

Partnership for Good Governance
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ANALYSIS OF AZERBAIJANI LEGISLATION ON
FREEDOM OF EXPRESSION

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The main purpose of this analysis is to provide an up to date overview of the legislative and regulatory framework of the Republic of Azerbaijan concerning the freedom of expression, and evaluate its compliance with the requirements of the Article 10 (freedom of expression) of the Convention for the Protection of Human Rights and Fundamental Freedoms, as elaborated in the decision of the European Court of Human Rights. This analysis starts with the general norms applicable to the freedom of expression and the scope of regulation, including issues, such as incitements of violence, defamation, hate speech, obscenity, classified and confidential information and religious expression among others. It continues with an overview of laws and regulations concerning mass media, and then specifically broadcast media and internet. Each chapter is followed by recommendations on how the existing legal framework should be reformed towards compliance with the requirements of the Convention. These recommendations, as well as a summary and overview of the analysis are also included in the last section of the analysis. This analysis is intended to be useful for journalists, media workers, citizens and lawyers, as well as the civil society and government officials interested in legal issues concerning freedom of expression in Azerbaijan.

1 Introduction

Several provision of the Constitution of Azerbaijan are relevant to the constitutional basis of the freedom of speech and expression in Azerbaijan.¹ Provisions most relevant to the freedom of expression are articles 47 (freedom of thought and speech), 50 (freedom of information) and 51 (freedom of artistic speech), as well as article 32 (right to personal inviolability):

Article 47. Freedom of thought and speech

- I. Everyone has a right to freedom of thought and speech.
- II. Nobody may be forced to promulgate one's thoughts and convictions or to renounce one's thoughts and convictions.
- III. Propaganda provoking discord and animosity based on racial, national, religious, social, or any other ground is prohibited

Article 50. Freedom of information

- I. Everyone is free to look for, acquire, transfer, prepare and distribute information by lawful means.
- II. Freedom of mass media is guaranteed. State censorship in mass media, including press is prohibited.
- III. Everyone is guaranteed a right to respond to or refute information published in mass media and damaging one's rights or interests.

Article 51. Freedom of creative activity

- I. Everyone has freedom of creative activity.
- II. The state guarantees freedom in literary-artistic, scientific-technical and other kinds of creative activity.

Article 32. Right to personal inviolability

- ... III. Except in cases provided in law, nobody may be subjected to following, video and photo recording, sound recording and other similar actions without one's knowledge or despite one's protest. ...
- VI. Except as provided by law, access to information resources conducted in electronic form or on paper for the purpose of obtaining data on third parties is prohibited.
- VII. Except when the person concerned with the data expressly agrees with this, the processing of statistical data of an anonymous nature with the condition of non-discrimination, and in other cases permitted by law, information technologies may not be used to disclose personal data, including about beliefs, religious and ethnic identity.
- VIII. The range of personal data, as well as the conditions for its processing, collection, transfer, use and protection are established by law.

These formulations concerning the freedom of expression and the right to personal inviolability were enacted by the 2016 changes to the Constitution², and were criticized by the Venice Commission as being too restrictive to the freedom of expression. In particular,

¹ Constitution of the Republic of Azerbaijan, adopted on 12 November 1995, as amended by referendums of 24 August 2002, 18 March 2009, and 26 September 2016.

² See Referendum Act of the Republic of Azerbaijan on changes to the Constitution of the Republic of Azerbaijan adopted by nationwide plebiscite (referendum) of 26 September 2016.

the Venice Commission noted that constitutional protection of private data “should not prevent collection and disclosure of data on “private life” of public figures, within the limits set by the ECtHR case-law under Article 10 of the European Convention”, nor prevent “collection and systematisation of data” for other legitimate purposes. Furthermore, with regard to section III of Article 47 of the Constitution Venice Commission noted that “such an open-ended clause may justify far-reaching restrictions on freedom of expression”³.

Article 71.2 of the Constitution sets out conditions under which constitutional rights may be limited.

Article 71. Protection of human and citizen’s rights and liberties

II. ... Everyone’s rights and liberties are limited on the grounds provided in the Constitution and laws, as well as by the rights and liberties of others. Restrictions on rights and liberties must be proportionate to the aim pursued by the state.

Azerbaijan signed the European Convention on Human Rights on 1 January 2001, and Parliament ratified it on 25 December 2001. The ratification was deposited on 15 April 2002, which is considered as the date of the entry into the force of the Convention with regard to Azerbaijan.⁴ According to the Constitution, international agreements “constitute an integral part of legislative system of the Azerbaijan Republic”.⁵ Moreover, the Constitution provides that in a case of conflict between Azerbaijani laws and regulations on the one hand, and the international agreements to which Azerbaijan is a party on the other, the provisions of international agreements prevail. The exception to this rule is the Constitution itself and acts accepted by way of a referendum.⁶

Following the accession to the Convention, Azerbaijan also passed the Constitutional Law on Human Rights in 2002. While it is not an implementing legislation, as the Convention is deemed to have a direct legal effect, it is facilitating legislation “adopted with a view of bringing the exercise of human rights and freedoms in the Republic of Azerbaijan in conformity with the European Convention on Protection of Fundamental Human Rights and Freedoms”.⁷

This law starts with a provision that prohibits the abuse of rights and with a general prohibition of the violation of rights of others.⁸ The most important part of the law is the one regulating restrictions that can be made on human rights. In Article 3 on the “requirements to the legal restrictions of human rights and freedoms” the Constitutional Law provides that such restriction should be provided by law and moreover be “compatible and proportionate to the aims” that are deemed legitimate under the Constitution or the Constitutional Law.⁹

The Venice Commission noted with regard to the current limitation clause of Article 71.2 of the Constitution that it is less protective than the provisions of the Constitutional Law on Human Rights, because:

“Not every result which the State may expect to reach from introducing restrictions on human rights would be a “legitimate aim” from the standpoint of the European Convention. It is thus necessary to amend the wording of Article 71 in order to duly

³ See *paras* 38 and 40, European Commission for Democracy through Law (Venice Commission), Opinion No. 864 / 2016, on the Draft Modifications to the Constitution Submitted to the Referendum of 26 September 2016 (endorsed by the Venice Commission at its 108th Plenary Session, (Venice, 14-15 October 2016), available at [www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2016\)029-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)029-e)

⁴ Information on signing and ratification is available at <http://conventions.coe.int>.

⁵ Article 148.2 of the Constitution.

⁶ Article 151 of the Constitution.

⁷ Constitutional Law № 404-IİKQ (24 December 2002) “on Regulation of the Exercise of Human Rights and Freedoms in the Republic of Azerbaijan”.

⁸ *Id.*, Art. 1.

⁹ *Id.*, Art. 3.

reflect the concept of “legitimate aim”. In this respect, the formula used by the 2002 constitutional law (“a legitimate aim provided by the Constitution”) is clearly preferable and ought to have been reproduced in modified Article 71 of the Constitution.”¹⁰

The application of the Convention by national courts has been encouraged by a Presidential decree that “recommends to the Supreme Court, Appellate Courts and Supreme Court of Naxçivan to organize the study of the case law of the European Court of Human Rights and to take it into account in judicial practice”¹¹.

Furthermore, the Plenum of the Supreme Court, which according to the law can provide courts with “clarifications on the issues of judicial practice”¹² gave an opinion on the functioning of the Convention law in Azerbaijan in its decision in 2006.¹³ The decision explains that human rights have “general character” and that every human is entitled to the human rights and freedoms without any discrimination, that human rights are “universal, indivisible, reciprocal, interdependent and interrelated”. The decision also instructs the courts in dealing with violations of human rights and freedoms to follow the provisions of the European Convention and in doing so, to resort to the practice of the Strasbourg Court.

The practice, however, is not optimistic, as shown by international monitoring mechanisms and media watchdogs. The UN Human Rights Committee, for example, observed¹⁴ in 2016 that:

36. The Committee remains concerned about extensive restrictions on freedom of expression in practice, including:

(a) Consistent reports of intimidation and harassment, including arbitrary arrest and detention, ill-treatment and conviction of human rights defenders, youth activists, political opponents, independent journalists and bloggers on allegedly politically motivated trumped-up administrative or criminal charges of hooliganism, drug possession, economic crimes, tax evasion, abuse of office, incitement to violence or hatred etc.;

(b) Reports of arbitrary interference with media freedom, including revocation of broadcast licences allegedly on political grounds (e.g. of Radio Free Europe/Radio Liberty and ANS television and radio outlets), allegations of politically motivated criminal proceedings against independent media outlets (e.g. the online news outlet Meydan TV and its journalists) and alleged financial pressure on the independent newspaper Azadliq;

(c) Criminalization of defamation (arts. 7, 9, 10, 14 and 19).

