Memorandum

on the

Law of the Republic of Azerbaijan on Defamation

London
October 2006

Commissioned by the Representative on Freedom of the Media of the Organisation for Security and Cooperation in Europe

ARTICLE 19 · 6-8 Amwell Street · London EC1R 1UQ · United Kingdom
Tel +44 20 7278 9292 · Fax +44 20 7278 7660 · info@article19.org · http://www.article19.org

TABLE OF CONTENTS

1 Introduction 1
2 International Standards 2
2.1 The Importance of Freedom of Expression 2
2.2 Restrictions on Freedom of Expression 4
3 Analysis of the draft Law 6
3.1 Scope 6
3.2 Opinions 7
3.3 Protection From Liability 7
3.4 Other Matters 9

1 INTRODUCTION

ARTICLE 19 very much welcomes the Law of the Republic of Azerbaijan on Defamation (draft Law), which seeks to decriminalise defamation in the country and to set out clear and progressive rules for civil defamation.[1] We understand that the draft is an official document, which has been prepared by Azeri officials. This Memorandum analyses the draft Law in light of international standards governing the right to freedom of expression. Our comments are based on a translation of the draft Law provided to us by the OSCE.[2]

The draft Law contains many provisions which seek to ensure respect for the right to freedom of expression while maintaining protection for reputations. In addition to abolishing the criminal defamation provisions, the draft Law prohibits public bodies from bringing defamation cases, largely limits the scope of defamation to false statements of fact, provides for strong defences against a defamation claim and sets out a progressive regime of remedies for defamatory statements. At the same time, some of the provisions could still be amended to bring them even more closely into line with international standards. Additional defences could be provided, the scope of the law could be narrowed further and provision could be made to address the problem of malicious plaintiffs. In some cases, the draft Law actually provides undue protection for defamatory statements, for example providing absolute protection for repeating statements made in other media or by NGOs, and even in some cases by individuals.

Section 2 of this Memorandum summarises the body of international law and practice on freedom of expression upon which our analysis is based. Section 3 of the Memorandum analyses the draft Law in the context of the standards outlined in Section 2. It specifically draws upon one of our key standard-setting publications, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation* (Defining Defamation).[3] Defining Defamation is based on international law, State practice (as reflected, *inter alia*, in national laws and judgments of national courts), and the general principles of law recognised by the community of nations. The Principles have been widely endorsed, notably by the three specialised mandates on freedom of expression, the United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media and the Organization of American States (OAS) Special Rapporteur on Freedom of Expression.[4]

[1] A translation of the draft law can be found at http://www.article19.org/pdfs/laws/Azerbaijan.DEF.06.pdf.
[2] ARTICLE 19 takes no responsibility for the accuracy of the translation.
[3] ARTICLE 19 (London: 2000). Available at: http://www.article19.org/.
[4] Joint Declaration of 30 November 2000. Available at: http://www.unhchr.ch/huricane/huricane.nsf/view01/EFE58839B169CC09C12569AB002D02C0?opendocument

2 INTERNATIONAL STANDARDS

2.1 The Importance of Freedom of Expression

Freedom of expression is a human right of fundamental importance, in particular because of its critical role in underpinning democracy and the realisation of all other human rights. Article 19 of the *Universal Declaration on Human Rights* (UDHR)[5] guarantees the right to freedom of expression in the following terms:

> Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

The UDHR, as a UN General Assembly resolution, is not directly binding on States. However, parts of it, including Article 19, are widely regarded as having acquired legal force as customary international law since its adoption in 1948.[6]

The *International Covenant on Civil and Political Rights* (ICCPR),[7] a treaty ratified by some 156 States, imposes formal legal obligations on State Parties to respect its provisions and elaborates on many of the rights included in the UDHR. Azerbaijan ratified both the ICCPR and the first Optional Protocol to the ICCPR[8] in 1992. Article 19 of the ICCPR guarantees the right to freedom of expression in terms very similar to those found in Article 19 of the UDHR:

> 1. Everyone shall have the right to freedom of opinion.
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice.

Freedom of expression is also protected in all three regional human rights instruments, at Article 10 of the *European Convention on Human Rights* (ECHR),[9] Article 9 of the *African Charter on Human and Peoples' Rights*[10] and Article 13 of the *American Convention on Human Rights*.[11] The right to freedom of expression enjoys a prominent status in each of these regional conventions.

