Institut suisse de droit comparé
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COMPARATIVE STUDY

ON

BLOCKING, FILTERING AND TAKE-DOWN OF ILLEGAL INTERNET CONTENT

Excerpt, pages 62-74

This document is part of the Comparative Study on blocking, filtering and take-down of illegal Internet content in the 47 member States of the Council of Europe, which was prepared by the Swiss Institute of Comparative Law upon an invitation by the Secretary General. The opinions expressed in this document do not engage the responsibility of the Council of Europe. They should not be regarded as placing upon the legal instruments mentioned in it any official interpretation capable of binding the governments of Council of Europe member States, the Council of Europe's statutory organs or the European Court of Human Rights.

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National reports current at the date indicated at the end of each report.

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I. INTRODUCTION

On 24th November 2014, the Council of Europe formally mandated the Swiss Institute of Comparative Law ("SICL") to provide a comparative study on the laws and practice in respect of filtering, blocking and takedown of illegal content on the internet in the 47 Council of Europe member States.

As agreed between the SICL and the Council of Europe, the study presents the laws and, in so far as information is easily available, the practices concerning the filtering, blocking and takedown of illegal content on the internet in several contexts. It considers the possibility of such action in cases where public order or internal security concerns are at stake as well as in cases of violation of personality rights and intellectual property rights. In each case, the study will examine the legal framework underpinning decisions to filter, block and takedown illegal content on the internet, the competent authority to take such decisions and the conditions of their enforcement. The scope of the study also includes consideration of the potential for existing extra-judicial scrutiny of online content as well as a brief description of relevant and important case law.

The study consists, essentially, of two main parts. The first part represents a compilation of country reports for each of the Council of Europe Member States. It presents a more detailed analysis of the laws and practices in respect of filtering, blocking and takedown of illegal content on the internet in each Member State. For ease of reading and comparison, each country report follows a similar structure (see below, questions). The second part contains comparative considerations on the laws and practices in the member States in respect of filtering, blocking and takedown of illegal online content. The purpose is to identify and to attempt to explain possible convergences and divergences between the Member States' approaches to the issues included in the scope of the study.

II. METHODOLOGY AND QUESTIONS

1. Methodology

The present study was developed in three main stages. In the first, preliminary phase, the SICL formulated a detailed questionnaire, in cooperation with the Council of Europe. After approval by the Council of Europe, this questionnaire (see below, 2.) represented the basis for the country reports.

The second phase consisted of the production of country reports for each Member State of the Council of Europe. Country reports were drafted by staff members of SICL, or external correspondents for those member States that could not be covered internally. The principal sources underpinning the country reports are the relevant legislation as well as, where available, academic writing on the relevant issues. In addition, in some cases, depending on the situation, interviews were conducted with stakeholders in order to get a clearer picture of the situation. However, the reports are not based on empirical and statistical data, as their main aim consists of an analysis of the legal framework in place.

In a subsequent phase, the SICL and the Council of Europe reviewed all country reports and provided feedback to the different authors of the country reports. In conjunction with this, SICL drafted the comparative reflections on the basis of the different country reports as well as on the basis of academic writing and other available material, especially within the Council of Europe. This phase was finalized in December 2015.

The Council of Europe subsequently sent the finalised national reports to the representatives of the respective Member States for comment. Comments on some of the national reports were received back from some Member States and submitted to the respective national reporters. The national reports were amended as a result only where the national reporters deemed it appropriate to make amendments. Furthermore, no attempt was made to generally incorporate new developments occurring after the effective date of the study.

All through the process, SICL coordinated its activities closely with the Council of Europe. However, the contents of the study are the exclusive responsibility of the authors and SICL. SICL can however not assume responsibility for the completeness, correctness and exhaustiveness of the information submitted in all country reports.

2. Questions

In agreement with the Council of Europe, all country reports are as far as possible structured around the following lines:

1. What are the legal sources for measures of blocking, filtering and take-down of illegal internet content?

Indicative list of what this section should address:

- Is the area regulated?
- Have international standards, notably conventions related to illegal internet content (such as child protection, cybercrime and fight against terrorism) been transposed into the domestic regulatory framework?

- Is such regulation fragmented over various areas of law, or, rather, governed by specific legislation on the internet?
- Provide a short overview of the legal sources in which the activities of blocking, filtering and take-down of illegal internet content are regulated (more detailed analysis will be included under question 2).

2. What is the legal framework regulating:

2.1. Blocking and/or filtering of illegal internet content?

Indicative list of what this section should address:

- On which grounds is internet content blocked or filtered? This part should cover all the following grounds, wherever applicable:
  - the protection of national security, territorial integrity or public safety (e.g. terrorism),
  - the prevention of disorder or crime (e.g. child pornography),
  - the protection of health or morals,
  - the protection of the reputation or rights of others (e.g. defamation, invasion of privacy, intellectual property rights),
  - preventing the disclosure of information received in confidence.
- What requirements and safeguards does the legal framework set for such blocking or filtering?
- What is the role of Internet **Access** Providers to implement these blocking and filtering measures?
- Are there soft law instruments (best practices, codes of conduct, guidelines, etc.) in this field?
- A brief description of relevant case-law.

