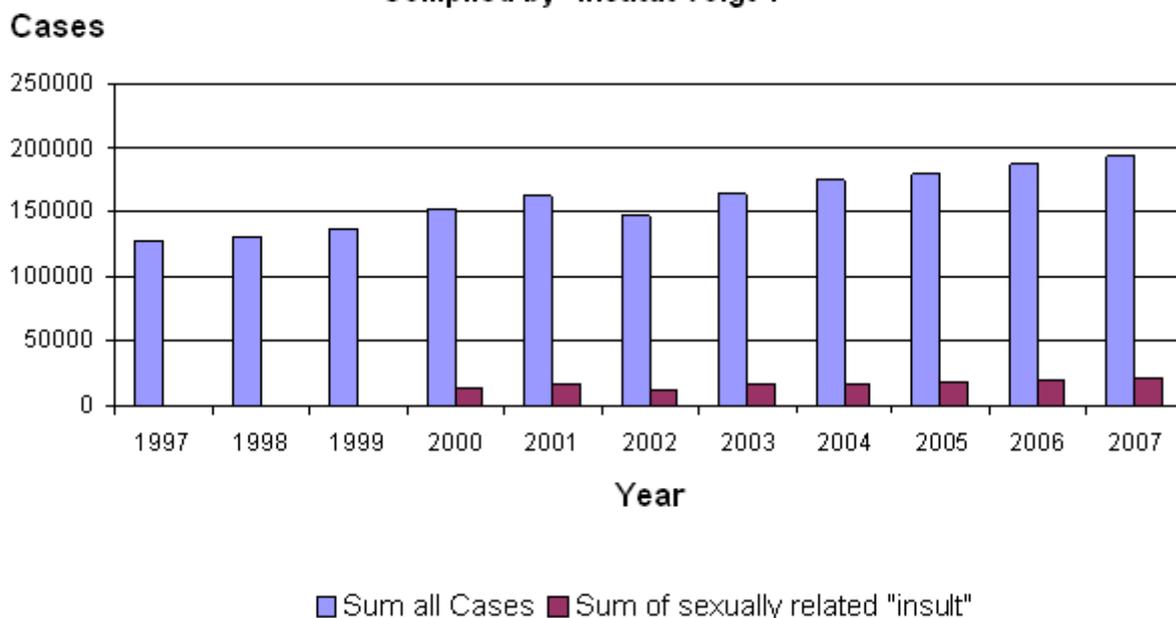
¹⁸ http://www.hrcr.org/safrica/expression/r_lucas.html

¹⁹ <http://www.canlii.org/en/ca/scc/doc/html>

²⁰ Id

²¹ Peter Briody, *Die Beleidigungsgesetze in Deutschland*, 2007, p.3

**Statistics on "Insult" per Year in Germany Data Source :
Bundeskriminalamt (1997-2007) Cases
Compiled by "institut voigt".**



As can be seen from the statistics, the number of insult (it is the same defamation in Germany) cases in Germany have risen. For such a country as Germany which is considered to be one of the countries of EU where human rights are firmly protected, such a statistics is really odd. Though incomparable with the experience of transitional countries, it still violates freedom of speech in many cases without a reasonable cause.

One example is Helmet Palmer, who was of German and Jewish origin, could still feel the remainders of Nazi way of thinking in Germany. From 1968-2003 he was convicted of defamation many times. In 3 cases he was accused under "political" defamation law, which is considered to be illegal by ECtHR.

Defenses for both civil and criminal defamation suits are: truth, legitimate public interest, and comment and critical opinion. Although truth is a good defense, it is not always a complete defense. Legitimate public interest is a defense which applies solely to statements of fact. Though the law is criminalized German courts generally do protect the freedom of speech primarily. They look favorably on defense pleas where public interest issues are at stake.²²

France

The French assume everyone has a reputation that deserves protection and which would be harmed by defamatory remarks. In Organization for Security and Co-operation in Europe