There is a growing number of statements on particular situations of restrictions on media freedom in Azerbaijan by the OSCE media freedom watchdog.¹⁵ Furthermore, in 2017

¹⁰ Venice Commission Opinion on Draft Amendments to the Constitution, *supra*, at para 31.

¹¹ President's Decree № 352 (19 January 2006) “on modernization of the judicial system of the Republic of Azerbaijan and on implementation of the law of the Republic of Azerbaijan “on changes and amendments to certain legislative acts of the Republic of Azerbaijan”.

¹² Art. 79 of the law “on judges and courts” №. 310-IQ (10 June 1997).

¹³ Decision № 5 (30 March 2006) of the Plenum of the Supreme Court of Azerbaijan Republic “on the application of the provisions of the European Convention “for the Protection of Human Rights and Fundamental Freedoms” and of the precedents of the European Court on Human Rights in the course of administration of justice”.

¹⁴ Human Rights Committee, Concluding observations on the fourth periodic report of Azerbaijan, CCPR/C/AZE/CO/4, 16 November 2016.

¹⁵ See OSCE Representative on Freedom of the Media statements concerning Azerbaijan at www.osce.org/representative-on-freedom-of-media

Parliamentary Assembly of Council of Europe expressed concern¹⁶ about the “arbitrary application of criminal legislation to limit freedom of expression”, noting arrests of journalists and bloggers “for criticising the policy of the authorities on Facebook”. In the same resolution further freedom of expression issues were raised, for example,:

8. The Assembly is concerned about repressive actions against independent media and advocates of freedom of expression in Azerbaijan. These actions are detrimental to effective media freedom and freedom of expression, undermine the safety of journalists and create a climate of violence against those who express divergent views. The Assembly is particularly worried about the recent amendments to the laws on internet regulation and court decisions to block websites, and recalls the need for protection of fundamental rights in the digital area. The Assembly deplores the recent legislative changes, including on criminal charges and prison sentences concerning defamation on social media, and reiterates its long-standing demand for decriminalisation of defamation.

...

16. Taking all these concerns and developments into account, the Assembly calls on the Azerbaijani authorities to:

...

16.5.3. refrain from any unjustified application of criminal law to limit freedom of expression;

...

16.6.1. create conditions enabling journalists to carry out their work freely, ensure that no pressure is exerted on them and, in particular, drop all criminal charges against Mehman Aliyev and those measures which also have an impact on the functioning of the Turan news agency;

16.6.2. ensure a genuinely independent and impartial review by the judiciary of cases involving journalists, fight against repression of independent journalists and ensure that there is no more prosecution of independent journalists and bloggers on allegedly trumped-up charges;

16.6.3. continue to step up efforts towards the decriminalisation of defamation, in co-operation with the Venice Commission, and in the meantime remove heavy criminal sanctions, such as custodial sentences for defamation, from the Criminal Code;

¹⁶ Parliamentary Assembly, Resolution 2184 (2017), The functioning of democratic institutions in Azerbaijan, adopted on 11 October 2017, available at <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24188&lang=en>

2 Regulation of freedom of expression

Besides the Constitution, various laws, presidential decrees, decisions of the Cabinet of Ministers, as well as regulations of various central executive bodies regulate the issues relevant to various aspects of the freedom of expression. In this section such legislation and regulations that affect freedom of expression in general and, therefore, are applicable to all media, are addressed.

2.1 Scope of regulation

This section addresses laws and regulations that regulate the freedom of expression in contexts including incitements to violence, hate speech, defamation, obscenity, classified and confidential information, protection of judicial proceedings, and religious expression.

2.2 Positive obligations to protect journalists

While the central rationale of Article 10 of the Convention is to safeguard the freedom of expression, it would not be able to realise its *raison d'être* without member states implementing a favourable environment in which journalists are protected and crimes against them are effectively investigated and prosecuted. These principles are reflected in the case-law of the European Court, that comprises relevant decisions in respect of Azerbaijan.

Probably one of the most significant events of the independence decades of Azerbaijan was the 2005 murder of Elmar Huseynov, the editor-in-chief of the weekly magazine *Monitor*. In the case of *Huseynova v. Azerbaijan* the European Court held that the lack of “an adequate and effective investigation into the circumstances surrounding the killing of the applicant’s husband” was a breach of Article 2 of the Convention¹⁷. In at least three other decisions the European Court pointed out the failure on behalf of the authorities to carry out an effective investigation into a mistreatment of a journalist¹⁸. For the protection of the freedom of expression to be effective, every step must be taken by authorities to effectively investigate and prosecute violence against journalists.

2.3 Incitements to violence

Azerbaijani criminal code provides punishments for various types of ‘calls’ (*çağırış*) to violent actions. It is characteristic that the criminal code does not take into account the probability or imminence of the harmful outcome to which the “call” is made. Neither does it account for the context in which the ‘call’ is made in evaluating whether an utterance deserves criminal punishment. Usually the punishment is higher when a ‘call’ is disseminated publicly through media.

Thus article 101 of the Criminal Code establishes criminal responsibility for “public calls to unleash an aggressive war”, which when made through the mass media or by an official, is punishable by imprisonment for a term of 2 to 5 years, with or without deprivation of the right to engage in certain activities for a period of up to 3 years.

There are three more provisions in the Criminal Code that deal with incitements to violence of various kinds. Most prominently, Article 214-2 provides for imprisonment of up to 5 years for “public calls or dissemination of materials with contents that make a public call” for a substantial category of actions, including:

- attacks on internationally protected persons and organizations;
- terrorism;
- terrorist training;

¹⁷ Huseynova v. Azerbaijan - 10653/10, 13 April 2017.

¹⁸ Rizvanov v. Azerbaijan - 31805/06, 17 July 2012; Najafli v. Azerbaijan - 2594/07, 2 October 2012; Emin Huseynov v. Azerbaijan - 59135/09, 7 August 2015.

- hostage-taking;
- hijacking air or water transportation ships or railway trains;
- sea piracy;
- illegal handling of radioactive materials;
- plundering of extorting radioactive materials;
- attempts on life of a statesman or a public figure;
- creation of armed groups or associations not provided for in law;
- sabotage.

Furthermore, under Article 220.2 of the Criminal Code, calls for “active disobedience to legitimate demands of government officials and to riots, as well as calls for violence against citizens” are punishable by imprisonment for up to 3 years.

Another important provision on sedition is contained in Article 281 of the Criminal Code that criminalises “open calls for the forcible seizure of power, violent holding of power or violent change of the constitutional order or violation of the territorial integrity of the Republic of Azerbaijan, as well as distribution of materials of this content” with imprisonment of up to 5 years, and imprisonment from 5 to 8 years if committed repeatedly or by a group of persons. If these actions are “committed on the instructions of foreign organizations or their representatives”, then imprisonment ranges from 7 to 12 years.

These provisions can be, and have been in the past, applied arbitrarily to statements out of context. For example, in *Fatullayev* case, the European Court of Human Rights (hereinafter ECtHR) found a violation of Article 10 of the Convention in the application of Article 214 to a newspaper article criticizing foreign and domestic policies of the government¹⁹. Arbitrary application of these provisions, without requirements of being made in a certain context, or without giving any guidelines as to the probability of the occurrence of the harm, may easily lead to their usage for silencing public expression of disagreement.

For example, in *Jersild v. Denmark* the Court pointed that a journalist feature should have been considered with regard to its manner of preparation, contents, context and the purpose of the programme to determine “whether the item in question, when considered as a whole, appeared from an objective point of view to have had as its purpose the propagation of racist views and ideas”, and that application of hate speech suppression legislation in the given instance was a violation of the freedom of expression²⁰. In a more recent decision the Court pointed that criminal punishment of genocide denials is justified if there is a context “marked by heightened tensions or special historical overtones” in the society in question²¹.

2.4 Defamation

Legislation of Azerbaijan provides for both civil action and criminal prosecution of defamation. Venice Commission in its 2012 opinion on defamation legislation in Azerbaijan, reiterating the jurisprudence of the ECtHR, recalls “the importance it attaches to citizens in general and journalists in particular not being dissuaded from voicing their opinion on matters of public interest for fear of criminal and other sanctions”²². In particular, it noted that

¹⁹ *Fatullayev v. Azerbaijan*, paras. 127-131 (22 April 2010), available at <<http://hudoc.echr.coe.int/eng?i=001-98401>> (e.g., “domestic courts failed to provide any relevant reasons for the applicant’s conviction on charges of threat of terrorism and incitement to ethnic hostility”).

²⁰ *Jersild v. Denmark* - 15890/89, 23 September 1994, para 31.

²¹ *Perinçek v. Switzerland* - 27510/08, 15 October 2015, para 280.