2.2. Take-down/removal of illegal internet content?

Indicative list of what this section should address:

- On which grounds is internet content taken-down/ removed? This part should cover all the following grounds, wherever applicable:
  - the protection of national security, territorial integrity or public safety (e.g. terrorism),
  - the prevention of disorder or crime (e.g. child pornography),
  - the protection of health or morals,
  - the protection of the reputation or rights of others (e.g. defamation, invasion of privacy, intellectual property rights),
  - preventing the disclosure of information received in confidence.
- What is the role of Internet Host Providers and Social Media and other Platforms (social networks, search engines, forums, blogs, etc.) to implement these content take down/removal measures?
- What requirements and safeguards does the legal framework set for such removal?
- Are there soft law instruments (best practices, code of conduct, guidelines, etc.) in this field?
- A brief description of relevant case-law.

3. Procedural Aspects: What bodies are competent to decide to block, filter and take down internet content? How is the implementation of such decisions organized? Are there possibilities for review?

Indicative list of what this section should address:

- What are the competent bodies for deciding on blocking, filtering and take-down of illegal internet content (judiciary or administrative)?
- How is such decision implemented? Describe the procedural steps up to the actual blocking, filtering or take-down of internet content.
- What are the notification requirements of the decision to concerned individuals or parties?
- Which possibilities do the concerned parties have to request and obtain a review of such a decision by an independent body?

4. General monitoring of internet: Does your country have an entity in charge of monitoring internet content? If yes, on what basis is this monitoring activity exercised?

Indicative list of what this section should address:

- The entities referred to are entities in charge of reviewing internet content and assessing the compliance with legal requirements, including human rights – they can be specific entities in charge of such review as well as Internet Service Providers. Do such entities exist?
- What are the criteria of their assessment of internet content?
- What are their competencies to tackle illegal internet content?

5. Assessment as to the case law of the European Court of Human Rights

Indicative list of what this section should address:

- Does the law (or laws) to block, filter and take down content of the internet meet the requirements of quality (foreseeability, accessibility, clarity and precision) as developed by the European Court of Human Rights? Are there any safeguards for the protection of human rights (notably freedom of expression)?
- Does the law provide for the necessary safeguards to prevent abuse of power and arbitrariness in line with the principles established in the case-law of the European Court of Human Rights (for example in respect of ensuring that a blocking or filtering decision is as targeted as possible and is not used as a means of wholesale blocking)?
- Are the legal requirements implemented in practice, notably with regard to the assessment of necessity and proportionality of the interference with Freedom of Expression?
- In the case of the existence of self-regulatory frameworks in the field, are there any safeguards for the protection of freedom of expression in place?
- Is the relevant case-law in line with the pertinent case-law of the European Court of Human Rights?

For some country reports, this section mainly reflects national or international academic writing on these issues in a given State. In other reports, authors carry out a more independent assessment.

AZERBAIJAN

1. Legal Sources

There are no special laws in Azerbaijan regulating the measures for blocking, filtering and taking down the illegal Internet content. There are also no specially established public authorities, keeping the Internet content under their control, deciding on compatibility of the Internet content with the law. Different public bodies responsible for national security, public order, investigation of crimes or prosecution monitor the media, including online content due to their general activities.

The legal system in Azerbaijan was established based on the roots coming from the Soviet period. This system is a modified version of the continental legal system into the Soviet communist legal system. Despite the fact that some steps had been taken in the post-soviet period towards free economy, pluralist political system, and human rights protection, this legal system continues to preserve the old traditions. Due to democratic governance deficiencies and problems related to the rule of law, the real effective mechanisms ensuring implementation of numerous new laws on political and civil rights are lacking.

The Constitution of the Republic of Azerbaijan, adopted in 1995,[1] is the Law having the highest legal force among the defined hierarchy of the laws. Laws adopted by referendum follow the Constitution. The international agreements to which Azerbaijan is a party, take the next place in the list. Constitutional laws and ordinary laws take the next place in this hierarchy. The decisions of the Government and its agencies take the following place.

Article 47 of the Constitution defines freedom of thought and speech, Article 50 stipulates everyone's freedom to look for, acquire, transfer, prepare, and distribute information. Article 32 of the Constitution stipulates the right to respect for everyone's private and family life, Article 46 defines everyone's right to defend his/her honour and dignity.

Azerbaijan joined the Convention on Cybercrime in 2009.[2] Azerbaijan has also ratified the Convention of the Council of Europe on Prevention of Terrorism,[3] the Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography, to the UN Convention on the Rights of the Child.[4] Furthermore, Azerbaijan joined the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data in 2009.[5]

In addition to the Constitution of the Republic of Azerbaijan, the content is regulated by the Constitutional Law on Regulation of Implementation of Human Rights and Freedoms,[6] the Law on Mass Media,[7] the Law on Television and Radio Broadcasting,[8] the Law on Advertising,[9] the Civil

1 http://www.e-qanun.az/framework/897.

2 Convention on Cybercrime (dated 23 November 2001) ratified by the Law dated 30.09.2009, see at http://www.e-qanun.az/framework/18619.

3 Convention of the Council of Europe on Prevention of Terrorism ratified by the Law dated on 03 February 2014. see at http://www.e-qanun.az/framework/27592.

4 Ratified by the Law dated on 2 April 2002, see at http://www.e-qanun.az/framework/1572.

5 ratified by the Law dated 30 September 2009, see at http://www.e-qanun.az/framework/18625.

6 The Law dated 24 December 2002, see at http://www.e-qanun.az/framework/1881.

7 The Law dated 7 December 1999, № 769-IQ, see at http://www.e-qanun.az/framework/30.

8 The Law dated 25 June 2002, № 345-IIQ, see at http://www.e-qanun.az/framework/1125.

9 The Law dated 15 May 2015, N 1281-IVQ, see at http://www.e-qanun.az/framework/30348.

Code,[10] the Criminal Code,[11] the Family Code,[12] and other laws. Furthermore, the content is regulated by the European Convention on Human Rights, to which Azerbaijan is a party and the case-law of the European Court of Human Rights.