²²<http://medialibel.org/libel/other.html>

regular report to the Permanent Council 13 March 2008 the representative on Freedom of the Media Miklós Haraszti expressed his concerns following Nikola Sarkozy's criminal lawsuit against the website of Le Nouvel Observateur, following a piece that made allegations about his marriage.²³ Even though the article might have been irresponsible journalism, he asked the President to pursue the matter in a civil-law procedure. In France, defamation is both a tort and a criminal offence. The civil and the criminal action take place before the same court at the same time. The action is tried without a jury and can result in a criminal fine to the state in addition to civil damages to the aggrieved party. Prison sentences, which range from 5 days to six months, are rarely imposed.²⁴ Truth is generally a defense, but it is not easy to prove and acquittals are rare on this ground. The defendant may establish a defence if he or she can prove good faith, that is to say, that he or she proceeded with care, checked the facts, tried to contact the interested person etc. Recent examples demonstrate the strict imposition of liability in such cases.²⁵

Eastern Europe and Central Asia

The post communist countries of Eastern Europe and Central Asia have mainly their defamation laws criminalized. This comes from the Soviet legal culture, where freedom of speech was restricted and with the help of criminal defamation law Soviet Union tried to ban on the Government's criticism. Many post Soviet countries retain the same tradition till today, and so do several Eastern European countries, though very few countries such as Ukraine, Moldova, Croatia have abolished their criminal defamation laws. From the report of OSCE observer Elena Yanchukova we have a clear overview about the status of freedom of speech in different countries of this region.²⁶ She characterizes Belarus, Azerbaijan, Uzbekistan, Kazakhstan, Kyrgyz Republic, Tajikistan, and Turkmenistan as having "less progress" toward freedom of speech. Of course the words "less progress" seem too diplomatic and very mild in describing the situation of these countries as many journalists have been prosecuted and convicted in criminal libel in these countries. Yanchukova identifies Russia, Armenia, Albania and Romania as countries where criminal libel prosecutions have been brought, or are pending. She states that criminal libel remains an offense, encouraging self-censorship, in the Federal Republic of Yugoslavia. Then she mentions that these countries identified by Freedom House as having free press-Bulgaria,

²³ www.osce.org

²⁴ Virginia Journal of International Law at 953.

²⁵ <http://bghelsinki.org/fe/suggestions-en/html>

²⁶ Jane E. Kirtley et al, *Criminal Defamation: An "Instrument of Destruction"*, , USA, University of Minnesota Minneapolis, Minnesota, 2003

Estonia, Slovakia, Slovenia, the Czech Republic, Poland, Latvia, Lithuania, Hungary, all have criminal code provisions covering libel and insult, which encourage self-censorship, though not frequently invoked. All these countries are subject to the jurisdiction of ECtHR and the latter seems to promote and protect freedom of speech, but, anyway, the latter struggles to balance the competing interests of subsidiarity and universality – to respect and accommodate legitimate national interests and differences while establishing uniform and universal human rights standards for all signatories²⁷.

While domestic courts of the above mentioned countries, especially where freedom of speech is poorly protected have convicted journalists in criminal libel thus seriously hurting freedom of expression. In **Russia** a journalist- German Galkin, was convicted in criminal libel. He was the publisher of a newspaper that allegedly libeled a deputy governor and though he himself hadn't written the articles, he was sentenced to one year in the labor camp.

In **Belarus** Journalists Mikola Markevich and Paval Mazheika were convicted of libeling President Aleksandr Lukashenko shortly before the elections of 2002 and sentenced to corrective labor. Another journalist, Viktor Ivanshkevich, was similarly convicted, and sentenced, also for libeling the President for an article accusing Lukashenko of corruption.

In this case we clearly see that the criminal prosecution and conviction was used by the president for the restriction of press so as not to be criticized. Such regimes can never be called fair and free.

In **Azerbaijan** Rovshan Kabirli and Yashar Agazade were convicted for libeling the brother of Heydar Aliyev and were sentenced to 5 months imprisonment. Although they were granted amnesty and released they retain the status of convicted criminals.

I think the above mentioned cases speak for themselves.

Middle East and North Africa

Many laws in Middle East and North Africa(hereinafter MENA) contain criminal penalties, including high fines and imprisonment, and that the threat and enforcement of these laws and policies leads to government censorship, self-censorship and sometimes imprisonment. This muzzles open discussion and critical reform debate and makes the promotion of basic human rights and a good governance reform agenda virtually impossible.²⁸ Keith Henderson mentions that Indeed, the media is the main source of public information in the region and one

²⁷ Jane E. Kirtley et al, *Criminal Defamation: An "Instrument of Destruction"*, USA, University of Minnesota Minneapolis, Minnesota, 2003, pp 7-8s

