MEMORANDUM

on

Laws of the Republic of Azerbaijan Relating to the Protection of Reputation

by

ARTICLE 19
Global Campaign for Free Expression

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

I. Introduction

ARTICLE 19 has been asked to comment on certain laws in force in the Republic of Azerbaijan that limit the right to freedom of expression, purportedly to protect reputation and dignity, generically referred to herein as defamation laws. The analysis is restricted to those parts of the laws under consideration that specifically address the question of reputation and dignity.

Specifically, this Memorandum considers provisions from the Constitution of the Republic of Azerbaijan (the Constitution), the Law on Mass Media (as amended in 2004) (the Media Law), the Civil Code and the Criminal Code. Our analysis also takes into consideration the elaboration of some of these provisions by Azerbaijan's Supreme Court and Constitutional Court. Our comments are based on an unofficial English translation of the provisions.[1]

The provisions under consideration suffer from a number of defects, rendered all the more problematic by their frequent application by Azerbaijani officials against the media. In June of this year, ARTICLE 19 released a statement regarding the government's record for protecting free expression and noted that criminal charges are regularly brought against journalists, often resulting in exorbitant fines or prison sentences.[2]

ARTICLE 19 welcomes the positive development that a working group organised by the Yeni Nesil Journalists' Association, with the participation of representatives of the Presidential Administration and of Parliament, has recently developed a set of Principles which would inform the development of a new defamation law. As the current analysis makes clear, such reform is urgently needed.

In Section II of this Memorandum, we briefly describe international standards for freedom of expression and the nature of Azerbaijan's obligations under international law to protect and promote of freedom of expression. Section II also sets out the test for legitimate restrictions to the right to freedom of expression under international and European law. The sections that follow address the different laws that we have been asked to analyse.

Our analysis draws upon the jurisprudence of international bodies, including the European Court of Human Rights, in the area of defamation. These standards, as well as comparative standards in this area, have been encapsulated in the ARTICLE 19 publication, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputations* (*Defining Defamation*),[3] to which we frequently refer. These principles have attained significant international endorsement, including by the three official mandates on freedom of expression, the UN Special Rapporteur on Freedom of Opinion

[1] ARTICLE 19 takes no responsibility for the accuracy of the translation or for comments based on mistaken or misleading translation.
[2] The statement is available on the ARTICLE 19 website at: http://www.article19.org/docimages/1806.doc.
[3] London: ARTICLE 19, 2000.

and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression.[4]

II. Azerbaijan's International Obligations

Article 19 of the *Universal Declaration on Human Rights* (UDHR),[5] a United Nations General Assembly resolution, 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 regardless of frontiers.

The *International Covenant on Civil and Political Rights* (ICCPR)[6] elaborates on many rights included in the UDHR, imposing formal legal obligations on State Parties to respect its provisions. Article 19 of the ICCPR guarantees the right to freedom of expression in terms very similar to Article 19 of the UDHR. Azerbaijan ratified both the ICCPR and the first Optional Protocol to the ICCPR[7] in 1992.

Azerbaijan is also a member of the Council of Europe[8] and, as part of the process by which it became a member, has undertaken various obligations to strengthen protection for freedom of expression in the country,[9] including through ratification of the European Convention on Human Rights (ECHR) in 2002. Consequently, Azerbaijan's domestic legal system and practice must conform to the provisions of the ECHR and are subject to the jurisdiction of the European Court of Human Rights, which is charged with interpretation and application of the ECHR.

Article 10 of the ECHR guarantees the right to free expression in the following terms:

> Everyone has the right to freedom of expression. this right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.[10]

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[4] See their Joint Declaration of 30 November 2000. Available at: http://www.unhchr.ch/huricane/huricane.nsf/view01/EFE58839B169CC09C12569AB002D02C0?opendocument.

[5] UN General Assembly Resolution 217A(III), adopted 10 December 1948.

[6] UN General Assembly Resolution 2200A(XXI), adopted 16 December 1966, in force 23 March 1976.

[7] 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.

[8] As of 25 January 2001.

[9] See Council of Europe Opinion No. 222 (2000), section 14.iv.d. Available at: http://assembly.coe.int/Documents/AdoptedText/TA00/eopi222.htm.

[10] Article 13 of the American Convention on Human Rights and Article 9 of the African Charter on Human and Peoples' Rights, in force as of 1978 and 1986, respectively, also protect freedom of expression.

The guarantee of freedom of expression applies to all forms of expression, not only those that reflect majority viewpoints and perspectives. As stated repeatedly by the European Court of Human Rights:

> 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 … it 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'.[11]

Despite its importance to effective democratic governance, the right to freedom of expression is not absolute and may be subject to restrictions. However, any restriction on the right to freedom of expression must meet a strict three-part test. This test, which has been confirmed by both the Human Rights Committee[12] and the European Court of Human Rights,[13] requires that any restriction must be (1) provided by law, (2) for the purpose of safeguarding a legitimate interest, and (3) necessary to secure this interest.