2. Legal Framework

Online and offline content is regulated almost by the same laws. Article 3 of the Law on Mass Media puts the Internet in the same group with other mass media outlets. However it does not clarify whether there is any obligatory registration requirement for the Internet, or whether any property, financial or other restrictions can be applied on the Internet which is the case with other mass media outlets. In practice, no restrictions or registration requirements are applied to the creation of websites or the distribution of content via the Internet. As the Internet is regarded as a mass media outlet, it allows the government to apply requirements for the content disseminated via the Internet.

The Constitutional Law of the Azerbaijan on Regulation of the Implementation of Human Rights and Freedoms,[13] which has been adjusted to the European Convention on Human Rights and its protocols, has defined the legitimate boundaries to which extent the freedom of expression (Constitution, Article 47) and freedom of information (Constitution, Article 50) can be restricted. The freedom of expression and information can be restricted only under the Article 3.1 of the constitutional law. According to Article 3.4 of this law, these restrictions must be proportionate to the legal purposes envisaged in the Constitution of Azerbaijan and in this constitutional law. The Article 3.6 of this constitutional law provides a list of the cases justifying the restrictions on the human rights including the freedom of expression. This article is the same as the Article 10.2 of the European Convention on Human Rights*: "*The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary*".*

According to the European Convention on Human Rights (which is more predominant than local laws, as stated in the Article 151 of the Constitution of Azerbaijan) and the above Constitutional Law, a three-part test should be taken before imposing the restrictions: (i) there should be a clear description in the law for imposing such restrictions, (ii) the restrictions must serve legitimate purposes and must not exceed legitimate boundaries and (iii) *must be "necessary* in a *democratic society"*.

Defamation and insult, privacy, protection of honour and dignity of the president of Azerbaijan

Defamation and insult is considered a crime by the Criminal Code. Article 147.1 of the Criminal Code defines libel as a "distribution of obviously false information which discredits the honour and dignity of any person, or undermines his/her reputation publicly or through a mass media outlet". Article 147.2 of the Criminal Code follows "The libel, which is connected with accusation of committing serious or especially serious crime (is) punishable by imprisonment for up to three years".

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10 Enacted by the Law dated 26 May 2000, N 886-IQ, see at http://www.e-qanun.az/code/8.

11 Enacted by the Law dated 26 May 2000, N 886-IQ, see at http://www.e-qanun.az/code/11.

12 Enacted by the Law dated 28 December 1999, 981-IQ, see at http://www.e-qanun.az/code/10.

13 See footnote 6 above.

According to Article 148 of the Criminal Code: "The Insult is deliberate humiliation of honour and dignity of a person, expressed in the indecent form in the public statement or publicly shown product or in mass media or in the open Internet information resources".[14] It is punishable by imprisonment.

Article 323.1 of the Criminal Code, which punishes humiliation of honour and dignity of the president of the Republic of Azerbaijan, states: "humiliation of honour and dignity of the president of the Republic of Azerbaijan in public statement, publicly shown product or mass media – is punishable by imprisonment for up to two years". The Article 323.2 follows, "The same acts connected to accusation of committing serious or especially serious crime (are) punishable by imprisonment for up to 5 years.

The violation of the National Flag or the State Emblem of the Azerbaijan Republic is also considered a crime and is punishable by imprisonment.

An individual's private life is protected by both criminal code and civil code. According to Article 156 of the Criminal Code, illegal distribution of information on private life, which is personal or family secrets of the person is a crime.

Defamation and individual's private life is protected by the Civil Code as well; the Article 23 of the Civil Code gives citizens the right to appeal to courts for the protection of personal honour and dignity and business reputation. A person can demand a refutation of a statement which he/she thinks violates his/her honour and dignity and business reputation. If information harming the honour, dignity or business reputation or disclosing a secret of private and family life of a natural person was disseminated in the mass media, the information shall be declared as untrue in the same mass media. There are not special safeguards provided by laws and established court practice making balance between the rights of plaintiffs and the freedom of expression of authors, apart from the ones established by the Constitutional Law of the Republic of Azerbaijan on Regulation of the Implementation of Human Rights and Freedoms, described in section 1 above.

According to Article 44 of the Law on Mass Media: "In case of transmission in mass media of information humiliating honour and dignity of physical or legal entities, they have the right within a month to require the given mass media to provide a retraction of the information, correction, and publish an apology".

The refutation shows the date and number in which the original information was published. As a rule the refutation must be published in the same size and on the same page as the original information, under the title "Retraction". Daily and weekly publications and other periodicals must publish the retraction in the next issue, after the demand for the publishing of refutation is received. As for TV programs, refutation must be read out in the next broadcast of the TV program, after the requirement for the refutation is received; here refutation can be in written, audio or video form. Apart from the refutation, the person, who believes to be discredited, can demand compensation for material (loss of benefit) and moral damages.

Proof of the accuracy of information gives absolute defence in libel cases. In addition the Article 62 of the Law on Mass Media specifies concrete cases of absolute defence: "the editorial office or journalist does not bear the responsibility for the information disseminated by official state bodies, from news agencies or press services of entities or from other mass media outlets which was not refuted before, elapsed during live streaming, or obtained in texts which are not subject to editing".