²⁸ Keith Henderson, *A Regional Strategy for Promoting A Free Media AND FREEDOM OF EXPRESSION in the Middle East and North Africa*, 2005, p. 3

of the primary means for citizens to participate in the ensuing reform debate, that's why regional law strategy should include decriminalization of defamation laws. The Constitutions of most countries in the Middle Eastern and North Africa (MENA) guarantee freedom of expression and freedom of the press. However, in practice, many MENA countries either lack the necessary implementing legislation or have adopted conflicting criminal laws, decrees or enforcement policies that obviate this fundamental right. All of these laws have been used, in various ways and degrees, to stifle the press and inhibit criticism of government officials and government decisions.²⁹ So, in MENA countries, like in post-soviet countries the decriminalization of defamation law is of utmost importance.

Latin American Experience

The American Court, which is the arm of the Organization of American States (OAS) and decisions of which are binding on member states, fosters decriminalization of defamation laws in Latin American countries. This tendency's roots go back to the 2004 *Paraguay* case, when the court ruled that, "the criminal proceeding and sentence "constituted an unnecessary and excessive sanction for statements made in the context of the electoral campaign, in reference to another candidate for the presidency and matters of public interest." Such sanctions", the court said, "limited an open debate on issues of interest or public concern."

The Committee to Protect Journalists, which has helped fight criminal defamation laws in Latin America, hailed the court ruling.

"This is a major step forward for freedom of expression and the campaign to decriminalize defamation from the Americas that could have broad implications throughout the world," CPJ Executive Director Ann Cooper said. "The legal logic of this decision requires that governments in Latin America refrain from prosecuting journalists on defamation charges and reform their defamation laws to eliminate criminal penalties."³⁰

Afterwards, other similar decisions, favoring decriminalization of defamation laws, followed. In a decision with broad implications for press freedom in Latin America, such *Costa Rica case* of August, 2004.³¹

²⁹ Id. pp 7-8

³⁰ <http://www.cpj.org/2004/09/interamerican-court-condemns-criminal-defamation-c.php>

³¹ Id.

3. Comparative Analysis/Advantages and Disadvantages

In the previous part the defamation law and remedies offered for defaming people in different countries was discussed. Looking at the experience in deciding cases of defamation law we can try to find ways of improving defamation law in Armenia by comparing different legal systems and jurisdictions.

It seems like there is a tendency in the world to decriminalize defamation laws in all countries. Different resolutions have been passed on this theme by world known organizations (e.g. EU, Resolution 1577) seminars, conferences. One of them was Sri Lanka conference in September, 1999, when journalists, lawyers, advocates and UN representatives gathered to develop international standard for defamation law. Most people agreed that the criminalized defamation law intended to serve a legitimate purpose, political bodies and public figures often abuse it to silence their critics. In some countries, the government shuts down opposition by jailing journalists on groundless charges of libel or slander. In others, the technicalities of litigation serve to chill free discussion of matters of public interest. After three days of discussion, participants produced a declaration that called for the abolition of criminal defamation laws³²

The memorandum of the Commission on Security and Cooperation in Europe volume 35 No 12 of May 24, 2002 contains the following statement:

"Criminal defamation and "insult" laws are often defended as necessary to prevent alleged abuses of freedom of expression. They are not, however, consistent with OSCE norms and their use constitutes an infringement on the fundamental right to free speech".³³

The OSCE, which is the main intergovernmental media freedom watchdog in the world, values the importance and protection of freedom of speech as a fundamental value and tries to promote decriminalization of defamation laws. ECHR also considers freedom of speech to be universal right.

In countries, such as the US where the freedom of speech is highly valued, the defamation law is decriminalized in the most part of the states and the decriminalization is highly promoted by the Supreme Court. But we have an interesting dilemma because in countries such as France and Germany, the founders of the European Union which is now considered to be one of the major promoters and protectors of human rights, the defamation can be punished through a criminal lawsuit, which is criticized by major world organizations and treaties.

³²Bonnie Docherty, *Defamation Law: Positive Jurisprudence*, Harvard Human rights Journal, 2008, pp 263-264

³³Petr Biody, *Die Beleidigungsgesetze in Deutschland*, 2007, p.3

These organizations and also many experts in this field clearly understand that criminalized defamation laws lead to the roots of defamation law and can obtain the function it fulfilled then, i.e. being legacy of autocratic, totalitarian or colonial states, the aim of which was to ban the criticism of the authorities.