²² European Commission for Democracy through Law (Venice Commission), *Opinion on the Legislation Pertaining to the Protection against Defamation of the Republic of Azerbaijan*, Opinion

the criminalization of defamation on internet in Azerbaijan “goes against the most recent trends in the field of defamation” and is “extremely worrying and disappointing”²³. Moreover, it noted that “the mere threat of punishment for defamation with the possibility of a criminal penalty such as imprisonment is sufficient to cause a “chill effect” suitable of restraining freedom of speech”²⁴.

I will first describe the scope of civil wrongdoing and civil law remedies applicable to it, and then the relevant criminal law provisions.

According to Article 23 of the Civil Code (“Protection of honour, dignity and business reputation”), individuals can pursue legal action in courts for information “discrediting one’s honour, dignity or business reputation, violating the secret of one’s personal and family life, or personal and family inviolability”. Furthermore, protection of honour and dignity of individuals is allowed even after the death of the individual. Legal entities can pursue action for information discrediting their business reputation.

There is a narrow defence of truth, if the person that spread information can prove that the information corresponds to reality. Furthermore, the person that spread information has a burden to prove that the information disseminated corresponds to reality when wrongdoing consisted in an incomplete publication of factual information. Moreover, if it is impossible to identify the person that disseminated the discrediting information, such information shall be deemed untrue. The law does not differentiate factual information from opinions.

There are several remedies against defamation provided by law. First is refutation, which must be published in the same media outlet where information was disseminated. When the information was disseminated in an official document, this document must be changed accordingly. Secondly, there is a right to reply, and the reply must also be published in the same media outlet as the discrediting information.

According to the law “on mass media”, the right to demand a reply ceases within one month of the date of publication of defamatory or untrue information. If the mass media outlet ceased or was suspended temporarily, refutation, reply or correction may be published or broadcasted at the expense of the respondent in another mass media chosen by the plaintiff. Refutation, reply or correction about the substance and results of a preliminary investigation in criminal cases may be demanded by the body the preliminary investigation.²⁵

Refutation must indicate which information is incorrect, as well as when and how it was published. If done in the printed media, it should be typed in the same font and published on the same page as the defamatory message or material was and be titled “refutation”. Printed media that are distributed daily or weekly must publish it in the issue following the day when they receive the demand for refutation. Other periodicals must publish it in the forthcoming or nearest planned release.

On radio and television, a refutation, reply or correction must be read in the subsequent corresponding program issue. An individual or his authorized representative, as well as the head of a legal entity or his representative who made the demand may be given the opportunity to speak on the broadcast.

Refutation or reply must be provided without any changes in the text. The text of a refutation or a reply may not exceed more than double the message refuted or replied to. In the issue in which the reply is published (broadcasted), it is not allowed to comment or refute it. The reply to the reply must be placed in the subsequent issues of the mass media.

n°692 / 2012, CDL-AD(2013)024, available at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2013\)024-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)024-e), para 30.

²³ Id., at 55.

²⁴ Id., at 57.

²⁵ Article 44, Law “on mass media”, № 769-IQ, (7 December 1999).

In cases of refusal to make a refutation, reply or correction, the person that demanded it must be provided with founded information within 3 days. Refutation may be refused if:

- it contradicts the court decision that entered into legal force;
- it is anonymous;
- the information or materials that have already been refuted in the given mass media are being refuted;
- if the text of the refutation or the answer is more than twice the size of the refuted message or information to which the reply is given;
- if more than one month has elapsed since the day of the dissemination of the message or material in the mass media (with the exception of the period of sickness, leave and travel of a citizen confirmed by official documents).²⁶

Thirdly, there is compensation for damage inflicted by dissemination of discrediting information. Constitutional Court held that the damage stipulated in Article 23 of the Civil Code includes both material damage and moral damage (physical and mental suffering), and that the compensation of moral damage in each case depends on the discretion of the court and must be proportionate to other fundamental rights and freedoms protected by the Constitution²⁷.

As to the criminal prosecution of defamatory utterances, options are more abundant. As of March 2017, there are four articles in the Criminal Code that provide criminal liability for defamation.²⁸

Firstly, Article 147 penalizes "slander" which is defined as "dissemination of deliberately false information discrediting the honour and dignity of another person or undermining his reputation which is done in a public speech, publicly displayed work, in mass media, or publicly disseminated in an internet information resource" and is punishable with a fine from 100 to 500 AZN, or by public works from 240 to 480 hours, or correctional labour for up to one year, or imprisonment for up to 6 months. Second part of this article holds that when slander is "combined with the accusation of a person in committing a grave or especially grave crime" then it is punishable by correctional labour for up to 2 years, or by imprisonment for up to 3 years.

Furthermore, Article 148 establishes criminal liability for "insult", which is defined as "a humiliation of the honour and dignity of another person, expressed in an indecent manner in a public speech, a publicly displayed work in mass media, or publicly disseminated in an internet information resource". Insult is punishable by a fine from 300 to 1000 AZN, or by public works from 240 to 480 hours, or by correctional labour for up to 1 year, or by imprisonment for up to 6 months.

On 29 November 2016, new Article 148-1 was added to the Criminal Code²⁹ that establishes criminal liability for defamation or insult on internet done anonymously or by using "fake name". The exact formulation of the crime is "slander or insult committed with using fake user name, profile or account at an internet information resource" and it is punishable with a

²⁶ Article 45, Law "on mass media", № 769-IQ, (7 December 1999).

²⁷ Decision of the Constitutional Court of the Republic of Azerbaijan "on interpretation of the Articles 21 and 24 of the Civil Code of the Republic of Azerbaijan", 31 May 2002.

²⁸ There are two further provisions on insult in the Criminal Code, disrespect of the court and insulting a military serviceman. Disrespect of the court (Article 289) which is expressed in an insult to trial participants is punishable a fine of up to 300 AZN or by public works for a period of 320 to 400 hours, or by imprisonment for up to 6 months. Insulting a judge is punished by fine of 300 to 500 AZN, or correctional labour of up to 2 years, or imprisonment for up to 6 months. Insulting of military serviceman (Article 333) is another, and consists in one military serviceman insulting another, or military commander insulting a subordinate (punishable with service in a disciplinary military unit for up to 6 months or up to 1 year respectively).

²⁹ Law № 444-VQD (29 November 2016).

fine from 1000 to 5000 AZN, by 360 to 480 hours of public works, or correctional labour of up to 2 years, or imprisonment of up to 1 year. The article clarifies in a note that "fake user name, profile or account" actually covers "names, profiles or accounts at internet information resources, that do not allow identification of user's person, including user names, profiles or accounts hiding or providing false information relating to name, surname, patronymic, or providing information about another person obtained without her/his consent at social networks". Thus, anonymous or satirical, and perhaps even genuine artistic pseudonyms and pen-names may fall under the scope of this provision.

Finally, the same 2016 amendment to the Criminal Code extended the scope of the Article 323 that criminalizes defamation of the President of the Republic of Azerbaijan to include defamation on internet and especially done through "fake names" and anonymously. The current state of Article 323 holds that "smearing or humiliation of honour and dignity of the President of the Republic of Azerbaijan in a public speech, publicly displayed work, in mass media, or publicly disseminated on an internet information resource" is punishable by a fine from 500 to 1000 AZN, or correctional labour of up to 2 years, or imprisonment of up to 2 years. Moreover, when such smearing or humiliation are "committed publicly on an internet information resource by using fake user name, profile or account" then they are punishable by a fine from 1000 AZN to 1500 AZN or imprisonment up to 3 years³⁰. The punishment increases if such "smearing or humiliation" are "combined with the accusation of committing a grave or especially grave crime", and becomes imprisonment ranging from 3 to 5 years.

A note to Article 323 makes a disclaimer that it does not apply to "public statements containing criticism of the activities of the head of the Azerbaijani state - the President of the Republic of Azerbaijan, as well as the policies carried out under his or her leadership". Nevertheless, there is a significant scope for utterances that do not constitute "criticism", but may include, for example, discussions of legality of President's actions, corruption allegations, or simply opinionated statements that may be perceived as hostile and partial, that could lead to a 5-year imprisonment.

The ECtHR found that applications of the Azerbaijani criminal law provisions on defamation had been contrary to Article 10 of the Convention³¹. Firstly, the law does not exclude possibility that the same statement may be subject to both civil and criminal proceedings for defamation³². Secondly, neither the civil code, nor the criminal code provisions envisage any protection for criticism of public officials, save a narrowly formulated exception in the Article 323.³³ Furthermore, while the Civil Code does distinguish between statements of facts and opinions, and provides a defence of truth for factual statements, the Criminal Code provisions do not provide for any distinction of that sort³⁴.

Moreover, while Articles 147 and 148 of the Criminal Code require that there is a victim of a defamation or an insult, notwithstanding a rather vague understanding of the term "victim" applied in practice by domestic courts³⁵, the new Article 148-1 drops requirement of a victim, and instead emphasizes the *mode* of making a defamatory statements (anonymously or using a fake name). This in effect transforms prohibition of defamation in the Criminal Code

³⁰ New Article 323.1-1.