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[14] The term of "the open Internet information resourses" was amended by the Law dated 14 May 2013, N 650 IVDQ.

Protection of personal data

The law "On personal data"[15] regulates gathering of personal data, operating with them and protection of personal data.

According to Article 5.6. personal data (name, surname, name of father, date and place of birth, sex, nationality, phone number, email address, home address, profession and occupation, marriage status, photo and other data) submitted by the person with his or her written consent could be included into the information systems of the general usage for the interest of society in the field of telecommunication, postage, address and others.

According to Article 5.7. of the Law if personal data included into the information systems of general usage from open sources the operator should inform the related person about the content and the source of such data. Such data should be immediately taken-down by the operators of the information systems of general usage on the ground of the written demand of related person or by court order or by the demand of the Ministry of Communications and High Technologies.

In case of the violation of his or her rights of protection of personal data (gathering of personal data or processing them, including publishing them in internet), a person has a right to apply directly to the operator of the information system and request to stop the gathering and processing of his/her personal data. In cases where the gathering and processing of data is not mandatory according to the law, the operator should stop processing the data. The person has a right to apply to the Ministry of Communications and High Technologies and to the courts with the same requests.

There is no established practice about the implementation of the abovementioned norms of the Law yet.

Article 156 of the Criminal Code criminalises the violation of the confidentiality of personal data, dissemination of data about a person's personal and family life, and unlawful gathering of such data.

Prohibition of national, racial, religious discrimination, racism, xenophobia and hate speech

According to the Article 283.1 of the Criminal Code: "Incitement of national, racial or religious hostility, humiliation of national honour, as well as discrimination of citizens based on their national, racial or religious background committed publicly or with use of mass media" is punishable by a fine or imprisonment. However concepts such as "incitement of national, racial or religious hostility" or "humiliation of national honour" are not clearly defined in the national legislation, therefore these concepts are not duly applied in practice by courts, resulting in serious consequences; there are some examples of it.

In 2007, journalist Rafig Tagi was jailed for 3 years by the Grave Crimes Court of Azerbaijan under Article 283 of the Criminal Code, because of his article "Europe and us". In his article, Tagi had compared Islamic and European values and the rapid progress of Europe related to the differences between Islam and Christianity. Six month after the publication of the article, a statement in this article was deemed an insult to the Islamic prophet by Iranian theologians and they issued a fatwa for Tagi's death. After it Tagi was arrested for inciting religious hatred and hostility.[16]

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15 Law dated to 11 May 2010, see at http://www.e-qanun.az/framework/19675.

16 Rafig Tagi and the editor of "Sanat" newspaper were arrested for 2 months http://www.azadliq.mobi/a/271315.html.

In the case of Fatullayev,[17] the journalist was sentenced for inciting religious hatred and hostility (Article 283 of the Criminal Code), for his article entitled "The Aliyevs go to war". He was acquitted following the decision of European Court of Human Rights concluding that the domestic courts had not provided well-grounded reasons for charging him with inciting ethnic hostility.[18]

Unlawfulness of calls for and propagation of terrorism

According to Article 214 of the Criminal Code "Terrorism is committing or threatening to commit explosion, arson or other actions leading to killing people, causing harm to their health, significant damage to property or other socially dangerous consequences, with the purpose to infringe public safety, intimidation of population or rendering influence to decision making of the state authorities or international organizations"

Article 214-2 of Criminal Code criminalises the public appeals to commit terrorism, to attack the persons or establishments under international protection, to exercise with the terrorism purpose, kidnapping, taking hostages, hijacking of aircraft, marine vessels or trains, maritime piracy, illegal transfer of radioactive goods, to attempt to kill public persons, to create and operate with illegal armed groups. Law criminalises the publication or distribution of materials with the same content as well.[19]

Under Article 216 of the Criminal Code, the following actions also are considered crime: "Distribution of obviously untrue report on preparation of explosion, arson or other actions leading to killing people, causing significant damage to property or other socially dangerous consequences".

There is no special provision in the legislation that criminalises the use of the Internet for terror purposes. However, the above articles criminalise the committal of terror act or threat of its committal, public appeals to terrorism made publicly or publication of materials with such contents and spread of wrong report on a terror plan, irrespective of the media through which these actions are committed.

The unclearness of the provisions on terrorism in the national legislation often leads to confusion in practice. In 2007 the Grave Crimes Court of Azerbaijan sentenced journalist Eynulla Fatullayev to a lengthy sentence, charging him with terrorism. He was acquitted later after following the decision of the European Court of Human Rights.[20]

In its decision, the ECHR did not agree with the conclusion of Azerbaijani courts that journalist's statements could be characterised "as threatening the Government with destruction of public property and with acts endangering human life, with the aim of exerting influence on the Government to refrain from taking political decisions required by national interests." ECHR stated that "However, having regard to the circumstances of the case, the Court cannot but conclude that the domestic courts' finding that the applicant threatened the State with terrorist acts was nothing but arbitrary. The applicant, as a journalist and a private individual, clearly was not in a position to influence any of the hypothetical events discussed in the article and could not exercise any degree of control over any possible decisions by the Iranian authorities to attack any facilities in the territory of Azerbaijan. Neither did the applicant voice any approval of any such possible attacks, or argue in favour of them. As noted above, the Court considers that the article had the aim of informing the public of possible consequences (however likely or unlikely they might seem) of the Government's

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17 Fatullayev vs Azerbaijan, no. 40984/07, 22 April 2010, ECHR.