Of course, this doesn't mean that a person can be defamed without having redress and possibility to punish the defamer. The question is-what kind of redress: criminal or civil?

Criminal defamation laws at first sight are aimed to protect the reputation of others. This is a permissible restriction on the right of freedom of expression. But the restriction mustn't serve as a tool in the hands of the Government and authorities to ban their criticism. These laws may favor public officials by substantive or procedural rules or because they provide for heavier penalties for defamation of public officials than for private individuals, e.g. the Bulgarian law offers a series of protections to political figures above and beyond those afforded to private persons. While in most cases of ECtHR, ECtHR clearly mentioned that the political figures were subject to larger criticism and by punishing press for that criticism we deprive it from the very important function that the press fulfills-the function of a public watchdog.

Then why Germany, France and many other countries yet have criminalized defamation laws? Well, there can be different reasons, one of which is the protection of human dignity, reputation. But in this case we must do a balancing test. Here the words of Diplock J. in (*Silkin v. Beaverbrook Newspapers Ltd.*, [1958] case in Canada) are worth citing: "Freedom of speech, like the other fundamental freedoms, is freedom under the law, and over the years the law has maintained a balance between, on the one hand, the right of the individual . . . whether he is in public life or not, to his unsullied reputation if he deserves it, and on the other hand . . . the right of the public . . . to express their views honestly and fearlessly on matters of public interest, even though that involves strong criticism of the conduct of public people".

The other reason may be that in civil law Europe, defamation has historically been treated under the criminal laws. However, the review of Western European states below shows that in this region, especially during the recent years, the trend is increasingly towards the use of civil laws and further, penal sentences are virtually never imposed, i.e. the criminal defamation laws are not imposed. In recent years, no prison sentence has been served for defamation in any of the following states -Australia, Austria, Belgium, Canada, Denmark, France, Germany, the Netherlands, Norway, Sweden, the United Kingdom and the United States. This means that though for example France and Germany retain their criminal defamation laws, they do not retain imprisonment punishments for defamation and there is a tendency of decriminalization of defamation laws in these countries as well, though maybe not formally.

To be more sure in the statement that defamation law is irrelevant and is an obstacle to freedom of speech protection, the reference to ECtHR test is useful. Any alleged interference with freedom of expression is subject to stringent conditions. An interference must be “prescribed by law”, “pursuant to a legitimate aim”, and “necessary in a democratic society”.³⁴

Criminal defamation law mainly fails to pursue a legitimate goal Freedom of the press affords the public one of the best means of discovering and forming an opinion about the ideas and attitudes of their political leaders. More generally, freedom of political debate is at the very core of the concept of freedom of opinion.³⁵

Criminal defamation laws are neither necessary in a democratic society. The test of necessity includes, inter alia, the notion of “proportionality”. It is submitted that criminal defamation laws do not satisfy this requirement because criminal sanctions for speech related offences are unduly harsh. The threat of a criminal record, a penal sentence and even a suspended sentence all impose a great and unnecessary burden on a potential speaker.³⁶

Many countries who understand that defamation laws are mainly dangerous when they deal with the Government, authorities, political bodies, several courts, especially of Commonwealth countries, have restricted who has the right to bring a defamation action. Governments are frequently denied standing because of the importance of allowing criticism of the state. Courts have also blocked suits by other public bodies, including state-owned corporations and political parties.³⁷ Many countries understand the danger of giving the right to Government to sue its critics. In the case *Derbyshire County Council v. Times Newspapers Ltd*³⁸ the House of Lords ruled that the common law does not allow authorities to sue for libel. *The Derbyshire* case distinguished the county council, a governmental and democratically elected body which would be denied action to sue, while other corporations, which are not owned by state can sue, if defamation damages their business.³⁹ State-owned corporations have been denied standing to sue in several cases. For example in *Die Spoorbond v. South African Railways (1946)*, the South African court set a precedent by ruling that the national railway could not sue the newspaper for defamation. The threat of even a civil action against the newspapers for criticizing ruling class was clearly perceived by judges. Following the *Derbyshire* case the Indian Supreme Court ruled in 1994 case *R. Rajagopal v. State of T.N.* :“the

³⁴ <http://bghelsinki.org/fe/suggestions-en/html>

³⁵ <http://bghelsinki.org/fe/suggestions-en/html>

³⁶ Id

³⁷ Bonnie Docherty, *Defamation Law: Positive Jurisprudence*, Harvard Human Rights Journal, 2008

³⁸ 1 All E.R. 1011 (H.L. 1993) (U.K.)

