NOTE

on

the Principles of the Law of the Azerbaijani Republic on Defamation

ARTICLE 19
Global Campaign for Free Expression

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Introduction

This Note sets out ARTICLE 19's comments on the Principles of the Law of the Azerbaijan Republic on Defamation (Principles) drafted by a voluntary committee organised by the Yeni Nesil Journalists' Association. We understand that the Principles are intended to serve as the basis for a defamation law to be drafted by the same committee. Our comments are based on an unofficial English translation of the Principles received by ARTICLE 19 in March 2004.[1]

Our analysis is based on international legal standards as articulated by the European Court of Human Rights and other international bodies, and on best national practice. International standards in this area are reflected in ARTICLE 19's key standard-setting publication, *Defining Defamation: Principles on Freedom of Expression and the Protection of Reputation*.[2] These principles, setting out the appropriate balance between the right to freedom of expression and the need to protect reputations, have attained some official status, having been endorsed by, among others, the three specialised mandates for 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.[3]

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[1] ARTICLE 19 takes no responsibility for the accuracy of the translation or for comments based on mistaken or misleading translation.
[2] (London: ARTICLE 19, 2000).
[3] See their Joint Declaration of 30 November 2000.

Azerbaijan joined the Council of Europe in 2001 and ratified the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR)[4] in 2002. Upon its accession to the Council of Europe in 2001, The Republic of Azerbaijan undertook to "accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms."[5] Azerbaijan has also ratified the *International Covenant on Civil and Political Rights* (ICCPR)[6] in 1992.

ARTICLE 19 is of the view that the Principles are largely consistent with international standards and best practice in the area of defamation law. Indeed, we note that they closely reflect the ARTICLE 19 publication, *Defining Defamation*. Principle 1, for example, addresses the importance of freedom of expression and articulates the need to strike a balance between freedom of expression and the right to reputation in cases where these two interests appear to conflict. Principle 3 states that public bodies may not bring defamation actions and Principle 4 calls for the repeal of all criminal defamation provisions.

Nonetheless, there are some omissions from the Principles that should be addressed in order to ensure an appropriate balance between freedom of expression and the protection of reputation. In addition, the full meaning of some of the Principles is unclear. This may perhaps be due to translation but we comment on these instances in case they may benefit from further elaboration in the original.

General Comments

Principle 3 makes it clear that State bodies which are not allowed to engage in business activities should not be entitled to sue for defamation. In many jurisdictions, even public bodies which do engage in business are prohibited from suing in defamation. In South Africa, for example, a public railway company was prohibited from taking a defamation action.[7] Consideration should be given to removing this condition on Principle 3. Principle 3 – or at least the resulting draft defamation law – should additionally specify that corporations may only sue for injury to their business reputations.

Principle 7, titled 'Proving the truthfulness', is unclear, at least in translation. It suggests that in cases involving matters of public interest, the 'respondent' should prove falsity. We assume this should be the plaintiff.

Principle 9 refers to the expression of ideas. In order to avoid any ambiguity, the word 'ideas' should be replaced with 'opinion', consistent with the terms used in the Universal Declaration of Human Rights, the ICCPR and the ECHR.

It is unclear what is meant by the statement, in the second paragraph of Principle 1, to the effect that a restriction on freedom of expression: "cannot be regarded as legal until the entire democratic society determines that they are necessary." We assume

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[4] Adopted 4 November 1950, E.T.S. No. 5, entered into force 3 September 1953.
[5] Statute of the Council of Europe, London, 5.V. 1949, Article3.
[6] Adopted and opened for signature, ratification and accession by UN General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force 3 January 1976.
[7] *Die Spoorbond v. South African Railways* [1946] AD 999.

that this means that only restrictions which can be shown to be necessary in a democratic society are legitimate.

Principle 6 states that the right to protect the confidentiality of sources is extended to "[j]ournalists who aim to disseminate information *in the interests of the public* and other people who obtain information from confidential sources" (italics added). The Committee of Ministers of the Council of Europe has adopted a recommendation on the Right of Journalists Not to Disclose Their Sources of Information.[8] This Recommendation guarantees the right of all those who disseminate information to the public via the mass media to protect the identity of sources, regardless of whether or not the information so disseminated is deemed to be in the public interest. We therefore recommend that the reference in Principle 6 to "in the interests of the public" should be removed.

Omissions

There are certain areas where we would recommend that the Principles – or at least the resulting draft defamation law – go further than they do at present. This section addresses those areas.

'Publication' or 'publish' should be defined in such a manner as to address the particularities of different media, including the Internet. Specifically, publication should be deemed to occur on the first day of dissemination to the public. This means the date of uploading for the Internet and the first date of issue or broadcast for other media. The six-month prescription period for bringing a defamation action (Principle 5) would start to run from this date.

Other terms that might benefit from being defined include: 'defamatory statement', 'matters of public concern', 'opinion' and 'public official'.

The addition of a principle of interpretation should be considered, to require courts to apply the provision of the defamation law in accordance with the guarantees of the ECHR and the jurisprudence of the European Court of Human Rights.

An additional defence, which we refer to as the defence of 'reasonable publication', should be contemplated by the Principles. Defendants should not be liable for a defamatory statement on a matter of public concern if they made the statement in good faith and it was reasonable in all the circumstances for a person in their position to have disseminated the information in this way. This recognises that it is unreasonable to expect the media to achieve perfect accuracy and that even the very best journalists can make mistakes, particularly when reporting in a timely fashion on matters of public interest.[9]

Principle 10 provides for what is known in some jurisdictions as 'absolute privilege', according to which the publication of certain types of statements will never attract liability for defamation, even if the party responsible for dissemination was motivated by malice. ARTICLE 19 recommends that Principle 10, or the resulting law, extend

[8] Recommendation No. R (2000) 7, adopted 8 March 2000.
[9] See, for examples of this, the European Court of Human Rights decisions of: *Colombani v. France*, 25 June 2002, Application No. 51279/99 and *Bladet Tromso and Stensaas v. Norway*, 20 May 1999, Application No. 21980/93.

such protection to fair and accurate *reports* of these types of statements. This ensures that accurate accounts – in the media or elsewhere – of official statements, even if not verbatim reproductions, are protected against defamation claims. This recognises that it is through such accounts that the general public normally learns of the official statements.

Principle 10 should also be expanded to recognise the need to protect a further set of statements which, while not absolutely privileged, should not attract liability unless they were made in bad faith (upon proof of bad faith the protection falls and the defendant may be held liable). Such a defence is known in common law jurisdictions as 'qualified privilege' and most other jurisdictions recognise something similar to this. Examples of the categories of information to which the defence apply include:

- statements made in the performance of a legal, moral or social duty or interest;
- a fair and accurate report of proceedings at any legal public meeting in Azerbaijan;
- a fair and accurate report of official proceedings or documents of a public company; or
- a fair and accurate report of any finding or decision of an association with formal powers of adjudication and/or control with the purpose of promoting art, science, religion, learning, trade, business, industry, any profession, sports, pastimes, or charitable objects.

Principle 14 deals with the amount of damages awarded in defamation actions. We also recommend that the law provide for a procedure whereby defendants can make an offer to settle, subject to court adjudication of any disagreement relating to the amount of the offer. Once such an offer is made, failure by the plaintiff to accept it becomes one of the factors to be considered by the court when determining any damage award.

Finally, the test for the imposition of injunctions contained at Principle 15 should be elaborated to contain the added requirement that the plaintiff be able to demonstrate a virtual certainty of success at trial.