18 Fatullayev case, § 126.

19 http://e-qanun.az/framework/27463

20 Fatullayev vs Azerbaijan, no. 40984/07, 22 April 2010.

foreign policy and, more specifically, criticising the latter for making certain decisions, such as supporting the "anti-Iranian" UN Security Council Resolution. However, there is nothing in the article to suggest that the applicant's statements were aimed at threatening or "exerting influence" on the Government by any illegal means. In fact, the only means by which the applicant could be said to have "exerted influence" on the State authorities in the present case was by exercising his freedom of expression, in compliance with the bounds set by Article 10, and voicing his disagreement with the authorities' political decisions, as part of a public debate which should take place freely in any democratic society."[21] (Fatullayev vs. Azerbaijan, no. 40984/07, 22 April 2010).

Criminalization of pornography and child pornography

Azerbaijani laws prohibit dissemination of content containing pornographic elements. Article 242 of the Criminal Code criminalises illegal manufacturing, distribution, advertising of pornographic materials or subjects, as well as illegal trade in printed editions, movie or videos, images or other objects of pornographic nature.

On 29 June, 2012 amendments to the Criminal Code separated the child pornography from adult pornography and defined it in Article 171.1 as an aggravated crime. Article 171.1.1 criminalises producing, offering or making available, distributing or transmitting, procuring, possessing child pornography. Here the term "child pornography" shall include pornographic material that visually depicts a minor or a person appearing to be a minor engaged in sexually explicit conduct and realistic images representing a minor engaged in sexually explicit conduct.

Protection of copyright

The main legislative act of the Republic of Azerbaijan regulating copyright is the Law of the Republic of Azerbaijan on "Copyright and Related Rights".[22] The individuals violating these rights bear civil liability and have responsibility to pay the compensation to the owners of these rights, in case of any damage.

The Criminal Code specifies punishment for violation of these rights. Illegal appropriation of copyright of other individuals' scientific, literary, art or other products, their illegal reprinting or distribution, causing significant damage to the actual owner, these actions are punished under Article 165 of the Criminal Code. More severe punishment is stipulated for the same act, committed repeatedly or on preliminary arrangement by group of persons and by organized group.

Article 166 of the Criminal Code criminalises the violation of inventor's right and patent rights, illegal use of inventions or efficiency proposals, disclosure of essence of inventions and efficiency proposals without the author's agreement before official publication of them, and appropriation of copyright.

Prohibition of the distribution of "harmful materials"

The Criminal Code prohibits publicising opinions that instigate extremism. Article 281 states: "Public appeals to violent capture of power, retention of authority or violent change in the constitutional order or infringement of territorial integrity of the Azerbaijan Republic, as well as distribution of such materials are punishable by imprisonment for up to five years".

Early in 2011 blogger Elnur Majidli, who used the Facebook social networking website to call on the youth to organize protests, was charged under this Article.[23] The prosecutor's office has suspended

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21 Ibidem § 123.

22 Law dated to 5 June 1996, http://www.e-qanun.az/framework/4167.

23 http://www.azadliqradiosu.az/content/news/24214470.html.

the criminal case opened against Majidli, as the journalist is currently living in France. A search has been launched for his detention by the prosecutor's office. The criminal charges against Majidli showed that Article 281 of the Criminal Code is very vague, and therefore prosecutors apply this Article at their sole discretion. The terms "capture of power", and "violent" are very vague and can be interpreted in many different ways. Also, real threat level of the "public calls to violence" is not considered. As stated in the Article 281, not only "public appeals to violence", but also "distribution of such materials (i.e. appeals)" is punishable.

According to the Law "On combating religious extremism" adopted in December 2015 the following activities, made on the ground of religious antagonist, religious radicalism or religious fanaticism are religious extremism: public appeals to forceful alteration of constitutional rule, including secular regime, capture of power, interruption of territorial integrity, to establish illegal armed forces, to participate in such groups, to conduct terrorist activities, to promote ethnic, social or religious hatred; preparation or dissemination of religious extremist materials, which appeals to religious extremist activities or promoting of such activities or justifying the necessities of such activities.[24]

Article 220 of the Criminal Code criminalises "organising mass disorders or participation in such disorders, accompanied by violence, robbery, arsons, demolition of property, use of fire-arms, explosives, and armed resistance to a representative of authority."
According to Article 220.2 of the Criminal Code "appeals to active insubordination to legal requirements of representatives of authority and to mass disorders, as well as appeals to violence against citizens are punishable by imprisonment for up to 3 years".

On August 2012, journalist Faramaz Allahverdiyev was sentenced under this Article of the Criminal Code, for the opinions he shared on the Facebook social networking website.[25] When Faramaz and his friends were discussing the March 1, 2012 public riots in Guba (where protesters burned the house of the Guba executive chief), Allahverdiyev called on his friends to meet near the mansion of the president of Azerbaijan. He promised to bring kerosene and matches, and burn himself during the protest. However, there is no evidence showing that Allahverdiyev or any of his friends went to the designated place after their conversation. This shows that the charges against the journalist stemmed solely from the content of the conversation; the consequences of this conversation (whether it caused damage or not) was not evaluated.

The Criminal Code prohibits actions instigating extremism; one of such actions is public appeals to launching an aggressive war, stated in the Article 101 of the Criminal Code. The second section of the Article follows: "the same appeals made through mass media are punished by imprisonment up to 5 years".