³¹ See Fatullayev case *supra*; see also Mahmudov and Agazade v. Azerbaijan, (18 December 2008), available at <<http://hudoc.echr.coe.int/eng?i=001-90356>>.

³² Fatullayev case, para 103.

³³ The ECtHR repeatedly held that "the limits of permissible criticism" are wider with regard to governments (Castells v. Spain, 23 April 1992, <http://hudoc.echr.coe.int/eng?i=001-57772>); politicians (Lingens v. Austria, 8 July 1986, <http://hudoc.echr.coe.int/eng?i=001-57523>), and even civil servants (July and SARL Libération v. France, 14 February 2008, <http://hudoc.echr.coe.int/eng?i=001-85084>).

³⁴ Lingens, para 46; See also Oberschlick v. Austria (no. 2), para 33, 1 July 1997, available at <<http://hudoc.echr.coe.int/eng?i=001-58044>>, where Court held that the word "Idiot" did not constitute a "gratuitous personal attack" in the context.

³⁵ See Fatullayev case, first criminal conviction for the "Karabakh Diary".

from being a measure for protection of individuals' reputation into a general prohibition of a broad category of statements that may appear offensive, ostensibly, to courts and authorities, and if that is the case, does not pursue any legitimate aim enumerated in the Article 10.2 of the Convention.

In any event it is also worth reiterating that the ECtHR on numerous occasions held that a prison sentence for defamation, which is possible under Azerbaijani law, may be justified "only in exceptional circumstances, notably where other fundamental rights have been seriously impaired", and that a mere existence of such possibility generates "a fear of such a sanction [that] inevitably has a chilling effect on the exercise of journalistic freedom of expression"³⁶.

2.5 Hate speech

There are some broad categories of expression that are proscribed as expressions of hatred and animosity by Azerbaijani legislation. Some of the broadest formulations, that furthermore were extended following the adoption of the law "on combating religious extremism"³⁷, are contained in the Article 283 of the Criminal Code that prohibits "incitement of national, racial, social or religious hatred and enmity". Such incitement is defined as "actions aimed at incitement of national, racial, social or religious hatred and enmity, humiliation of national dignity, as well as actions aimed at restricting the rights of citizens, or establishing superiority of citizens on the basis of their national, racial, or religious belonging, if such acts are committed in public or through the use of mass media."

Ordinarily such incitement is punishable with a fine from 1000 to 2000 AZN, or correctional labour for up to 2 years, or imprisonment from 2 to 4 years. However, if such incitement is committed "with the use or threat of violence", "by a person using an official position", or "by an organized group", then incitement is punishable by imprisonment from 3 to 5 years.

Article 283 was also used arbitrarily in a violation of Article 10 in the *Fatullayev* case, where the ECtHR found it "grossly disproportionate"³⁸ that, *inter alia*, the "mere fact that [the applicant] discussed the social and economic situation in regions populated by an ethnic minority and voiced an opinion about possible political tension in those regions ...[was considered]... as incitement to ethnic hostility"³⁹.

Moreover, according to recently added section 283.1-1⁴⁰, when committed "on the basis of religious enmity, religious radicalism, or religious fanaticism", the punishment becomes 3 to 5 years' imprisonment. Article 283.3 also punishes financing of incitements on the basis of religious enmity, radicalism or fanaticism with imprisonment from 3 to 5 years long.

One may wonder why it was necessary to further distinguish between ordinary incitement of religious hatred, for example, and an incitement of religious hatred on the basis of religious enmity, radicalism and fanaticism, and whether these terms at all could be subject to judicially manageable standards. At the same time the law "on combating religious extremism" does provide less than watertight definitions of "religious radicalism" and "religious fanaticism". This law explains that:

"religious radicalism" consists of "behaviour within the framework of any religious belief expressing devotion to extreme religious beliefs, demonstrating uncompromising stance on identifying exclusiveness of such religious views, and characterised by use of aggressive methods and means in their propagation"⁴¹;

³⁶ Mahmudov and Agazade, paras. 49 and 50; Fatullayev, paras 102 and 103.

³⁷ Law "on combating religious extremism", № 27-VQ (4 December 2015).

³⁸ *Fatullayev*, para. 129.

³⁹ *Id*, at 126.

⁴⁰ Law № 365-VQD from 28 October 2016 (amending Criminal Code).

⁴¹ Law "on combating religious extremism", Article 1.0.2.

"religious fanaticism" is to be understood as an "extreme degree of religious belief accompanied by exclusion of any critical approach and blind following of religious norms that is an ideological basis of religious extremism"⁴².

Apart from being a rare form of restriction of freedom of religious belief and conscience (proscribing a kind of a religious belief itself), such formulations are hardly consistent with the quality of law requirements of the European Convention. As the ECtHR held in the *Sunday Times* decision, "a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail"⁴³. Formulations in Azerbaijani legislation, such as "uncompromising stance", "aggressive methods and means", or "extreme degree of religious belief" as they stand are vague and may be subject to arbitrary interpretations.

The "legal regime" governing a "special operation against religious extremism", boundaries of which are determined by the Ministry of Internal Affairs (MIA) and the State Security Service (SSS),⁴⁴ itself provides for disquieting restrictions on the freedom of expression. It envisages suspension of communications services, listening to telephone conversations and extracting information from communication channels,⁴⁵. To start with, "all activities of media workers" in a "zone of carrying out a special operation" are "regulated by [MIA and/or SSS]"⁴⁶. Furthermore, "informing the public about special operations against religious extremism is carried out in the form and to the extent determined by [MIA and/or SSS]"⁴⁷. It is expressly prohibited to disseminate information concerning "tactics and technical methods", information "justifying religious extremism, or conducive to its propaganda", or information "obstructing the conduct of a special operation against religious extremism"⁴⁸.

Another provision of the Criminal Code criminalises desecration of flag and coat of arms of Azerbaijan. Defining it as "insulting actions with regard to the state flag or state coat of arms of the Republic of Azerbaijan", Article 324 provides for up to one year of imprisonment for such insulting actions.

2.6 Obscenity

There are two definitions of pornographic materials in Azerbaijani law, and a broad conception of erotic material and demonstrations of violence (usually treated together), that are regulated in various contexts.

Pornographic materials are defined in the law "on mass media" as "artistic, photographic works, paintings, information and other materials, the main content of which is an obscene and indecent depiction of the anatomical and physiological properties of sexual relations"⁴⁹. A narrower definition is in the Criminal Code with regard to child pornography, where child pornography is defined as "any items or materials that reflect the participation of a minor or of a person impersonating a minor in real or simulated acts of a clearly expressed sexual

⁴² Law "on combating religious extremism", Article 1.0.3.

⁴³ *Sunday Times v. the United Kingdom*, para 49, (26 April 1979), *available at* <http://hudoc.echr.coe.int/eng?i=001-57584>.

⁴⁴ Decree № 697 (5 December 2015) of the President concerning the implementation of the law "on combating religious extremism".

⁴⁵ Law "on combating religious extremism", Article 7.2.

⁴⁶ *Id.*, Article 9.1.

⁴⁷ *Id.*, Article 9.2.

⁴⁸ *Id.*, Article 9.3.

⁴⁹ Article 3 of law "on mass media" № 769-IQ (7 December 1999).

nature, or reflect the sexual organs of minors for sexual purposes, including realistic images that reflect a minor engaged in explicit sexual actions"⁵⁰.

With regard to pornographic materials, Article 242 of the Criminal Code punishes "unlawful manufacture for the purpose of distribution or advertising, distribution, advertising of pornographic materials or items, as well as illegal trade in printed publications, film or video materials, images or other pornographic objects" with a fine in the amount of 2,000 to 4,000 AZN, or correctional labor for up to 2 years, or imprisonment for up to 3 years with or without deprivation of the right to hold a certain position or engage in certain activities for up to 3 years. Article 242 only prohibits "unlawful" activities with regard to pornography to exclude specific cases of, for example, treatment or research purposes.

Article 10 of the law "on mass media" among other things prohibits to media resources to print pornographic materials, while Article 19 provides that if a media outlet prints or broadcasts pornographic materials, Ministry of Justice⁵¹ shall bring an action in court to stop the production and distribution of such outlet. TV and radio broadcasters also have an obligation not to broadcast pornography⁵². Moreover, media outlets that publish and broadcast pornographic materials will be held responsible according to the Criminal Code.⁵³

Furthermore, distribution of foreign printed publications containing pornographic materials may be banned by a court decision, and a court can take an expeditious decision to withdraw from sale a printed publication already distributed in defiance of this requirement⁵⁴.

Advertising pornography is also prohibited⁵⁵.