Azerbaijan is a member of the Council of Europe[12] and, as such, has undertaken various obligations to strengthen protection for freedom of expression in the country,[13] including

[5] UN General Assembly Resolution 217A(III), adopted 10 December 1948.
[6] See, for example, *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd Circuit).
[7] UN General Assembly Resolution 2200A(XXI), adopted 16 December 1966, in force 23 March 1976.
[8] Optional Protocol to the International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI), 16 December 1966, in force 23 March 1976, in accordance with Article 9. The Optional Protocol grants the UN Human Rights Committee jurisdiction to receive and hear complaints from individuals regarding violations of the ICCPR's provisions by State Parties.
[9] Adopted 4 November 1950, in force 3 September 1953.
[10] Adopted 26 June 1981, in force 21 October 1986.
[11] Adopted 22 November 1969, in force 18 July 1978.
[12] As of 25 January 2001.
[13] See Council of Europe Opinion No. 222 (2000), section 14.iv.d. Available at: http://assembly.coe.int/Documents/AdoptedText/TA00/eopi222.htm.

through ratification of the ECHR in 2002. Azerbaijan is subject to the jurisdiction of the European Court of Human Rights (ECtHR), which is charged with interpretation and application of the ECHR.

Freedom of expression is a key human right, in particular because of its fundamental role in underpinning democracy. At its very first session, in 1946, the UN General Assembly adopted Resolution 59(I) which states: "Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated."[14] As the UN Human Rights Committee has said:

> The right to freedom of expression is of paramount importance in any democratic society.[15]

The ECtHR has often stressed the fundamental status of freedom of expression. In one of its first cases, it stated:

> Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man.[16]

It has often repeated this and similar statements since then. The ECtHR has also made it clear that the right to freedom of expression protects offensive and disturbing speech, frequently noting that the right to freedom of expression,

> … is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society.'[17]

The guarantee of freedom of expression applies with particular force to the media. The ECtHR has consistently emphasised the "pre-eminent role of the press in a State governed by the rule of law".[18] Furthermore:

> Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.[19]

In the context of defamation cases, the ECtHR has emphasised that the duty of the press goes beyond mere reporting of facts; its duty is to interpret facts and events in order to inform the public and contribute to the discussion of matters of public importance.[20] The Court has similarly emphasised: "Journalistic freedom … covers possible recourse to a degree of exaggeration, or even provocation."[21] This means, for example, that the media are free to chose the means by which they wish to communicate their messages, including through

---

[14] 14 December 1946.
[15] *Tae-Hoon Park v. Republic of Korea*, 20 October 1998, Communication No. 628/1995, para. 10.3.
[16] *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72, para. 49.
[17] *Ibid.* Statements of this nature abound in the jurisprudence of courts and other judicial bodies around the world.
[18] *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63.
[19] *Castells v. Spain*, 24 April 1992, Application No. 11798/85, para. 43.
[20] *The Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, para. 65.
[21] *Dichand and others v. Austria*, 26 February 2002, Application No. 29271/95, para. 39.

hyperbole, satire or colourful imagery.[22] Context is important. In the second *Oberschlick* case, the ECtHR considered that calling a politician an idiot was a legitimate response to earlier, provocative statements by that same politician.[23] Similarly, in the *Lingens* case, the ECtHR stressed that the circumstances in which the impugned statements had been made "must not be overlooked."[24]

The ECtHR attaches particular value to political debate and debate on other matters of public concern. Robust debate is part and parcel of democracy and only very limited restrictions on such statements are acceptable: "There is little scope … for restrictions on political speech or debates on questions of public interest."[25] The ECtHR has clarified that this enhanced protection applies even where the person who is attacked is not a 'public figure;' it is sufficient if the statement is made on a matter of public interest.[26]

2.2 Restrictions on Freedom of Expression

The right to freedom of expression may, under certain limited conditions, be restricted. Article 10(2) of the ECHR outlines the narrowly prescribed circumstances under which freedom of expression may be limited:

> 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 or impartiality of the judiciary.

This translates into a three-part test, according to which restrictions on freedom of expression are legitimate only if they (a) are provided by law; (b) pursue a legitimate aim; and (c) are "necessary in a democratic society."

Each of these elements has specific legal meaning. The first requirement implies not only that the restriction is based in law, but also that the relevant law meets certain standards of clarity and accessibility. The ECtHR has noted:

> [A] norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given situation may entail.[27]

Laws which grant authorities excessively broad discretionary powers to limit expression also fail the requirement of "provided by law." The ECtHR has stated that when a grant of discretion is made to a media regulatory body, "the scope of the discretion and the manner of its exercise [must be] indicated with sufficient clarity, having regard to the legitimate aim in question, to give the individual adequate protection against arbitrary interference."[28] The UN

[22] See *Karatas v. Turkey*, 8 July 1999, Application No. 23168/94, paras. 50-54.
[23] *Oberschlick v. Austria (No. 2)*, 1 July 1997, Application No. 20834/92.
[24] *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, para. 43.
[25] See *Dichand and others v. Austria*, note 21, para. 38.
[26] See *Bladet Tromsø and Stensaas v. Norway*, 20 May 1999, Application No. 21980/93.
[27] *The Sunday Times v. United Kingdom*, note 20, para. 49.
[28] *Wingrove v. United Kingdom,* 25 November 1996, Application No. 17419/90, para. 40.