In order for a restriction to be deemed necessary, it must restrict freedom of expression as little as possible, it must be carefully designed to achieve the objective in question and it should not be arbitrary, unfair or based on irrational considerations. Vague or broadly defined restrictions, even if they satisfy the "provided by law" criterion, are unacceptable because they go beyond what is strictly required to protect the legitimate interest. The test is set out in Article 10(2) of the ECHR in the following terms:

> 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 the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Relevant to the Azerbaijani legal provisions addressed in this Memorandum is the fact that the protection of reputation and of the rights of others are legitimate grounds for restricting expression. Nonetheless, the three-part test applies to such restrictions and any restriction that fails to meet any branch of the test will fall short of international standards, thereby breaching Azerbaijan's legal obligations.

III. The Constitution of the Azerbaijan Republic

The Constitution of Azerbaijan, adopted on 12 November 1995, contains a number of articles that provide positive protection for freedom of expression. Article 47 states:

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[11] *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72, 1 EHRR 737, para. 49. Statements of this nature abound in the jurisprudence of courts and other judicial bodies around the world.
[12] For example, in *Laptsevich v. Belarus*, 20 March 2000, Communication No. 780/1997.
[13] For example, in *Goodwin v. United Kingdom*, 27 March 1996, Application No. 17488/90.

> 1. Everyone has the right to freedom of thought and speech
> 2. Nobody should be forced to promulgate his/her thoughts and convictions or to renounce his/her thoughts and convictions.

Article 45 guarantees the right to use one's mother tongue, Article 50 recognizes the right to information and Article 51 guarantees freedom of creative activity.

Restrictions to the right to freedom of expression are found at Articles 47(3), 46 and 75.

Article 47(3) prohibits "propaganda provoking racial, national, religious and social discord and animosity". Its wording is similar to Article 20(2) of the ICCPR, which states: "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law." The most noteworthy difference between these two sets of provisions is that "social discord and animosity" posits a lower threshold than "discrimination, hostility or violence", but this may be an issue of translation.

Article 46, which protects honour and dignity, states:

> 1. Everyone has the right to defend his/her honor and dignity.
> 2. The dignity of a person is protected by the state. Nothing must lead to the humiliation of the dignity of a human being.

This article underpins a number of the provisions analysed by this Memorandum which place restrictions on freedom of expression. For example, Article 23 of the Civil Code penalizes the dissemination of information that humiliates a person's "honor, dignity and business reputation".

Article 46 differs from international law in this area by referring to the concepts of honour and dignity, whereas Article 10(2) of the ECHR and Article 19(3) of the ICCPR refer to the rights and reputation of others. Furthermore, according to Decision #7 of the Supreme Court of Azerbaijan,[14] the right to "honor and dignity" found at Article 46 is based on the International Covenant on Economic, Social and Cultural Rights (ICESCR).[15]

There is no specific, legally binding provision in the ICESCR that recognizes the right to honour and dignity, although human dignity is mentioned in the Preamble as the general source from which human rights are derived, as it is in both the UDHR and ICCPR.[16] This concept of human dignity is extremely general in nature, serving as the philosophical foundation for all human rights rather than the basis for a specific legal provision. As such, it is not capable of precise definition. Furthermore, honour *and*

[14] On the practice of application of the legislation on protection of honor and dignity by the courts, 14 May 1999.
[15] Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, in force 3 January 1976, in accordance with Article 27.
[16] Article 17 of the ICCPR also provides protection against unlawful attacks on one's 'honour and reputation', avoiding the word dignity in this specific contextA.

dignity, as they are employed together in the Azerbaijani laws considered in this analysis, represent a different conception of dignity, more closely aligned to reputation than the more general reference in the preambles to the international documents noted above. This is relevant because international and European law unambiguously require restrictions on freedom of expression to be prescribed by law, and not to be unduly vague.

ARTICLE 19 suggests that "dignity" is too vague a legal concept on which to justify a specific restriction to freedom of expression. This is certainly true of the term as referred to in the preambles to the international documents noted above, to which it was linked in Decision #7. The courts of Azerbaijan and the government should therefore seek to clarify that the legal provisions analysed in this Memorandum are aimed at protecting individual reputation – which is more obviously tied to the concept of honour than to dignity. As stated in *Defining Defamation*:

> Defamation laws cannot be justified unless their genuine purpose and demonstrable effect is to protect the reputations of individuals – or entities with the right to sue and be sued – against injury, including by tending to lower the esteem in which they are held within the community, by exposing them to public ridicule or hatred, or by causing them to be shunned or avoided.[17]

Article 75 of the Constitution also provides a constitutional basis for some of Azerbaijan's defamation provisions. It states: "Every citizen must respect state symbols of the Azerbaijan Republic -- its banner, state emblem and hymn." Under international law, the protection of the reputation of State symbols *per se* cannot justify a restriction on expression.

Similarly, Article 106 of the Constitution states that the honour and dignity of the President are protected by law. It is well established under international law, as repeatedly stressed by the European Court of Human Rights, that public figures should be subject to greater criticism, not less (see Section V, below). Consequently, this constitutional provision, which singles out the president's office for special legal protection, is inconsistent with international legal norms.