As to erotic content, it is defined as "scenes demonstrating awakening of lustful feelings, sexual intercourse or other sexual satisfactions, sexual identity, and conversations about sexual relationships".⁵⁶ Besides erotic scenes, the following broadcasted content is deemed as indecent or violent, and is subject to special broadcasting regime, and cannot be broadcasted between 07.00 and 23.00:

- "descriptions of physical or mental violence, sadism, vandalism and similar cruelty, scenes of the infliction of injuries and suffering, maiming, body of dead or brutally murdered";
- "fear and horror scenes, scenes demonstrating occult rituals, mystical teachings, Spiritism, frightening and terrifying creatures";
- "surgeries that have medical importance, but demonstration of which may adversely affect human psyche";
- "depiction of hypnosis scenes, or hypnosis through broadcasting scenes";
- "depictions of criminal activities, suicide, self-mutilation and their methods and tools";
- "scenes that use obscene phrases, words or gestures";
- "scenes that include consumptions of alcoholic beverages, narcotic substances, and tobacco products";

⁵⁰ Note to Article 171-1 of the Criminal Code. This Article forbids "distribution, advertising, sale, transfer to others, sending, offering, creating conditions for the acquisition, or manufacturing, acquisition or storage for the purpose of distribution or advertising of child pornography" with sentences going up to 8 years of imprisonment in qualifying circumstances.

⁵¹ Decree № 277 (8 February 2000) of the President "on implementation of the law on mass media".

⁵² Article 40.2.2 of the law № 345-IIQ "on TV and radio broadcasting" (25 June 2002).

⁵³ Article 60.5 of the law "on mass media".

⁵⁴ Article 27 of the law "on mass media".

⁵⁵ Article 35.10 of the law "on TV and radio broadcasting"; Article 4.6 of the law № 1281-IVQ "on advertising" (15 May 2015).

⁵⁶ Article 3.6 of "special rules for programs that may harm physical, mental and moral development of children and minors, including programs with erotic and violent content, that cannot be broadcasted without code", adopted by Decision № 04/3 (10 April 2015) of the National TV and Radio Council.

- "scenes that promote gambling and sport bets".⁵⁷

These rules were adopted by the National TV and Radio Council in pursuance of Article 33 of the law "on TV and radio broadcasting"⁵⁸, that provides for a state body to determine rules with regard to programs that may be harmful to children and minors. Administrative fine for breaching them is from 1500 to 2500 AZN for officials, and 5000 to 8000 AZN for legal entities.⁵⁹

Whereas, admittedly, there is "no uniform European concept of morality"⁶⁰ imposed by the Convention, it is interesting that the special rules for programs that may harm children and minors includes scenes "depicting sexual identity". While this provision is on its face neutral, not mentioning any particular sexual "identity", in practice this essentially means a general ban on demonstrations of mere homosexual "identity".

2.7 Classified information

According to the law "on state secret", list of information classified as state secrets is determined by the President of the Republic of Azerbaijan.⁶¹ While there are some broad categories of information that cannot be classified as state secret, there are equally extensive and broad categories of information subject to classification. The main issue is of course that the decisions to classify and declassify information are not amenable to judicial scrutiny, and therefore relevance of classified information is ostensibly opaque.

At the same time, criminal code provides for serious penalties for disseminations of state secrets and spying, that unfortunately have been applied to journalists⁶² in Azerbaijan. These include separate provisions for state treason (Article 274), disclosure of state secrets that does not amount to treason (Article 284) and unlawfully obtaining state secrets (284-1), and espionage committed by foreign citizens or individuals without citizenship (Article 276).

Heaviest sentences are possible for treason, which can only be committed by a citizen of Azerbaijan and includes "crossing over to the enemy side, espionage, transfer of state secret to a foreign state, assistance to a foreign state, foreign organization or their representatives in conducting hostile activities against the Republic of Azerbaijan to the detriment of the sovereignty, territorial integrity, state security or defence capability of the Republic of Azerbaijan" and is punishable with imprisonment from 10 to 15 years or life imprisonment.

Foreigners or persons without citizenship can commit espionage, which is "providing, as well as stealing, collecting, or storing with the purpose of making available to a foreign state, foreign organisation, or their representatives of information constituting state secrets, as well as providing, stealing with the purpose of making available of other information on instructions from the intelligence services of foreign states for its use to the detriment of the security of the Republic of Azerbaijan", which is punishable by 5 to 10 years of imprisonment.

Finally, both obtaining and disclosing state secrets are punishable, even if they do not amount to espionage or treason. Disclosure of state secrets is punishable by imprisonment

⁵⁷ Article 3 of the "special rules".

⁵⁸ Law № 345-IIQ "on TV and radio broadcasting" (25 June 2002). See also Article 8.16 of the "Regulations of the National TV and Radio Council" adopted by President's Decree № 795 (5 October 2002).

⁵⁹ Article 384.0.1 of the Code of Administrative Offenses.

⁶⁰ Handyside, supra, at 48.

⁶¹ Article 4.2, law "on state secret" № 733-IIQ (7 September 2004), see also article 3.1 of the Presidential decree "on implementation of the law of the Republic of Azerbaijan on state secret" № 139 (5 November 2004).

⁶² See e.g. Idrak Abbasov, Azerbaijani Journalist Accused of Spying for Armenia, available at <<https://iwpr.net/global-voices/azerbaijani-journalist-accused-spying-armenia>>.

for a term of 3 to 6 years (4 to 8 years, if disclosure results in grave consequences) with or without the deprivation of the right to hold certain positions or engage in certain activities for up to 3 years. Non-accidental obtaining of state secret, namely “by force, threat of force, threats or other coercive means, theft, deception, or with using specially designed or other technical means for acquisition of secret information” is punishable with 2 to 5 years’ imprisonment.

With regard to classified information, it should also be noted that Azerbaijani law does not envisage any possibility for the protection of whistle-blowers. The ECtHR held that “the signalling by a civil servant or an employee in the public sector of illegal conduct or wrongdoing in the workplace should, in certain circumstances, enjoy protection”, because “in a democratic system, the acts or omissions of government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the media and public opinion”⁶³.

2.8 Private, confidential and secret information

Restrictions on information deemed as private are constantly increasing, and 2016 amendments to the Constitution reflect this trend and provide a basis for further extension of privacy at the expense of the freedom of expression. Article 32 of the Constitution (Right to Personal Inviolability) provides in section 3 that as a rule “no one can be subjected to surveillance, video, photographic and voice recording, and other similar actions without one’s knowledge and notwithstanding one’s objections”. The prohibition of recording and taking photos of individuals without their consent is reflected in the law “on obtaining information”, which provides that “surveillance, video, photographic, and sound recording, and other similar actions by representatives of the mass media and other persons, performed against a person without his knowledge or contrary to his consent” outside of law enforcement activities are subject to liability in law⁶⁴.

Criminal Code provides in Article 156 (“Infringement of inviolability of a private life”) that “illegal collection, dissemination of information about the private life of a person that constitutes his personal or family secret, as well as the sale or transfer to another person of documents, video and photo materials, sound recordings with such information” is a criminal offense, punishable by a fine (100-500 AZN), public works (240-480 hours), or correctional labour (up to 1 year); and if committed by an official using his official position, then by imprisonment for up to 2 years (with or without deprivation of the right to hold certain positions or engage in certain activities for up to 3 years).

Moreover, “unlawful dissemination” in the mass media of recordings (video, voice or photographic) taken “in the course of proceedings concerning administrative offenses” without the consent of both the person subjected to administrative responsibility and the victim, is punishable with a fine from 1000 to 1500 AZN on officials⁶⁵.

New provisions in Article 32 of the Constitution, introduced by the 2016 amendments (paragraphs 6, 7, and 8) provide that “it is prohibited to access electronic or paper information resources to gain information about third persons, except in cases provided in law”. Moreover “information technology cannot be used to disclose information on private life, including the belief, religion and ethnicity of individuals without their express consent” with the exception of anonymous and non-discriminatory statistical publications.

⁶³ Guja v Moldova, paras. 72-74, 12 February 2008, *available at* <http://hudoc.echr.coe.int/eng?i=001-85016>.

⁶⁴ Article 6.2, of the law “on obtaining information” № 1024-IIQ (30 September 2005).

⁶⁵ Article 376 of the Code of Administrative Offenses.

Furthermore, it is an administrative offense to “disseminate statistical secrets”⁶⁶. The offense consists in “disclosure of statistical secrets, that is, information about legal entities (their representations and branches) and individuals without their consent, the transfer of such information to state bodies, enterprises, organizations or individuals who do not have the right to use them” (fine up to 200 AZN for individuals; 300-500 AZN for officials; 1,000-2,500 AZN for legal entities) and in particular “through its publication in the press” (200-300 AZN for individuals; 500-700 AZN for officials; 2,000 – 3,500 AZN for legal entities).