The Criminal Code has also prohibited the following content, which it considers harmful: Article 104 criminalises the propagation or open incitement to genocide and Article 236 criminalises the incitement to consumption of narcotics or psychotropic substances.

Limitation imposed by advertising laws

The Law on Advertising[26] defines the requirements for content of the information which can be considered advertising and its distribution, as well as restricted or prohibited advertising.

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24 http://www.e-qanun.az/framework/31509

25 http://www.bbc.com/azeri/azerbaijan/2012/08/120823_azerbaijan_journalist_sentenced.shtml.

26 http://www.e-qanun.az/framework/30348.

Article 11 of the Law on Advertising prohibits the advertisement of goods, derived by law from commodity turnover (e.g. narcotic and psychotropic substances, weapons and explosive devices, etc.), as well as products and activities that adversely affect morale, physical and psychological health of the consumer of advertising, install bad habits, and carry a potential threat to public safety or the environment. Article 12 of that Law also prohibits advertising foreseen to be harmful to minors' moral and physical integrity.

The scope of these prohibitions is very wide and in many cases, it is not concrete and clear, and there is no practice ensuring its accurate understanding. The list of these prohibitions includes as follows: Information, damaging the reputation of the parents, guardians, trustees, educators and other persons, undermining their credibility; Grafting brutality, hatred, aggression, bad habits towards other person; Information aimed at instigating parents and others to purchase the goods, making them the possibility of acquiring the goods, regardless of the financial situation of the family, by using powerful and distinctive words; Demonstrating acts which endanger life or health, instigate for their repetition;
Advertising goods unrelated to the minors in mass media, television and radio programs, intended for them; Use of elements harmful to the interests of children in advertisings addressed to minors or broadcasted with their participation; Description of minors in situations that could create a psychological tension.

Blocking websites and access to Web 2.0 services, filtering

There are no special laws sanctioning the blockage of websites and access to web 2.0 services. Neither legislation, nor regulatory acts have provisions like "blocking access to websites" or "application of blocking systems". In practice, there have not been any administrative or court decisions ordering to block the access to a web content.

Azerbaijani legislation retains power to impose sanctions on mass media outlets based on the content they disseminate. Article 19 of the Law on Mass Media specifies terms and conditions for cessation or termination of production and distribution of print media. Among other sanctions that can be applied by courts, there is a sanction to suspend the work of the print media for two months. In addition, the production and distribution of a mass media can be terminated for the dissemination of pornographic materials, as well as appeals or information that causes serious damage to the territorial integrity and security of the state and to the public order. The appeal for the termination of the production and distribution of a mass media can be filed by the Ministry of Interior, the Ministry of Justice and the Ministry of National Security. The same measure is applied when a mass media outlet is illegally financed by a foreign organization, a foreign based physical person or a legal entity, or if the mass media outlet is sentenced by courts for more than three times in one year, on charges of defamation, insult, or interference with private and family life.

The abovementioned sanctions apply to print media and to online newspapers as this law regards the Internet as a mass media outlet. Measures of limitations for such contents disseminated by broadcasting media are regulated by the Law on Television and Radio Broadcasting.[27]

No measures such as blocking or filtering websites or removal of web-content are envisaged in the legislation. However it is possible that local courts can use such measures based on such a vague media law. No blocking or filtering acts have been reported so far.

Responsibilities of intermediaries

[27] See footnote 8 above.

Although regulations on limitations of freedom of expression are applicable to the content spread via Internet, there is no provision in the legislation regarding definition of intermediaries, intermediary liability of either host or content providers, about content filtering and blocking, or taking down the content considered harmful and illegal. Furthermore, no private practice examples exist in this field, which can be referred to. Neither host, nor content providers have their own special written rules. ISPs do not have terms of services developed by them. The editors are responsible for content provided by them. In these cases, appeal and its consideration procedure are not defined.

Existing laws regulate only the responsibilities of editors. The definition of editors could be applied to the content providers as well. Under Article 60 of the Law on Mass Media, the editorial office of the mass media outlet are responsible if the disseminated information is prohibited by the law; the editor-in-chief (editors) of the print media is responsible for the lack of control on conformity of materials to requests of the present Law. As stated in the law, the accountable editor, editorial office, and even the chief editor of a publication bear responsibility for the published content (information) besides the author of this content. The editorial office or the broadcaster is exempted from responsibility only if information disseminated by official state bodies or their press services (official documents of state structures and court decisions are intended), obtained from other mass media outlets which was not refuted before, elapsed during live streaming, or obtained in text forms which are not subject to editing.
The laws regulating emergency or martial situations ("Law on Emergency Situations",[28] "On *Martial Law",*[29]) allow the internet providers to kill switch the internet services of the users in emergency or martial situations. Those laws are vague; their scope is even wider than that of the restrictions stipulated in the other laws. An internet provider is entitled to cut the internet services of all the users in war and emergency situations and natural disaster.

According to the Article 8.0.12 of the Law on Emergency Situations, in cases of emergency situations the freedom of the press and other mass media outlets can be restricted through application of preliminary censorship. Under the clause 8.0.22 of this Law, special rules of using communication services can be applied in cases of emergency situations. According to the Article 16 of this Law, authorised state agency can restrict, suspend usage communication or set special rules on their use in emergency situations. Operators of communication and Internet network and providers should priorities the distribution of information about urgent measure to ensure the protection and security of people and the country during natural disasters, epidemics and catastrophes.