Furthermore, and more seriously, none of the provisions above imposes a three-part test for restrictions on freedom of expression as described above in Section II. Very limited guidance regarding when and how rights may be restricted, or on how to balance conflicting rights, is found at Article 71, which provides:

> (2) No one may restrict implementation of rights and liberties of a human being and citizen.
> (3) Rights and liberties of a human being and citizen may be partially and temporarily restricted only on announcement of war, martial law and state of emergency, and also mobilization, taking into consideration international obligations of the Azerbaijan Republic. Population of the Republic shall be notified in advance about restrictions as regards their rights and liberties.

[17] Note 3, Principle 2(a).

These provisions appear to prohibit any restriction on freedom of expression outside of the limited circumstances envisaged in Article 71(3). However, they fail to provide any guidance as to how the right to honour and dignity, protected by Article 46, should be reconciled with the right to freedom of expression, protected by Article 47.

This lack of guidance is not resolved by Article 57(2), which grants constitutional protection to criticism, which is the expression of a negative view, while simultaneously denying protection to insult, which also constitutes the expression of a negative view. The provision states:

> Citizens of the Azerbaijan Republic have the right to criticize the activity or work of State bodies, their officials, political parties, trade unions, or other public organisations and also the activity and work of individuals. Prosecution for criticism is prohibited. Insult or libel shall not be regarded as criticism.

This is highly ambiguous and fails to provide a basis upon which courts should distinguish between protected criticism and unprotected insults.

Furthermore, the court decisions reviewed by ARTICLE 19 provide little additional guidance. The decision of the Constitutional Court "On interpretation of Articles 21 and 23 of the Civil Code of Azerbaijan Republic", dated 31 May 2002, acknowledges that the application of one legal provision should not necessarily "imply the restriction of [an]other right" – in that case Article 10 of the ECHR – but the Court does not set out how a balance should be struck between competing rights, beyond mentioning that "proportionality" between rights should be observed, on a case-by-case basis.

The result is that these constitutional protections fail to impose the necessary limits on restrictions on freedom of expression for purposes of protection of reputation, as required under international law. In particular, the constitution fails to ensure that any restrictions on freedom of expression meet the three-part test outlined above.

Recommendations:

- Article 46 of the Constitution should make specific reference to reputation rights, or should be interpreted in this manner, rather than relying on the more vague and unarticulated concept of dignity.
- Article 47(3) should be amended to incorporate the language of Article 20(2) of the ICCPR, which provides a higher level of protection to freedom of expression.
- Articles 75 and 106 should be repealed.
- All restrictions on the right to freedom of expression should be subject to the three-part test, described in Section II, and Articles 71 and 57(2) should be amended to reflect this test.

IV. The Civil Code

Article 23 of the Civil Code has the heading "Protection of honor, dignity and business reputation" and consists of six provisions.

Article 23(1) grants all physical persons the right to seek a court order for refutation of information that: "humiliates his/her honor, dignity and business reputation, interfere[s] with the secrets of his/her private life or security of a person", if the person that disseminated the information cannot prove that the information is true. A similar order may be obtained where the information disseminated is true but "only partially published". Finally, the rights associated with the protection of honor and dignity of a physical person may be exercised by "interested persons" after the death of the physical person.

Article 23(2) provides that if the offending information was disseminated by mass media then the refutation shall appear in the same mass media. If the information was published in an official document, then the document shall be changed.

Article 23(3) grants the right of refutation to physical persons whose rights or "lawful interests" have been "humiliated" by the mass media.

Article 23(4) allows for compensation for damage caused by the dissemination of information that humiliates a physical person's honor, dignity or business reputation. Article 23(5) states that if it is impossible to determine who disseminated the offending information, then the subject of the information may demand to have the information considered false.

Finally, Article 23(6) extends the rights associated with the protection of business reputation to legal persons.

Analysis

There are a number of problems with these provisions. First, they fail to set out any specific criteria regarding how the right to refutation will be exercised in practice. Although the Civil Code makes no reference to relevant provisions of the Media Law, Decision #7 of the Supreme Court,[18] referred to earlier in Section III, specifically notes that the Media Law and its provisions regarding the exercise of the right to refutation are the applicable rules for exercising the right to refutation contained in the Civil Code. Chapter VI of the Media Law sets out some rules in this regard but these are presumably restricted in application to the mass media. Furthermore, the Court's statement, at paragraph 8, that a right of refutation can arise if the media merely refers to the interests of a person, regardless of whether there has been "humiliation of honor and dignity", is alarming, although it appears to be consistent with the overbroad wording of Article 23(3).

Second, there is no indication of what constitutes "partial information". This term could be interpreted very broadly to include, for example, various different conclusions that people might draw from an article which was itself factually correct. It should at least be limited to situations in which the article in question presented the facts in a way that was, factually, clearly misleading so as effectively to constitute a false, factual statement.

[18] We note that the decision refers to Article 7 of the Civil Code, not Article 23. However, given the similarity between the two provisions, we are assuming that they are one and the same.