Human Rights Committee, the body of independent experts appointed under the ICCPR to monitor compliance with that treaty, has repeatedly expressed concern about excessive ministerial discretion.[29]

The second requirement relates to the legitimate aims listed in Article 19(3). To satisfy this part of the test, a restriction must truly pursue one of the legitimate aims; it is illegitimate to invoke a legitimate aim as an excuse to pursue a political or other illegitimate agenda.[30] With regard to defamation laws, the only legitimate aim is protection of reputation.[31]

The third requirement, that any restrictions should be "necessary", is often essential to the assessment of alleged breaches of the right to freedom of expression. The word "necessary" means that there must be a "pressing social need" for the limitation.[32] The reasons given by the State to justify the limitation must be "relevant and sufficient", the State should use the least restrictive means available and the limitation must be proportionate to the legitimate aim pursued.[33] The ECtHR has warned that one of the implications of this is that States should not use the criminal law to restrict freedom of expression unless this is truly necessary. In *Şener v. Turkey*, the Court stated that this principle applies even in situations involving armed conflict:

> [T]he dominant position which a 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 … Contracting States cannot, with reference to the protection of territorial integrity or national security or the prevention of crime or disorder, restrict the right of the public to be informed of them by bringing the weight of the criminal law to bear on the media.[34]

While States must act to protect their citizens from public order threats, their actions must be appropriate and without excess.[35] Criminal offences should be narrowly defined and applied with due restraint, and the criminal law should not be used if a civil law action suffices.[36]

[29] This is particularly so in the context of media regulation. See, for example, its Concluding Observations on Kyrgyzstan, 24 July 2000, UN Doc. CCPR/CO/69/KGZ, para. 21 and its Concluding Observations on Lesotho, 8 April 1999, UN Doc. CCPR/C/79/Add.106, para. 23.
[30] See Article 18 of the ECHR. See also *Benjamin and Others v. Minister of Information and Broadcasting*, 14 February 2(1), Privy Council Appeal No. 2 of 1999 (Judicial Committee of the Privy Council).
[31] Defining Democracy, Principle 2.
[32] See *Handyside*, note 16, para. 48.
[33] See *Lingens v. Austria*, note 24, paras. 39-40.
[34] *Şener v. Turkey*, Application No. 26680/95, 18 July 2000, paras. 40, 42.
[35] See *Incal v. Turkey*, 18 May 1998, Application No. 22678/93, para. 54.
[36] See *Raichinov v. Bulgaria*, 20 April 2006, Application No. 47579/99, para. 50 (ECtHR).

3 ANALYSIS OF THE DRAFT LAW

The purpose of the draft Law is to bring Azeri law into line with international standards in the area of defamation. As noted above, it is largely successful in this endeavour, in particular inasmuch as it repeals the criminal defamation provisions.[37] As noted above, the draft Law includes numerous provisions given effect to the right to freedom of expression. At the same time, it lacks some protections for freedom of expression which are promoted under international law while, in some other cases, it actually provides undue protection for potentially defamatory statements. This Section of the Memorandum analyses in detail the specific provisions of the draft Law where we believe there could be further improvement.

3.1 Scope

Article 1 of the draft Law defines its purpose as being to protect reputation from the deliberate dissemination of false information in the mass media, while protecting freedom of speech. In fact, the scope of the law is not entirely restricted to false information (see below, under Opinions). Furthermore, it is not, for the most part, restricted to the mass media. This latter is appropriate, since defamation through other means, such as publishing books, should also be subject to the same standards.

While Article 1 refers only to the protection of reputation, Article 2, setting out the scope of the law, refers to the protection of "honor, dignity and business reputation". These are further defined in Article 3, which defines honour as the "society value given to a physical person for his/her social and moral qualities". This is in law an 'objective' definition since it relates to the esteem in which someone is held by others in society, something which can objectively be measured through the standard of the reasonable person. Dignity, on the other hand, is defined as the "esteem given to a physical person himself/herself to his/her position established in the society". This would appear to be a 'subjective' definition, referring to the status someone themselves feel they have attained in society. Business reputation, for its part, is defined as a person's professional and business attributes, as economic activities.