³⁹ <http://bghelsinki.org/fe/suggestions-en/html>

Government, local authority and other organs and institutions exercising power” cannot bring a defamation suit for damages” Going a step farther, this court also ruled that because public officials do not have a right to privacy, they cannot seek damages for statements that discuss their official conduct⁴⁰ Of course, in my opinion, the Indian Supreme Court went too far by saying that public officials do not have a right to privacy. The fact that they are public officials doesn’t put them only to criticism. The right to privacy is a fundamental right for everybody. The thing is that by allowing governments to punish their critics by sentencing them can become abusive and can be a serious ban on freedom of speech.

Besides, criminal actions take longer time and effort, let alone money. You must address a prosecutor to file a suit but how much chance do you have that a prosecutor who has many more serious cases than yours (murder, theft, etc) will leave them and process your case. You may have to wait for a long time, maybe the prosecutor won’t even take the case. But even if these obstacles may seem minor and easy to overcome, there still remain clear and major disadvantages of criminalized defamation law.

While civil laws are more adequate to deal with defamation laws as they are less harsh and restrictive. civil actions are better equipped to remedy the harm of defamation than criminal actions, because they are designed to remedy the injury to the victim’s reputation by compensation in terms of damages. In contrast, criminal sanctions do not for the most part aim to remedy the actual harm caused to the victim.⁴¹ The monetary compensation for harm to reputation is very sufficient, and it may give the plaintiff just redress for being defamed. He will get money in civil case, while in the criminal case the money goes to state. The monetary compensation for moral damages(such as in defamation law) can be subject to criticism. Many people may think that it will be better for them to get a moral compensation and I will completely agree with them. Of course, moral compensation is very important, but the criminal sanctions will not give the person the moral compensation one seeks to reach. The mere fact that the person pays the money to the state and not to the person who suffered from being defamed is unjust in itself. But as the counter argument of having moral compensation is just and sufficient in defamation cases, so I would offer together with the monetary compensation the defamed person gets, he also gets a public excuse from the person who defamed him. If it is a journalist, and the case is a libel case, then he must be obliged to publish an article apologizing to the victim of his defamation.

⁴⁰ Bonnie Docherty, *Defamation Law: Positive Jurisprudence*, Harvard Human Rights Journal, p. 268

⁴¹ <http://bghelsinki.org/fe/suggestions-en/html>

In my opinion, this can be a very just compensation and sufficient to Armenia because as I have mentioned before, Armenia is a transitional post-soviet country, where the protection of human rights and freedom of speech isn't developed enough and a serious ban on freedom of speech that criminalized defamation laws can impose on can be of a particular danger. For Armenia, which is a transitional country not having sufficient legal experience and mechanisms to deal with the human rights protection, the criminalized defamation law can become a substantial obstacle on freedom of opinion and freedom of speech.

Besides the above mentioned, advantages of civil action of the defamation law, when compared to disadvantages of criminalized defamation law, show the privilege of the civil action and the monetary compensation.

Conclusion

The objectives of the Criminal Code of the Republic of Armenia and the definition of crime in it both speak for decriminalization of defamation law as the latter being in the Criminal Code, doesn't suffice the purposes of the code. Besides, the clear examination of the defamation law in other countries and the advantages and disadvantages of decriminalizing the defamation law we can come to the conclusion that Armenian defamation law should be decriminalized by all means. Armenia's being a transitional country, where human rights protection and the legal system is still in the making speaks for decriminalization of the law as it will help to protect the freedom of speech and avoid the law being a tool in the hands of the government and authorities to ban criticism. The criticism of government doesn't destroy it, it just strengthens it. This doesn't mean that the person whose reputation has been harmed won't be given chance to have redress. The reputation of the person is very important and the person defamed must have redress but the latter mustn't be excessive and very harsh so that the balance between the two very important values as freedom of speech and reputation be preserved.

To reach this I offer to decriminalize defamation law in Armenia and import to our legal system the institute of monetary compensation for moral damages. I think it will be better if the person defamed gets monetary compensation himself, instead of the state in case of criminal sanctions and that the person defamed be also granted public apology.

This can help him to save time, effort, money and get just compensation. Besides, deducting from my survey I can also think that much more people will sue if they know that the defendant won't get a very harsh punishment and instead the person injured will get both a moral and monetary compensation.