Third, the provision makes no distinction between statements of fact and statements of opinion. Statements of opinion receive no specific protection under Azerbaijani law and Decision #7 of the Supreme Court makes it clear that the expression of a negative opinion can constitute humiliation to a person's honour and dignity. This is in clear contradiction to the jurisprudence of the European Court of Human Rights, which has on numerous occasions distinguished between statements of fact and of opinion. For example, statements of opinion are not susceptible of being proven true but it would appear that this is not recognised by the Civil Code. As the European Court has often noted:

> In its practice, the Court has distinguished between statements of fact and value judgments. While the existence of facts can be demonstrated, the truth of value judgments is not susceptible to proof. The requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right [to freedom of expression].[19]

Furthermore, it is recognised that greater latitude should be accorded to statements of opinion. ARTICLE 19 is of the view that such statements should never attract defamation liability.[20] The European Court of Human Rights has not gone quite that far, holding that freedom to express value judgements is not entirely unfettered. In practice, however, the Court allows a considerable degree of leeway to statements of opinion. For example, in *Dichand and others v. Austria*, the Court stressed that the discussion was on a matter of important public concern[21] and recalled:

> It is true that the applications, on a slim factual basis, published harsh criticism in strong, polemical language. However, it must be remembered that the right to freedom of expression also protects information or ideas that offend, shock, or disturb.[22]

Fourth, as noted, Article 23(1) provides that truth is a defence for defendants charged with defamation. This is partially consistent with *Defining Defamation*, which provides that no one should be liable for a statement which has been found to be true.[23] However, the Civil Code places the entire burden of proof on the defendant, a position which is clearly affirmed by Decision #7 of the Supreme Court. This is inconsistent with evolving international practice, particularly regarding statements on matters of public concern. As set out in Principle 7(b) of *Defining Defamation:*

> In cases involving statements on matters of public concern, the plaintiff should bear the burden of proving the falsity of any statements or imputations of fact alleged to be defamatory.

[19] *Dichand and Others v. Austria*, 26 February 2002, Application No. 29271/95, para. 42.
[20] See *Defining Defamation*, note 3, Principle 10.
[21] *Dichand and others v. Austria*, 26 February 2002, Application No. 29271/95, para. 51.
[22] *Ibid*., para. 52.
[23] Note 3, Principle 7(a).

Fifth, Article 23 is seriously deficient in relationship to the defences which are available to an allegation of defamation, presently limited to the possibility of proving the truth of the information at issue.

An important defence not recognized by Article 23 of the Civil Code is that of reasonable publication, known in some jurisdictions as "due diligence" or "good faith". Under this defence, defendants accused of publishing defamatory statements are protected against liability if they can establish that they acted reasonably in publishing a statement on a matter of public concern. This defence is particularly important to the media, which have a duty to satisfy the public's right to know and be informed of matters of public interest, and thus cannot always exhaustively verify the accuracy of every fact alleged to be true. The European Court of Human Rights, in finding a breach of the right to freedom of expression even in the context of inaccurate statements, has noted that when the media has acted in accordance with accepted professional standards, the reasonableness test will normally be satisfied.[24]

Additionally, Article 23 fails to exempt statements made in certain contexts from liability. The Media Law does include exemptions of this sort (see Section VI) but, given that it is restricted in application to the media, this does not assist others exercising their right to freedom of expression. Principle 11 of *Defining Defamation* defines the types of statements that should be protected against liability in defamation:

> (a) Certain types of statements should never attract liability under defamation law. At a minimum, these should include:
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> i. any statement made in the course of proceedings at legislative bodies, including by elected members both in open debate and in committees, and by witnesses called upon to give evidence to legislative committees;
> ii. any statement made in the course of proceedings at local authorities, by members of those authorities;
> iii. any statement made in the course of any stage of judicial proceedings (including interlocutory and pre-trial processes) by anyone directly involved in that proceeding (including judges, parties, witnesses, counsel and members of the jury) as long as the statement is in some way connected to that proceeding;
> iv. any statement made before a body with a formal mandate to investigate or inquire into human rights abuses, including a truth commission;
> v. any document ordered to be published by a legislative body;
> vi. a fair and accurate report of the material described in points (i) – (v) above; and
> vii. a fair and accurate report of material where the official status of that material justifies the dissemination of that report, such as official documentation issued by a public inquiry, a foreign court or legislature or an international organisation.
>
> (b) Certain types of statements should be exempt from liability unless they can be shown to have been made with malice, in the sense of ill-will or spite. These should

[24] See *Bladet and Tromso and Stensaas v. Norway*, 20 May 1999, Application No. 21980/93, para. 65. See also Principle 9 of *Defining Defamation*, note 3.

include statements made in the performance of a legal, moral or social duty or interest.

There are a number of decisions from the European Court of Human Rights that recognize that statements of the sort noted above should never, or only very rarely, attract liability.[25]

Finally, Article 23 does not provide for a defence of "innocent dissemination", which would apply, for example, to Internet Service Providers that have no means of verifying the content of all the information that they transport over the Internet.