Defining Defamation limits the scope of defamation laws to protecting objective reputations, or the esteem in which others in society hold a person.[38] The reason that 'subjective reputation', or feelings, was not included is that anyone can claim that their feelings have been hurt due to a statement about them, even if most people will understand the statement as being positive. Since feelings do not lend themselves to definition but are, rather, subjective emotions, these laws can be interpreted flexibly to suit the authorities' needs, including in order to prevent criticism. Moreover, the subjective nature of what constitutes an affront to ones feelings means that a charge of this sort is very difficult to defend against.

Recommendations:

- Consideration should be given to removing the reference to mass media in Article 1 of the draft Law, given that in fact its scope is not limited to mass media, as should be the case.

[37] In an August 2004 *Memorandum on Laws of the Republic of Azerbaijan Relating to the Protection of Reputation*, ARTICLE 19 was very critical of the Azeri criminal defamation provisions, calling for them to be repealed.
[38] See Principle 2(a).

- Consideration should be given to limiting the scope of the Law to what is defined therein as 'honor' or the esteem in which one is held by others.

3.2 Opinions

The draft Law includes rather complicated provisions dealing with opinions. Moral damage is defined in Article 3(1)(4) as moral or physical suffering (as opposed to material or actual harm) as a result of the dissemination of false statements *and* information that defames honour, dignity or business reputation. The same phrase is repeated in Article 11(2), which provides that anyone claiming compensation for moral harm must prove moral damage, as defined. Article 13(1), also referring to compensation for moral harm, again refers to false and defamatory information as well as separately to deliberate insult of a person's honour or dignity. We understand the use of two separate references to defamation of honour or dignity in these provisions as covering two different types of statements, namely false factual statements and insulting or defamatory opinions, but it is possible that this is a matter of unclear translation.

Article 3(1)(5) defines an opinion as something which does not contain a factual connotation, or cannot be interpreted as such, following closely the definition of opinion in Defining Defamation.[39] Article 3(1)(6), for its part, defines 'criticism' as opinions about various public bodies and officials. Pursuant to Article 4(3), one cannot apply, among other things, for protection against opinions or criticism.

These provisions are confusing. For one thing, our understanding of Articles 3(1)(4), 11(2) and 13(1) suggests that moral harm for both false factual statements and opinions may be compensated, whereas Article 4(3) suggests that opinions may never lead to compensation. Secondly, inasmuch as 'criticism' is limited to opinions, it is unclear why separate definition of this term is required. If no opinion may lead to compensation, then opinions about public bodies and officials are *a fortiori* protected.

Defining Defamation provides absolute protection for the expression of opinions.[40] This is because statements of opinion, which do not contain factual allegations, cannot be proven to be true or false; the law should not decide which opinions are correct and which are not, but should allow citizens to make up their own minds. Furthermore, under international law, there is an absolute right to hold opinions.

Recommendation:

- The rules relating to opinions should be clarified. If, as appears to be the case, the intention is to accord absolute protection to opinions, this should be made quite clear.

3.3 Protection From Liability

Article 14(1) sets out a number of cases in which editorial staff and journalists cannot be held liable for statements disseminated in the mass media. These include where the media repeats

[39] See Principle 10.
[40] *Ibid.*

statements by public bodies, political parties and NGOs, statements from other mass media and the Internet which have not been refuted, and statements from other individuals repeated verbatim.

Protection of this sort is an important part of a system for balancing protection of reputation with freedom of expression. At the same time, there are a number of shortcomings with this set of proposals. First, it is limited to the mass media. The protection should extend to all forms of expression. If, for example, an NGO publishes these sorts of statements in a critique of government spending, they should equally be entitled to protection.

Second, these protections extend too far. If, for example, information which is clearly false and defamatory is published on the Internet, others should not be permitted to republish it without risking liability, simply due to the fact that it has already been published on the Internet. This could be abused, for example, by individuals publishing defamatory statements anonymously on the Internet and then using this as an excuse to publish them in the mass media. Similarly, the republication of statements by NGOs and private individuals should not be protected unless there is at least some good reason to believe that they are true, or unless the re-publisher has acted without malice.