Criminal code in Article 202 also provides punishment for unlawful receipt and disclosure of information constituting commercial or bank secrets. Thus, collecting information that is bank or commercial secret by “unlawful means” for the purposes of disclosure or unlawful use is punishable with fine of 100-500 AZN, or correctional labour for up to 1 year, or imprisonment for up to 2 years. Furthermore, unlawful use or disclosure of such information that causes major damage is punishable with fine of 500-1,000 AZN, or correctional labour for up to 2 years, or imprisonment for up to 6 months.

If only minor damage (not exceeding 100,000 AZN) is caused by unlawful obtaining or dissemination of bank and commercial secrets, then these actions also constitute an administrative offense punishable with a fine in the amount of double to four times quantity of the damage caused⁶⁷.

Commercial secret is defined in the law “on commercial secret” generally as “information relating to production, technological, management, financial and other activities of legal entities and individuals, disclosure of which can cause damage to their legitimate interests if performed without their consent”⁶⁸. Moreover, the law specifically mentions that “information concerning founders and shareholders, and about shares of commercial legal entities”⁶⁹ is commercial secret. Hence, for example, a publication that someone is an owner or shareholder of any commercial legal entity is criminally punishable in Azerbaijan.

Law “on banks” adds to this information concerning bank account, account transactions and balance, as well as information about customers (names, addresses and owners), and stored property⁷⁰.

Other types of confidential information include medical secrets⁷¹ and confidential information of attorneys (legal representatives)⁷².

The very breadth of protected information, as well as heavy criminal sentences may be problematic for journalistic freedom, considering that in the current circumstances mere discussion of ownership of any companies is effectively banned. This would seriously inhibit, and at times make it impossible, to discuss allegations of conflict of interest or corruption involving ownership or shareholding of any commercial legal entity.

The ECtHR held that “most careful scrutiny on the part of the Court is called for when the measures taken by the national authority are capable of discouraging the participation of the press, one of society’s “watchdogs”, in the public debate on matters of legitimate public concern”⁷³. It also found a violation of Article 10 by invocation of confidentiality in a case of a

⁶⁶ Article 390 of the Code of Administrative Offenses.

⁶⁷ Article 431 of the Code of Administrative Offenses.

⁶⁸ Article 2.0.1 of the law “on commercial secret” № 224-IIQ (4 December 2001).

⁶⁹ Article 4.1.2 of the law “on commercial secret”.

⁷⁰ Article 41 of the law “on banks”, № 590-IIQ (16 January 2004).

⁷¹ Article 53 of the law “on protection of population’s health” № 360-IQ (26 June 1997).

⁷² Article 17 of the law “on advocates and legal representation” № 783-IQ (28 December 1999).

⁷³ *Bladet Tromsø and Stensaas v. Norway*, para 64, 20 May 1999, *available at* <http://hudoc.echr.coe.int/eng?i=001-58369>.

“legitimate gathering of information on a matter of public importance”, because the information owners’ “monopoly of information ... amounted to a form of censorship”⁷⁴.

2.9 Protection of judicial proceedings

The Criminal Code provides that the information on criminal inquiries or preliminary investigations cannot be disclosed by a person that is warned in accordance with the law about inadmissibility of such disclosure, if such disclosure harms an interested party or obstructs investigation.⁷⁵ In particular, it is prohibited to disseminate “information on activities conducted against the legalisation of money or other property obtained by criminal means or financing of terrorism”⁷⁶.

Furthermore, disclosure of information about security measures applied to judicial and law enforcement staff⁷⁷, about security measures applied to persons who participate in criminal proceedings⁷⁸, and dissemination of confidential information about victims of human trafficking are also criminalized⁷⁹.

Furthermore, dissemination of information about administrative offenses is also prohibited in the Code of Administrative Offenses, which provides that information on proceedings concerning administrative offenses can only be announced with the permission of the judge, authorized body or official, and if such dissemination impacts victims personal interests, then also with permission of the victim and only in the amount they deem necessary. Moreover, if in the course of the proceedings on an administrative violation photographic, video or audio recordings was conducted, it may not be disseminated in the media without the consent of the victim and the person against whom proceedings are conducted⁸⁰.

The provisions aimed at protecting judicial proceedings, or provisions protecting judges from defamation⁸¹ do not contradict the Convention. With regards to the protection of judges from defamation, for example, the ECtHR held that judges must “enjoy public confidence” and “be protected from destructive attacks that are unfounded, especially in view of the fact that judges are subject to a duty of discretion that precludes them from replying to criticism”⁸².

2.10 Religious expression

Besides the above-mentioned restrictions concerning religious ‘extremism’, there are explicit restrictions on printed and other information media content that has religious substance. Law “on freedom of religious conscience” provides that religious organizations and citizens can only acquire and use religious literature in any language (printed or electronic formats), audio and video materials, goods and products and other informational materials of religious content that are branded by a control mark of the State Committee for Work with Religious Organizations. Furthermore, permission of the same committee is required to manufacture, import, export and distribute these materials. Moreover, mentioned items branded by a

⁷⁴ Társaság a Szabadságjogokért v. Hungary, para 28, 14 April 2009, available at <<http://hudoc.echr.coe.int/eng?i=001-92171>>.

⁷⁵ Article 300 of the Criminal Code, such disclosure is punishable by a fine from 500 to 1000 AZN, or correctional labour for up to 2 years, or imprisonment for up to 6 months.

⁷⁶ Article 316-2 of the Criminal Code.

⁷⁷ Article 301 of the Criminal Code.

⁷⁸ Article 316 of the Criminal Code.

⁷⁹ Article 316-1 of the Criminal Code.

⁸⁰ Article 51 of the Code of the Administrative Offenses.

⁸¹ *Supra* note 29.

⁸² De Haes and Gijssels v. Belgium, para 37, 24 February 1997, available at <<http://hudoc.echr.coe.int/eng?i=001-58015>>.

control mark issued by the Committee can only be distributed by specialized retailers created with the permission of the Committee and local executive authorities⁸³.

It is also a crime to “unlawfully manufacture, import with purpose of sale or distribution, sale, or distribution of religious literature, religious items and other informational materials with religious content”, with sentence for this crime reaching 5 years of imprisonment⁸⁴.

The law does not anywhere provide for what is considered as religious literature, for example, discussion of literary and historical research on religious artefacts or texts could fall within this category, not to mention religious texts used for proper proselytism. Furthermore, a new entry in Criminal Code prohibits even possession of “religious extremist materials”, along with their preparation, distribution and financing.⁸⁵ Thus materials that are “religiously extremist”, or call for religious extremist activity, or give basis for such activity, or “justify necessity of such activity” cannot be prepared, possessed, or distributed with punishment ranging from 8,000 to 10,000 AZN, or 2 to 5 years of imprisonment. Financing of such activities is punishable with 2 to 5 years of imprisonment.

2.11 Recommendations

The following recommendations aim to bring existing legislation and regulations in the field of freedom of expression to conformity with the requirements of Article 10 of the European Convention of Human Rights, as applied and elaborated by the ECtHR.

- With regard to hate speech and incitements to violent action, laws would benefit from more specific definitions of content of prohibited calls, as well as guidance as to the context of prohibited utterances and probability of harm to be inflicted by them.
- Definitions of call for, or justification of, religious extremism as they stand, are too vague to be acceptable as “law” for the purposes of the Article 10 of the Convention, and should be clarified, to provide guarantees against arbitrary application.
- Prohibitions of religious literature should provide guidance and limitations on what constitutes such literature.
- Provisions on defamation in criminal law context should make a distinction between facts and opinions, provide for a defence of truth, and make opinions subject to higher protection against perceptions of offensiveness.
- Provisions concerning defamation on the internet should emphasize the protection of the victim by requiring latter’s complaint, because otherwise they pursue no legitimate purpose (“protection of rights of others”).
- Penalties for civil and criminal defamation must be proportionate and not discourage free and uninhibited discussion on issues of legitimate public interest.
- Provisions on defamation should provide a higher protection for criticism of public officials and civil servants.
- Provisions on confidential information should be less restrictive with regards to the scope of the classified and confidential information (e.g. commercial secrets), and provide for at least minimal protection for disclosures done in the public interest.

⁸³ Article 22, Law “on freedom of religious conscience” № 281 (20 August 1992). See also Article 516.0.2 of the Code of Administrative Offenses.

⁸⁴ Criminal Code, Article 167-2.

⁸⁵ Criminal Code, Article 167-3, introduced by the law amending the criminal code № 365-VQD (28 October 2016). For definition of what constitutes “religious extremism” see *supra*.

3 General and print media regulation

Besides freedom of expression in general, Azerbaijani law also addresses printed media, broadcast media and internet media. Key provisions of the law “on mass media” addressed in this section are applicable in general to all mass media, including printed press, which is (after the March 2017 legislation concerning freedom of expression on internet discussed below) currently the least regulated form of mass media. Additional or special requirements affecting internet and broadcast media are elaborated in the fourth and fifth sections of this report.