A sixth problem with Article 23 of the Civil Code is its failure to provide for a limitation period for launching defamation actions, although a generic provision of this sort, for a range of actions in tort, is probably found elsewhere in the Civil Code. Allowing cases to be initiated long after the statements on which they are based have been disseminated undermines the ability of those involved to present a proper defence and exerts a chilling effect on defendants' freedom of expression. *Defining Defamation* proposes a limitation period for defamation actions of one year, absent exceptional circumstances, an approach that has been adopted and/or recommended in a number of jurisdictions.[26]

Finally, defamation laws cannot be justified if their purpose or effect is to protect individuals against harm to a reputation that they do not have or no longer have. Perhaps even more importantly, relatives and others do not have a sufficient interest in the reputation of a dead person in order to be allowed to sue on their behalf.27

Decision #7 of the Supreme Court

This Decision has been referred to on a number of occasions above. In addition to the points already made, ARTICLE 19 has the following observations on this decision. First, it states that a negative opinion may attract liability but then goes on to state that criticism of faults will not attract such liability. The difference between the two is not elaborated, leaving the issue in a state of some confusion. It would appear to provide for a hierarchy of opinions, some of which relate to 'faults', a clearly subjective term when used in relation to public policy, and some of which do not.

Second, in discussing the quantum of damages that may be awarded following a claim under the Civil Code for moral damages, the Court does not set an upper limit for monetary awards, leaving open the possibility of unreasonable damages being imposed on defendants.

[25] See for example: *Colombani and Others v. France*, 25 June 2002, Application No. 51279/99; *Jersild v. Denmark*, 23 September 1994, Application No. 15890/89; and *Nikula v. Finland*, 21 March 2002, Application No. 31611/96.

[26] See, for example, the Report of the Legal Advisory Group on Defamation in Ireland, published in March 2003. Available at: http://www.justice.ie/80256976002CB7A4/vWeb/fsWMAK4Q7JKY. See also *Defining Defamation*, note 3, Principle 5.

[27] *Defining Defamation*, note 3, Principle 2(b)(iv).

ARTICLE 19 is reluctant to draw strong conclusions from this troubling decision given that it predates Azerbaijan's accession to the Council of Europe by two years and that subsequent decisions have begun to refer to Article 10 of the ECHR. We are, however, strongly of the view that the application of Article 23 of the Civil Code will need to be revisited by the courts.

Recommendations:

- The content of the right of refutation should be set out in the Civil Code and should reflect the principles discussed below, in Section VI of this Memorandum.
- The term "partial information" should be defined to include only statements which are so misleading as effectively to constitute false statements of fact.
- The Civil Code should distinguish between statements of fact and statements of opinion. The latter should not attract liability for harm to honour or reputation but, at a minimum, and in accordance with the decisions of the European Court of Human Rights, they should be accorded additional protection.
- Defendants should not bear the burden of proving the truth of defamatory statements where these relate to matters of public concern.
- The Civil Code should incorporate the defences of reasonable publication and innocent dissemination. In addition, the Code should recognize that certain statements will not attract liability or will only attract liability in limited circumstances.
- The Civil Code should include a limitation period for initiating actions under Article 23, if it does not already. This period should be no more than one year from the date of publication.

V. The Criminal Code

Articles 147, 148 and 323 of the Criminal Code prohibit the dissemination of information that in some way damages the honour and dignity of a person or, in the case of Article 323, that of the President of the Republic of Azerbaijan.

Article 147(1) states that the slander of a person, which consists of the "distribution of obviously false information which discredit honour and dignity…or undermining his reputation in a public statement, publicly or in mass media products", will be punished by a fine of up to 500 "nominal financial units", by up to 240 hours of "public works", by "corrective works" for up to one year or by up to six months of imprisonment. Article 147(2) doubles the work and imprisonment sanctions if the slander "is connected with" an accusation of "serious or especially serious" criminal wrongdoing.

Article 148 provides that the dissemination of insults will also be punished by a fine, by public works, by corrective works or by imprisonment. The severity of these sanctions is the same as for Article 147 except that the fine can range from between 300 and 1000 nominal financial units. Insult is defined as the "deliberate humiliation of honor and dignity of a person, expressed in the indecent form in the public statement, publicly or in mass media".

Finally, Article 323(1) states:

> Disgrace or humiliation of honor and dignity of the President of the Republic of Azerbaijan in public statement, publish shown product or mass media shall be punished by fine of five hundred up to one thousand of nominal financial unit, or corrective works for term up to two years, or imprisonment on same term.

Article 323(2) increases the period of imprisonment to between two and five years where the statement contains an accusation of "serious or especially serious" criminal wrongdoing.

Analysis

Consistent with evolving international standards in this area, ARTICLE 19 is of the view that defamation should not be punished through the application of criminal laws but rather should be subject only to civil or administrative sanctions, or dealt with through self-regulatory mechanisms.