Martial Law as well allows restriction of the freedom of the mass media outlets and imposing of censorship (Article 11.2 of the Martial Law)

3. Procedural Aspects

In Azerbaijan, there is no special administrative body determined by law, authorised for making decisions on blocking, filtering or taking down the illegal content from the Internet. Only the courts of general jurisdiction can theoretically make decisions on taking down, filtering and blocking of the Internet content, although the Law does not stipulate the possibility for taking such measures.

Under the Code of Criminal Procedure, the courts decide on criminal accusations submitted by the prosecution bodies and private prosecutions, initiated by ordinary persons. Criminal accusations for libel and slander, defined by Article 147 and 148 of the Criminal Code, are initiated by ordinary

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28 Adopted on8 June 2004; http://www.e-qanun.az/framework/6193 03.10.2015.

29 Adopted on January 6, 1994; http://www.e-qanun.az/framework/8984.

persons, considered victims under the procedure of private prosecution, according to Article 37.2 of the Code of Criminal Procedure. According to Article 37.6 in other cases, prosecution bodies lodge the accusations based on the outcomes of the investigated cases, with regard to Articles of the Criminal Code, defining the criminal liability for content.

Furthermore, the courts under the Code of Civil Procedure, consider the cases based on the alleged violations of rights and damage claims (CCP, Article 5) under civil jurisprudence.
While deciding on criminal cases, the courts cannot go beyond the punishment measures defined by the Criminal Code. The Criminal Code establishes an exhaustive list of the punishment measures applied to convicted persons. This list does not include measures such as blocking, filtering, or taking down the content considered illegal. And there are not any provisional measures that could be interpreted as possible grounds for blocking, filtering and take-down.

There are no such measures of restriction in consideration of civil cases. Under Article 5 of the Code of Civil Procedure, the court shall start the proceeding in case any physical person or legal entity applies to court for protection or recognition of his/her rights or interests prescribed by law. In cases provided by law, the proceeding can also get initiated for protection of rights and interests of other person, or persons or state, based on the application of the person or public authority.

Although no blocking, filtering or taking down the illegal content on Internet are defined by law in one case court ruled to take down the allegedly defamatory content published on Internet. In March 2014, while considering a case regarding the protection of honour and dignity, the Narimanov District Court ruled to close the Facebook page "Lies of I.Mirzayev", which published the content, considered by the court defamatory. The court also decided to take down the defamatory expressions used about the plaintiff, from the web sites.[30] No legal basis for imposition of such measure was defined by the court in its decision. In this case, while holding the decision on removing the illegally considered content from the web sites, the courts referred to the general provisions of the Law on Mass Media defining the liability of the media, and the general provisions of the Civil Code, requiring taking the measures for prevention of the action continuing to damage.

In other case, the Astara District Court[31] ruled that the person accused of defamation damaged the business reputation of the plaintiff-bank, because of the content published on his Facebook page. The court which criminally punished the accused person did not rule about taking down the opinions considered false, from the Facebook page, however, requested refutation.

In other court case, based on the private prosecution complaint made by the Minister of Internal Affairs, the Yasamal District Court ruled a decision on punishment of the person degrading the reputation of him and other police officers in his Facebook status, but did not request from the defendant to take down the expressions, considered by the court defamatory.[32]

According to general rule, as well as well established practice with regard to mass media, the obligation to refute or to take down the harmful content, lies on the person who disseminates such information. Also, the Narimanov District Court, ruling the decision on taking down the harmful content from the Internet, put this obligation on online newspapers, which published this information. Another respondent was obligated to close the Facebook page which he specifically opened and shared illegal information about the plaintiff.

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30 http://www.monitoring.az/index.php?lngs=aze&cats=1&ids=2559

31 http://musavat.com/news/azerbaycanda-facebook-statusuna-gore-mehkeme-cezasihokm_160723.html?welcome=2.

32 http://www.meydan.tv/az/site/politics/6035/Məhkəmə-Eldəniz-Quliyevin-1000-manat ödəməsini-tələb-edir.htm.

In court practice, no decision was ruled with regard to blocking or filtering illegal content.

There is no practice regarding involvement of internet host providers and internet access providers in execution of the court decision about taking down the content.
According to general rules of the civil and criminal court proceedings, the appeals against the court rulings are considered in the appellate and cassation instances.

4. General Monitoring of Internet

There is no public authority, responsible for monitoring of Internet content in Azerbaijan and making decisions on illegally considered content. Different public authorities monitor the Internet content within their functional obligations. For instance, the State Committee for Religious Organizations monitors religious content shared. The State Committee is authorised to control the production, publication, importing or dissemination of religious content (print or online literature, other content with religious information). The Ministry of National Security and the Ministry of Internal Affairs are authorised to monitor the Internet content with the purpose of protecting the state and the public safety, and preventing the commission of crimes. However, the special monitoring and decision-making authorities responsible for consideration of the illegal internet content and taking measures regarding such content (e.g. taking down, blocking or filtering) are not defined. There is no established case law about application of any such measures by government agencies.

The Ministry of Education's Bureau of Informatisation of Educational System[33] created Azerbaijani Educational System's Intranet and Internet Network which provide internet access, as well as, content services for the purpose of education to schools and other educational institutions. The content accessible through those Internet and Intranet is under monitoring and uncovered illegal and dangerous content are subject to filtering and blocking by special software programs. The Bureau also operates a hotline to send complaints about such content. No developed written rules regulating of the procedures, measures of such filtering and blocking and existing safeguards for free expression rights have been reported since. The Bureau has never made public any information about its practice in this field.