3.1 General requirements and scope of regulation

The law “on mass media” provides the basis for regulating the activities for all types of media outlets that are established in the territory of Azerbaijan, as well as to that part of mass media created abroad which is distributed within the territory of the Republic of Azerbaijan⁸⁶. Mass media includes “print periodicals, TV and radio programs, news agencies, the Internet, newsreel programs and other forms of distribution”.⁸⁷

Print periodicals are defined as “newspapers published at least twelve times a year and journals, collections, bulletins and other periodicals, published at least twice a year, prepared by means of a printing process or a copy technique, having more than 100 copies of a single print, having the permanent title and issue number.” TV and radio programs and newsreel programs are defined as “a set of audio, audio-visual messages and materials (transmissions) that have a permanent name and are broadcasted at least once a year”.⁸⁸ Inclusion of “Internet” among various regulated types of mass media (alongside radio programs and printed periodicals), and without providing any definition of which kinds of Internet services are to be regulated, could attest among others things to incomplete understanding of “the Internet”, or (worse) to intentional obscurity.

“Mass media products”, according to the law, include “circulation or part of the circulation of a separate issue of a printed publication, a separate issue of TV and radio programs, newsreel programs, circulation or part of the circulation of audio or video recording of the program”. At the same time, “sale or distribution of periodicals, TV and radio programs, audio or video recordings of programs, broadcasting of TV and radio programs, demonstration of newsreel programs” constitutes dissemination of these products.⁸⁹

Key figures for a mass media outlet referenced in the law show that it was originally intended to cover printed press and pre-internet expression in general. These include executive editor (“main editor or editor or a person substituting for such, who directs a printed publication, or in TV and radio organizations a person giving permission to broadcast programs”), publisher (“publishing house, other institution (entrepreneur), providing material and technical support for the production of printed materials, an individual or legal entity equated to a publisher for whom the specified type of activity is not the main source of income”), and distributor (“a natural or legal person distributing the products of the mass media under a contract concluded with the editorial or publisher, or on other lawful grounds”).⁹⁰

The law “on mass media” generally prohibits abuse of the “freedom of mass information” which is defined in broader terms than in the constitution, and includes disclosure of protected secrets, “usage of mass media to forcibly overthrow existing constitutional order, encroachment of integrity of the state, propaganda of war, violence, cruelty, incitement to national, racial, social enmity or intolerance, publication under the name of an authoritative

⁸⁶ Article 2, law “on mass media”, № 769-IQ, (7 December 1999).

⁸⁷ Article 3, law “on mass media”.

⁸⁸ Id.

⁸⁹ Id.

⁹⁰ Id.

source of rumours, lies and biased publications, degrading honour and dignity of citizens, of pornographic materials, slander or other unlawful acts”⁹¹.

The law also prohibits recording of citizens without their consent, even if they are in a public context. Thus, in line with the constitutional amendment and criminal code provisions prohibiting “secret recording”, the law also bans any “use of secret audio, video, film and photographic recordings, or distribution of information and materials prepared with such recording” without a written permission of the person concerned and only when “necessary measures” are taken to protect rights and freedoms of third persons⁹².

3.2 Registration requirements for printed publications

As a rule, printed publications, as defined above by the law “on mass media”, must be registered with the Ministry of Justice⁹³. Requirement for broadcast media registration are elaborated in the next section of this report. Printed media can be established by an individual or a legal entity, and is free to choose its corporate form⁹⁴. While the law “on mass media” proclaims that “the authorization of state bodies is not required for the establishment of printed publications”, a legal entity or individual that wants to establish a printed publication must apply to the Ministry of Justice⁹⁵ 7 days prior to the publication. The form of application is specified in the rules on registration of printed publications. The application must contain:

- name, purpose, publication frequency, and legal address of the printed publication;
- the surname, name of the founder, of the editor (executive editor) where applicable, of the printed publication;
- in case the founder or editorial office of a printed publication is a legal entity, then the registered charter of that entity;
- “when establishing religious publications, the documents shall be accompanied by the opinion of the [State Committee for Work with Religious Organisations]”.⁹⁶

According to law, Ministry of Justice may raise the issue of terminating the activity of a publication before a court if a publication is distributed without applying for registration, or if the information indicated in the application was false.

A mass media may not use of the names of state organizations, international organisations, institutions and enterprises, local self-government bodies without a permission of these structures. Furthermore, it is not allowed to establish printed publications reflecting the names of prominent persons of Azerbaijan (without the permission of close relatives or heirs) or having a same or similar name with other previously established periodicals.⁹⁷

Similar names are defined in the law as “names that differ from the name of a previously printed publication only by changing places or by translating words into a foreign language

⁹¹ Article 10, law “on mass media”.

⁹² Article 10-1, law “on mass media”.

⁹³ Article 14, law “on mass media”; See also “Rules on the acceptance and registration of applications on the establishment of printed publications”, adopted by the Decision № 10-N of the Collegium of the Ministry of Justice (14 October 2015), hereinafter referred to as ‘rules on registration of printed publications’.

⁹⁴ Article 14, law “on mass media”.

⁹⁵ Executive bodies implementing the law are designated by the Decree of the President of the Republic of Azerbaijan “on the implementation of the law on mass media” № 277 (8 February 2000), and are referred to accordingly.

⁹⁶ Article 14, law “on mass media”.

⁹⁷ Id.

by another founder, or are identical to the names of printed publications, despite the addition of a symbol or a word expressing a symbol⁹⁸.

There are further restrictions as well. First of all, “on the territory of the Republic of Azerbaijan, the mass media uses the [Azerbaijani] language”, while Azerbaijani citizens only may “use other languages spoken by the population of the Republic of Azerbaijan, as well as other languages widely spoken in the world, while producing and disseminating mass information.”⁹⁹ Secondly, public associations and parties that are not registered, or “whose activities are prohibited by law” cannot establish mass media, while registered political parties may only establish printed media¹⁰⁰. Thirdly, printed publications may not be established by imprisoned persons, and persons deprived of legal capacity¹⁰¹. Fourthly, editor or executive editor of a printed publication must be an Azerbaijani citizen with a higher education¹⁰².

Moreover, there is a restriction for foreign ownership and establishment of mass media by foreign citizens and legal entities. Thus, according to law legal entities and citizens of foreign countries may not establish a mass media in Azerbaijan, unless there is an interstate agreement to the contrary. A legal entity of foreign state is defined as a legal entity of which “more than 30 percent of the authorized capital or shares belong to legal entities and citizens of a foreign state” or of which “1/3 of founders are legal entities or citizens of a foreign state”.¹⁰³

According to Rules “on registration of printed publications”, individuals or legal entities wishing to establish a printed publication must apply to the Ministry of Justice 7 days before the publication using an approved application form in 2 copies, to which they should enclose:

- a copy of identity document (individuals);
- notarized copy of the charter (commercial and religious legal entities);
- a copy of identity document of the editor (executive editor);
- notarized copy of a document confirming higher education of the editor (executive editor);
 - if name of a printed publication uses names of government agencies, international organizations, institutions and enterprises, local governments, then written and signed consent of the head of such organ;
 - if name of a printed publication uses names of distinguished persons of Azerbaijan, then written permission of their close relatives (grandparents, parents, adoptive parents, siblings, step-brothers and step-sisters, spouses, children, adopted children, grandchildren) or their heirs;
 - document confirm authority of the representative;
 - if publication is religious, opinion of the State Committee for Work with Religious Organizations¹⁰⁴.

Application for registration is examined by MoJ as to its compliance with the rules mentioned, as well as to “whether it breaches requirements of the law of the Republic of Azerbaijan “on state language”, and if the application does not comply with the requirements, an explanation is given to the person who has applied to remedy deficiencies within 5 days¹⁰⁵. If there are no deficiencies, then a printed publication is entered into the

⁹⁸ *Id*, Article 3.

⁹⁹ *Id*, Article 6.

¹⁰⁰ *Id*, Article 14.

¹⁰¹ *Id*.

¹⁰² *Id*, Article 22.

¹⁰³ *Id*, Article 14.

¹⁰⁴ Rules, Article 2.