There is a strong and growing body of law in support of the principle that criminal defamation is itself a breach of the right to freedom of expression. For example, the UN Human Rights Committee, the body with responsibility for overseeing implementation of the ICCPR, has repeatedly expressed concern, in the context of its consideration of regular country reports, about the possibility of criminal sanctions for defamation.[28]

Similarly, the UN Special Rapporteur on Freedom of Opinion and Expression, in his Report in 2000, and again in 2001, called on States to repeal all criminal defamation laws in favour of civil defamation laws.[29] Every year, the Commission on Human Rights, in its resolution on freedom of expression, notes its concern with "abuse of legal provisions on defamation and criminal libel".[30]

In a similar vein, the three special international mandates for promoting freedom of expression – the UN Special Rapporteur, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression – have met each year since 1999 and each year they have issued a joint Declaration addressing various freedom of expression issues. In their joint Declarations of November 1999, November 2000 and again in December 2002, they called on States to repeal their criminal defamation laws. The 2002 statement read:

> Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.[31]

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[28] For example in relation to Iceland and Jordan (1994), Tunisia and Morocco (1995), Mauritius (1996), Iraq (1997), Zimbabwe (1998), and Cameroon, Mexico, Morocco, Norway and Romania (1999).
[29] See *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, 18 January 2000, para. 52 and *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2001/64, 26 January 2001.
[30] See, for example, Resolution 2003/42, 23 April 2003, para. 3(a).
[31] Joint Declaration of 10 December 2002. Available at: http://www.cidh.oas.org/Relatoria/English/PressRel02/JointDeclaration.htm.

The European Court of Human Rights has never actually ruled out criminal defamation and there are a small number of cases in which it has allowed criminal defamation convictions.[32] Nonetheless, the Court has clearly recognised that there are serious problems with criminal defamation; it has frequently reiterated the following statement, taken from the case of *Castells v. Spain*, involving a charge of criminal defamation:

> [T]he dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media.[33]

Even where sanctions have been financial, the Court has still held these to be, in a number of cases, illegitimate restrictions on freedom of expression. In the very first defamation case brought before it, *Lingens v. Austria*, it stated:

> [T]he penalty imposed on the author…amounted to a kind of censure, which would be likely to discourage him from making criticisms of that kind again in the future…In the context of political debate such a sentence would be likely to deter journalists from contributing to public discussion of issues affecting the life of the community. By the same token, a sanction such as this is liable to hamper the press in performing its task as purveyor of information and public watchdog.[34]

The principal concern expressed by these bodies, as well as by various national courts, with respect to criminal defamation is the chilling effect of criminal penalties, which are disproportionate to any harm incurred. Additionally, given that defamation is already subject to sanction under the civil laws of most countries, and that these laws are effective in redressing harm to reputation, there is no need for parallel criminal provisions.

The provisions in Azerbaijan's Criminal Code, like other criminal defamation provisions, are both disproportionate and unnecessary. We are not aware of the precise rules relating to the application of these provisions but, like all criminal provisions, they should place the burden of proof of the offence clearly on the party bringing the case and require that all elements be proved on the criminal standard of beyond a reasonable doubt. Furthermore, again consistent with general criminal law, liability should depend on mental guilt, or *mens rea*, which, in this case, should include knowledge of the falsity of the statements and a specific intention to harm the person who has been defamed.

The available sanctions – particularly the threat of imprisonment – are clearly disproportionate to the offence. The threat of criminal sanctions necessarily inhibits healthy public debate, thus seriously undermining democracy by stifling important

[32] In the case of *Prager and Oberschlick v. Austria*, 16 April 1995, Application No. 15974/90, the Court upheld a criminal conviction, although the sanction imposed was a fine of approximately US$1,700. In the case of *Tammer v. Estonia*, 6 February 2001, Application No. 41205/98, the conviction and fine of one day's wages was upheld by the Court on the ground that the defamatory comments published by the applicant served no public purpose.
[33] 24 April 1992, 14, Application No. 11798/85, para.46.
[34] 8 July 1986, Application No. 9815/82, para. 44.

political speech. Furthermore, the deprivation of liberty – as contemplated by the provisions – is a very severe penalty affecting a fundamental human right.[35]

Article 148 of the Criminal Code is also open to criticism on the basis that it penalizes expressions of opinion. As already discussed above in Section IV, expressions of opinion are granted special status under both international law and the laws of many national jurisdictions.

Article 323 constitutes a violation of the right to freedom of expression because it accords special legal protection to a public official, the President. It is well established in international law that public officials should tolerate more, rather than less, criticism and should not derive greater protection from defamation laws than ordinary citizens. Democracy depends on open debate about public figures and institutions, and laws that offer higher standards of protection for the reputations of public officials or higher penalties for defendants that have defamed public officials have a chilling effect on freedom of expression. As the European Court stated in *Lingens v. Austria*:

> The limits of acceptable criticism are…wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed both by journalists and the public at large, and must consequently display a greater degree of tolerance.[36]

The principle is not limited to criticism of public officials acting in their public capacity, but extends to private or business matters. It also applies to cases involving not officials but, rather, statements on matters of public interest.

The severity of the violation to freedom of expression that Article 323 represents is aggravated by the fact that, unlike Article 147, there is no requirement that the information be false and liability is not dependent on the impugned statement being "expressed in the indecent form", as required by Article 148.

The 'Note' at the end of Article 323, which states that the provision does not apply to criticism of the activity of the President is not particularly helpful, although presumably it creates the possibility of a defendant arguing that the impugned statement concerned *actions* taken by the President and not the *person* of the President. This note is probably based on Article 57(2) of the Constitution, discussed above in Section III.