5. Assessment as to the case law of the European Court of Human Rights

Although the Constitution, the Constitutional Law on Regulation of the Implementation of Human Rights and Freedoms, the Law on Mass Media and other laws define provisions about freedom of expression, its safeguards and limitations in general, there is almost no law specifically regulating the procedure on putting limitations on Internet content. There are numerous provisions in the Criminal Code, the Civil Code, the Law on Mass Media and other laws about the consideration of content to be illegal and the list of criteria and measures for limitations. However, since the provisions of the laws regarding illegal content are not precise and completely clear, they create wide opportunities for arbitrary implementation.

Alongside the absence of laws regulating blocking, taking down, or filtering of illegal content, as well as the absence of laws defining intermediary liability of Internet Service and Host Providers, there are no laws defining concrete procedures guaranteeing the rights of intermediaries from arbitrary interference.

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33 http://ict.edu.az/az/home.html.

Lack of laws and regulations creates a risk of incompatibility of the measures taken with respect to illegal content with "restrictions .... described by law", as defined by the European Convention on Human Rights and quality, foreseeability, accessibility, clarity and precision requirements, as developed by the European Court of Human Rights.
In both I. Mirzayev case[34] and Access Bank[35] cases, the implementation of the decision on taking down the content considered illegal was directly imposed on the persons sharing that content. Therefore, the problems with respect to intermediary liability of Internet Service and Host Providers have not come into play. While the decisions on blocking or filtering illegal content are made, it will be impossible to avoid such problems during their implementation.

Lack of regulations defining the measures for blocking or filtering illegal content, as well as enforcement of such possible decisions creates unavoidable risk of violations of other positive obligations of the state, including other human rights the state has the obligation to guarantee (protection of state security, territorial integrity, public safety, public morality and health, specifically, mental and physical health of children, protection of rights of other persons, etc.).

The unclearness of the provisions on terrorism in the national legislation often leads to confusion in practice. In 2007 the Azerbaijan Grave Crimes Court sentenced journalist Eynulla Fatullayev (director of two critical newspapers) to a lengthy sentence, charging him with terrorism. In an article titled "The Aliyevs go to war" (published in *Realniy Azerbaijan* newspaper) Eynulla Fatullayev put forward his hypothetic opinions about international disputes over the Iran's efforts to acquire a nuclear weapon, the United State's possible missile attack on Iran and its consequences for Azerbaijan. The journalist wrote that in case of Azerbaijan's support for international anti-Iran coalition, Iran might launch a missile attack on strategic industrious objects and infrastructures of Azerbaijan. Then he gave a long list of such objects (targets).

Fatullayev followed that Iran may put the ethnic minorities living in Azerbaijan against the central government. The author also criticised the Azerbaijani government for poor management of the country, economic and social problems, and stressed that people living in regions are dissatisfied with the policy of the central government.

Soon after the publication of the article the journalist was arrested and sentenced to a lengthy jail term, under the Article 214 of the Criminal Code, it was part of the government's suppression of free media and journalists. This decision once again proved that the concept of terrorism is very vague in the national legislation; it is not understood properly which leads to its incorrect application.

The ECtHR came to the conclusion that: "the domestic courts arbitrarily applied the criminal provisions on terrorism in the present case. Such arbitrary interference with the freedom of expression, which is one of the fundamental freedoms serving as the foundation of a democratic society, should not take place in a state governed by the rule of law."[36]

Concepts such as "incitement of national, racial or religious hostility" and "humiliation of national honour" are not clearly defined in the national legislation, therefore these concepts are not duly applied in practice by courts resulting in serious consequences.

In the abovementioned case, journalist E. Fatullayev was sentenced for inciting religious hatred and hostility (Article 283 of the Criminal Code), for his article entitled "The Aliyevs go to war". The

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34 See footnote 30 above.

35 See footnote 31 above.

36 Fatullayev vs. Azerbaijan, no. 40984/07, 22 April 2010, § 124.

journalist expressed his opinions about possible missile attack by Iran on Azerbaijan, and its influence to the future social situation of ethnic minorities living in the regions of Azerbaijan. He condemned the government police on the administration of the regions of Azerbaijan.

As the charges for ethic discrimination and hatred are not clearly defined in the legislation, it repeatedly led to confusions regarding local court's decisions. When considering an appeal from Azerbaijan, the European Court of Human Rights stated that the local courts of Azerbaijan failed to provide evidence for their decisions on calls for ethnic hostility.

As the concepts "ethnic hostility" and "hatred" are not clearly defined in the national legislation, the courts made significant mistakes when charged the journalist with inciting ethnic hostility and hatred. When considering the journalist's appeal, the ECtHR concluded that the Azerbaijani courts had not provided well-grounded reasons for charging him with inciting ethnic hostility.

The ECtHR stated that the "issues raised in the relevant passages of the applicant's article could be considered a matter of legitimate public concern which the applicant was entitled to bring to the public's attention through the press. The mere fact that he discussed the social and economic situation in regions populated by an ethnic minority and voiced an opinion about possible political tension in those regions cannot be regarded as incitement to ethnic hostility. Although the relevant passages may have contained certain categorical and acerbic opinions and a certain degree of exaggeration in criticising the central authorities' alleged treatment of the Talysh minority, the Court considers nevertheless that they contained no hate speech and could not be said to encourage inter-ethnic violence or to disparage any ethnic group in any way."[37]

Rashid Hajili – 01.11.2015

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[37] Fatullayev case no. 40984/07, 22 April 2010, § 126.