Third, these protections do not go far enough. They do not protect all sorts of statements which society has an interest in protecting. For example, individuals should be able to report suspected crime to the police without fear of being sued in defamation if they should happen to be wrong about the crime. When asked to provide a job reference, individuals should be free to voice their views on the applicant, once again without worrying about possible defamation actions. Furthermore, they do not provide a general level of protection to statements about matters of public interest. Some protection is warranted for this sort of statement, regardless of the source. Where a journalist believes that he or she has uncovered corruption, based on solid investigation, he or she should be free to publish, even if in fact it turns out that the information is inaccurate. This does not fit easily within the scope of the provisions in Article 14(1).

In many countries, three different systems are in place to provide a balance between protection of reputation and freedom of expression. First, certain statements are accorded the absolute protection currently found in Article 14(1). These include, for example, statements made in legislative and judicial bodies, documents required to be produced by these bodies, and fair and accurate reports on these other statements.

Second, certain statements are accorded protection as long as the speaker did not act out of malice. The range of such statements is often very wide, including the examples given above of reporting to the police and providing job references. This can be dealt with in legislation either through a list of protected statements or through a set of criteria for such protection, leaving it to the courts to determine whether, in the circumstances, a particular statement meets those criteria.

Third, statements on matters of public concern (or interest) are protected as long as it can be shown that, taking into account all of the circumstances, it was reasonable to publish them. This is of particular importance for the media, which are under a duty to satisfy the public's right to know and often cannot wait until they are sure that every fact alleged is true before they publish or broadcast a story. Even the best journalists make honest mistakes and to leave them open to punishment for every false allegation would be to undermine the public interest in

receiving timely information. A more appropriate balance between the right to freedom of expression and reputations is to protect those who have acted reasonably, while allowing plaintiffs to sue those who have not. For the media, acting in accordance with accepted professional standards should normally satisfy the reasonableness test.

A14(2) protects Internet service providers (ISPs) against liability unless they have effectively adopted the published statements as their own. This is important. It is also important, however, to protect all of those who may have contributed innocently to the dissemination of defamatory falsehoods. This might, for example, include the printer or a newspaper distributor.

Recommendations:

- The protections in Article 14(1) should extend to all forms of expression, not just the mass media.
- The protections in Article 14(1) should not provide absolute protection to the republication of all statements by other media, NGOs and even private individuals. Rather, protection should be conditioned on a reasonable belief that these statements are true or at least an absence of malice on the part of the re-publisher.
- Consideration should be given to adapting Article 14(1) to reflect a more sophisticated system, for example along the lines of the three-tier system noted above. At a minimum, general protection for reasonable statements on matters of public interest should be added to the set of protections.
- Consideration should be given to including protection for innocent publication in the draft Law.

3.4 Other Matters

Appeals

Article 5 provides that an appeal may be lodged either six months from the date the affected person learns of the allegedly defamatory statement(s) or six months after the statement(s) have been published.

It is appropriate to set the length of time from the date of publication, but allowing it alternatively to run from the date the affected person learns of it is problematical. This could be years after the original statement was published, for example where the individual reads an old newspaper or book in a library. Allowing the period to be extended in this way defeats the important objectives of setting a short limitation period, namely to preserve the ability of defendants to present a proper defence and to avoid the chilling effect unduly drawn-out cases exert on defendants' freedom of expression.

Consideration should be given to defining when publication on the Internet occurs, given the unique nature of the Internet, which in some cases is considered to represent continuous publication. Given the importance of short limitation periods, this should be when the material is first uploaded, or re-uploaded (if this happens more than once).

Sources

Article 7(1) provides that media plaintiffs shall not be required to reveal confidential sources of information while Article 7(2) provides that they shall not be held liable for refusing to

disclose a source. This may be a matter of translation, but Article 7(2) could be understood as providing absolute protection against liability where a confidential source is involved. Instead, the rule should state that the defendant should not suffer any negative inference of liability due merely to his or her refusal to reveal a confidential source of information.

Malicious Plaintiffs

Even where defamation laws provide appropriate protection for freedom of expression, they may be abused by the powerful who may institute cases they know they are going to lose, simply to harass the media or others. Defending oneself against a defamation claim is time-consuming, expensive (including because of lawyers fees) and can be quite intimidating. Remedies against such 'malicious plaintiffs' can include summary actions to strike out clearly unsubstantiated defamation claims or even a mechanism for bringing a counter-claim against them for abuse of civil process.

Recommendations:

- The limitation period of six months should run from the time the material was first published, not from the time the plaintiff learns of the publication, and, for this purpose, Internet publication should be deemed to occur on the date the material was last uploaded.
- It should be clear in Article 7(2) that a defendant may not suffer any negative inference of defamation liability for refusing to reveal a confidential source of information, not that he or she may not be held liable.
- Consideration should be given to providing for a legal mechanism for responding to clearly unsubstantiated defamation claims.