These Criminal Code provisions contain certain ambiguous concepts and terms that should either be clarified or removed, although we recognise that some of these may be due to translation. For instance, as already noted, Article 148 states that in order to qualify as an insult, a statement must be "expressed in indecent form." This is highly subjective. Articles 147 and 323 both refer to "serious or especially serious" crimes. Arguably all crimes are serious and the terms are clearly ambiguous; alternatives might be crimes of violence or crimes attracting a certain level of penalty.

[35] Protected by Article 9 of the ICCPR and Article 5 of ECHR.
[36] Note 34, para. 42.

Finally, as noted above in relation to civil defamation law, defendants should benefit from a range of defences, all absent from these criminal provisions.

Recommendations:

- Articles 147, 148 and 323 should be removed from the Azerbaijani Criminal Code.
- In the event that any of the provisions are retained, the following amendments should be introduced:
    - prosecution of these offences should be consistent with basic criminal rules relating to onus and standard of proof, as well as mental guilt;
    - there should be no possibility of imprisonment or other harsh criminal sanctions for defamation;
    - strict proportionality should be required between the harm done and any penalty imposed;
    - clear guidelines should be set out regarding penalties; and
    - ambiguous language should be removed or clarified.

VI. Law on Mass Media

A number of provisions in the Media Law are relevant to the question of defamation or harm to reputation.

Article 10 sets out and prohibits a number of acts that constitute abuse of "the freedom of mass information". Among these is the offence of "printing under cover of reliable source rumors that humiliate honor and dignity of citizens…[and] slandering or acting unlawfully".

Article 62 of the Media Law lists the circumstances in which the publication of false information will not result in liability for the editor or the journalist. These are:

> 1. if disseminated by official state bodies or their press services;
> 2. if obtained from news agencies or press services entities, organizations, political parties and public associations;
> 3. if obtained from other mass media and is not refuted.
> 4. if quoted as it appeared word by word in official speeches of the deputies of Milli Mejlis, representatives of state organs, municipalities, entities, organizations and public associations as well as political figures and officials;
> 5. if mentioned on the air in life translation, or passed in the texts that were not to be edited, according to the present law.

Article 10 is similar to Article 23 of the Civil Code and Articles 147 and 148 of the Criminal Code and, as such, suffers from the same defects. Furthermore, given that the prohibition appears in the Media Law, it singles out the media and imposes another layer of sanctions for them alone. It is not clear, but it does not seem unlikely, that a member of the press could face legal action and punishment under the Media Law, the Civil Code *and* the Criminal Code for the same allegedly defamatory publication. This is supported by Article 60 of the Media Law, which states that the editorial office and the journalist will face "civil, administrative, criminal *and other responsibility*" (italics added) for

revealing information in breach of the Media Law, presumably including defamatory material.

Given that there are already prohibitions against defamation in the Civil and Criminal Codes, there is no need for an additional provision in the Media Law and it is inappropriate to single out the press in this manner as the threat of special sanctions can have a chilling effect on free expression. Furthermore, the layering of sanctions (civil, criminal, administrative, "other") is unreasonable and creates the possibility of seriously disproportionate sentences being imposed.

Article 62, which provides a defence to charges arising under Article 10, is largely consistent with Principle 11 of *Defining Defamation*, discussed above in Section IV, regarding the Civil Code. However, the provision has limited application as it is in the Media Law and thus does not appear to apply to charges made under the Civil Code or the Criminal Code, or at least to non-media practitioners.

Recommendation:
- Article 10 should be removed from the Media Law.
- The defence provided by Article 62 should be extended to all defamation cases.

Article 10-1 limits the use of secret audio and video recordings, film footage and photographs to cases where the person or citizen being recorded has provided his or her written consent and where the "necessary measures were taken to guarantee the rights and freedoms of other person", as provided by the Constitution. Alternatively, a court order may be obtained to permit use.

This provision essentially prohibits the use of secret recordings and visual images, thus precluding the possibility of investigative journalism. If consent has been obtained, the action is hardly secret. Even then, the material may not infringe the individual's right to have his or her reputation respected. If a journalist records a conversation that reveals that a politician is corrupt, this will undoubtedly harm the politician's dignity as defined under the provisions analysed above, thereby breaching the second condition for using secret recordings.

The other means of engaging in secret recordings, gaining permission of the court, seems to confuse the media with the police or secret services, a serious error. It grants the courts the power effectively to act as editors as censors, able to prevent stories even before they are made, contrary to Article 50 of the Constitution which guarantees the right to distribute information and prohibits censorship.

The right to privacy is widely recognised and protected. However, at the same time, there are certain limits on protection of this right in the public interest. Most countries do not prohibit the publication of photographs of people taken in public places, even if the

subject's permission was not obtained.[37] Furthermore, most countries recognise a general public interest defence to a claim of privacy, based on the recognition that in many circumstances, the public's right to know can override a privacy interest.

Recommendations:
- Article 10-1 should be amended to permit the use of photographs, and sound and video recordings, if these are gathered in a public place.
- The use of recordings and photographs gathered in a private place should be permitted when this is in the overall public interest.
- The media should not be required to obtain the court's prior permission to use secretly recorded material.

Articles 44 and 45 of the Media Law set out the right to refutation, correction and answer, and the means by which these rights should be implemented. These provisions are also applicable when a right to refutation is exercised under Article 23 of the Civil Code, discussed above in Section IV.

Article 44 grants these rights following the publication of any information that is "of slanderous and offensive nature that humiliates the honor and dignity as well as distorted thoughts of physical and legal persons". The provision also grants the right to an apology or to have the matter addressed directly in court. The person who exercises his or her rights to refutation, correction and answer must do so within a month of publication.

This provision goes beyond penalizing defamatory content by introducing the vague concept of "distorted thoughts", not seen in any of the other provisions.

The following conditions for the publication of a refutation, correction or answer are set out in Article 45:
- If the offending material appeared in a print publication then the refutation, correction or answer must appear on the same page as the original story under the headline "Refutation" and in the same font.
- The refutation, correction or answer should indicate what information in the original story is false, as well as when and how it was published.
- The refutation, correction or answer must be published in the next issue of the offending publication, or be read on the first radio or television programme following the making of the request.
- The physical person who makes the request, or his or her authorized representative, may appear on air to make an answer.
- The refutation or answer must be transmitted without any changes made to the text. It may be up to twice as long as the original piece. No additional commentary may be made to the refutation or answer.

[37] For instance, a recent decision by the *17e chambre du tribunal de grande instance de Paris*, handed down in June 2004, held that the unauthorised use of a person's photograph – taken in a public place – did not result in any damage to the subject of the picture.

- If the media is going to refuse to publish the refutation, correction or answer, then the person who made the request must be informed of the decision within three days, with reasons.

The following are acceptable grounds under Article 45 for refusing to publish a refutation (and possibly a correction or answer, although this is not explicitly stated):
- it contradicts a court order that is already in force;
- it is unsigned;
- it was already provided to the media;
- it is more than twice as long as the original; or
- more than one month has passed since the original publication.

The right of reply, which would appear to embrace both the right of refutation and the right of answer, constitutes a highly disputed area of media law[38] and advocates of media freedom, including ARTICLE 19, generally suggest that such a right should be voluntary rather than prescribed by law. The right of reply constitutes an infringement to editorial independence, which is an important element of the right to freedom of expression. As an interference with freedom of expression, any measures enforcing a right of reply should therefore comply with the three-part test. Certain conditions should apply:
- The reply should only be in response to statements which are false or misleading and which breach a legal right of the claimant; it should not be permitted to be used to comment on opinions that the reader or viewer doesn't like.
- It should receive similar but not necessarily identical prominence to the original article or broadcast.
- It should be proportionate in length to the original article or broadcast.
- It should be restricted to addressing the incorrect or misleading facts in the original text and not be taken as an opportunity to introduce new issues or comment on correct facts.
- The media should not be required to carry a reply which is abusive or illegal.

The Media Law provisions do not conform to these provisions in important ways. First, their scope is not restricted to false or misleading statements which breach a legal right. As noted, they also provide for a reply for 'distorted thoughts'. The allowable length of twice the original article is almost certainly disproportionate, particularly given that the reply should be restricted to addressing the incorrect statements, although this ground for refusing a reply is not included in the Media Law.

Furthermore, the Media Law provisions are confusing because they refer to three different remedies: refutation, correction and answer. The drafting of Article 45 implies

[38] In the United States, it is seen as unconstitutional on the grounds that it represents an interference with editorial independence. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). In Europe, in contrast, the right of reply is the subject of a resolution of the Committee of Ministers of the Council of Europe. Resolution (74) 26 on the right of reply, adopted on 2 July 1974. See also the Advisory Opinion of the Inter American Court of Human Rights, *Enforceability of the Right to Reply or Correction*, 7 HRLJ 238 (1986). In many Western European democracies, law provides for the right of reply and these laws are effective to a varying extent.

that all three may be claimed, whereas Article 44 implies that only one of the options is available.

Further confusion arises because Article 44 refers to the right to demand an apology or to go to court, but there is no elaboration on how these remedies are to be pursued by the claimant or complied with by the media. In any event, the right to demand and receive an apology is a clear violation of the right to freedom of expression. Forcing someone to produce an apology contradicts the absolute right to freedom of opinion. In any case, it is unnecessary given that a refutation or correction is available.

Article 61(1) states that an editor who refuses to publish a refutation, correction or answer without grounds will be subject to administrative, criminal or other responsibility. The exact nature of the responsibility should be specified since the threat of unknown sanctions has a chilling effect on expression and may grant courts the discretion to impose unreasonable and disproportionate punishments.

Recommendations:

- The right of reply should be elaborated in more detail and restricted in scope in accordance with the principles set out above. In particular, the right should be restricted to cases where a legal right of the claimant has been infringed and should be restricted to addressing false information.
- The right to demand a refutation, correction and answer for the publication of "distorted thoughts" should be removed.
- The Media Law should remove the confusing and redundant language and grant only one remedy rather than referring to three different rights.
- The right to demand an apology should be removed from the Media Law.
- Article 61 should specify the sanction for failure to publish a refutation, answer or correction.