¹⁰⁵ Rules, Article 3.3.

registry, and both copies of the application form are stamped, and one copy is sent or given back to the applicant.¹⁰⁶ Any changes to the registered information must be communicated to the Ministry of Justice in an approved application form, and are entered into the registry within 5 days of being communicated.¹⁰⁷

Law establishes certain responsibilities for founders, editors, publishers and distributors of mass media. Thus, a founder (co-founder) of mass media:

- approves the charter of the editorial staff of the mass media, concludes an agreement with the editorial office (editor, executive editor);
- determines the direction of production and distribution of the mass media, and resolves its financial issues, provides for technical supply and equipment;
- founder is entitled to speak in the established mass media, make a statement in it, and publish other official communications. The maximum volume of speech or the statement of the founder is determined by the registered charter of the editorial board, or by an agreement concluded between the founder and the editor-in-chief (editor).
- founder is liable for any legal actions with regard to such statements
- in case of liquidation of the founder (institution, enterprise, organization, state bodies, municipalities, political parties, public associations), the editorial staff has the pre-emptive right to establish the media with the same name, unless otherwise provided by the registered charter.
- founder does not interfere in the production and distribution of the mass media, except for the cases specified in law "on mass media", in the charter and in the contract concluded with the editorial office.
- The co-chairs of the mass media carry out activities as its co-founders.¹⁰⁸

The publisher can act simultaneously as a founder, editorial office, distributor of the mass media, and owner of the editorial office's property.¹⁰⁹ Otherwise, relations between founders and with the editorial staff are regulated by an agreement. An agreement concluded between the co-founders of the mass media indicates their mutual rights, duties, responsibilities, procedure, conditions and legal consequences of changing the composition of co-founders, the rules for resolving possible disputes between them. A contract concluded between the founder and the editorial staff (editor, executive editor), addresses the property and financial relations, as well as the obligations of the founder and editorial staff. Editorial staff (editor, editor-in-chief) and publisher, as well as founder and publisher, may also conclude other agreements with each other.¹¹⁰

As to the editorial board (editor) as a legal entity may act as a founder of a printed publication, as owner of its property, as a publisher and a distributor.¹¹¹ Printed publications may be distributed directly by the editorial office, by the publisher, or by other organisations and individuals based on a contract. Distribution is considered a commercial activity, and publications intended for non-commercial distribution should be marked "free" to be exempt from being considered as commercial activity. Distribution of printed products cannot be restricted without a court decision.¹¹²

Distribution and import of foreign printed publications containing messages that seriously damage the integrity of the state and the security of the country, as well as pornographic

¹⁰⁶ Rules, Article 3.4.

¹⁰⁷ Rules, Articles 5.1 and 4.4.

¹⁰⁸ Article 17, law "on mass media".

¹⁰⁹ Article 18, law "on mass media".

¹¹⁰ Article 10, law "on mass media".

¹¹¹ *Id*, Article 22.

¹¹² *Id*, Article 26.

materials, may be prohibited by a court decision. Furthermore, a court may take an expeditious decision to withdraw from sale an already printed publication that was distributed in defiance of this requirement¹¹³.

Provisions of the law “on mass media” with regard to editorial office, publishers, and distributors of mass media also apply to information (news) agencies.¹¹⁴

There are additional restrictions on the distribution of products of foreign media outlets. Thus, the law provides that “for distribution of a foreign printed periodical publication that has a permanent seat of its founder or its editorial office outside the borders of the Republic of Azerbaijan a permission of the [Ministry of Communications and High Technologies¹¹⁵] is required, unless the distribution is not provided for by an interstate agreement concluded by the Republic of Azerbaijan”¹¹⁶. Furthermore, “representative offices of foreign mass media are established in the Azerbaijan Republic with the permission of the [Ministry of Foreign Affairs], unless otherwise stipulated by interstate agreements”¹¹⁷.

According to the “Rules on granting permission for distribution in the Republic of Azerbaijan of printed periodicals with founder or editorial office outside of the boundaries of the Republic of Azerbaijan”,¹¹⁸ to receive such permission application must be made to the Ministry of Transportation, Communications and High Technologies (MTCHT) together with:

- certificate that they are registered according to the legislation of the foreign country;
- certified charter of the foreign print periodical about its activities;
- certificate about legal address of the foreign print periodical;
- information about publication frequency, circulation volume, and area distribution of the foreign print periodical;
- information about languages in which the print periodical is to be published.¹¹⁹

The MTCHT makes a decision on granting a permission within 15 days, and this period may be extended for 5 more days to rectify possible deficiencies.¹²⁰ Permission may be denied if:

- documents required are not submitted;
- documents contain inaccurate or distorted information;
- the period for which distribution was permitted is suspended by the initiative of the body that granted permission;
- in other cases provided by law.¹²¹

3.3 Funding and advertisements

Mass media may be financed by any lawful¹²² sources, and there are restrictions on funding from foreign sources and regulations on advertising. The law mentions that monopolistic activity and unfair competition will be prevented to ensure economic guarantees of media independence¹²³, but antitrust legislation and enforcement in Azerbaijan are still rudimentary and do not afford sufficient guarantees against arbitrary usage potential of this provision.

¹¹³ *Id*, Article 27.

¹¹⁴ Article 16, law “on mass media”.

¹¹⁵ By the ordinance of the President of Azerbaijan № 2669 (13 February 2017) this ministry is now transformed into “Ministry of Transportation, Communications and High Technologies”. Throughout decrees the old name still persists, and it may be referred by an old name or as MTCHT in this report.

¹¹⁶ Law “on mass media”, Article 52.

¹¹⁷ *Id*, Article 53.

¹¹⁸ Adopted by the Cabinet of Ministers Decision № 64 (11 April 2000).

¹¹⁹ *Id*, Article 4.

¹²⁰ *Id*, Article 6.

¹²¹ *Id*, Article 7.

¹²² Article 6-1, law “on mass media”.

¹²³ Article 9, law “on mass media”.

As to the foreign funding, there are limitations on foreign ownership of media, presence of foreign media outlets and distribution of their products as described above.

Furthermore, the law with few exceptions generally prohibits financing of mass media by foreign state bodies, legal entities and individuals¹²⁴.

The law directly addresses issue of sponsorship in the production and distribution of mass media. Sponsorship is prohibited to producers and sellers of goods prohibited for advertisement. Furthermore, news releases and political information programs may not be prepared with sponsorship. Foreigners and foreign legal entities may only partially sponsor mass media, that is “individual issues of a printed publication or an episode”.¹²⁵

According to the law, sponsorship of the media may not influence “independence of the presenter and journalist”, while it is not specified what is meant by independence and whether it also includes e.g., impartiality.

In periodicals prepared with a financial assistance from a sponsor, information should be printed about this. In broadcast programs either titles must be provided at the beginning and at the end of the broadcasts together with the display of a trademark, or open announcement made in a narrative form. Other ways of declaring sponsorship may be established by an agreement concluded between the parties.

Rules on advertisement apply to mass media in general, and there are specific provisions concerning printed publications and broadcast media¹²⁶. Furthermore, breaches of the law concerning advertising entail administrative¹²⁷ and criminal¹²⁸ liability.

Thus, legislation on advertisements regulates allowed types of advertisement, for example “advertising should not openly incite against the state, call to treason, terrorism, violence, aggression, call to actions that can harm national and spiritual values, life and health, honour and dignity, religious and political beliefs of people, public safety, the environment. Advertising should not allow distortion of state symbols and attributes, or instances that are contrary to ethical standards”¹²⁹.

Furthermore, law prohibits unfair¹³⁰, inaccurate¹³¹ and hidden¹³² advertising. Unfair advertising includes mentioning names of goods of competitors when comparing products; “discrediting honour and dignity, business reputation of a market rival by various means or ways”; placing deliberately false advertisements; ridiculing or forming negative opinion about people that do not use advertised goods; misleading likening of an advertised product to goods of other producers and sellers; deliberate concealment of information on the adverse effects of the advertised product on health and the environment; etc.

Inaccurate advertisement entails distorted or inaccurate information about:

- “manufacturer, seller and origin of goods”;
- “availability of goods on the market, the possibility of acquiring it in the specified quantity, time and place”;
- “purpose of the goods, composition, consumer properties, including terms of use, acquisition, production date, the expiration date and the period of use”;

¹²⁴ Article 14, law “on mass media”.

¹²⁵ Article 21, law “on mass media”.

¹²⁶ Article 13, law “on mass media”. See also law “on advertisement” № 1281-IVQ (15 May 2015).

¹²⁷ Article 428, Code of the Administrative Offenses.

¹²⁸ Article 198, Criminal Code.

¹²⁹ Article 4.4, law “on advertisement”.

¹³⁰ Id, Article 6.

¹³¹ Id, Article 7.

¹³² Id, Article 8.

- “price of the goods at the time of advertising, price discount, terms of purchase and payment”;
 - “conditions and term of delivery of goods to consumers, providing quality assurance, providing after-sales service, replacement and return of goods”;
 - “availability of a license for the production (sale) of goods, a certificate of conformity, awarded prizes”;
 - “possession of the right to use official symbols of countries and international organizations, trademarks of legal entities, intellectual property rights”;
 - “results of application and testing of the goods”;
 - “possibility of obtaining additional information about the advertised product”;
 - “advertiser, creator, producer, agent, distributor of the advertised product”;
- etc.

Advertisement is hidden, if an information that attracts the attention of the consumer is not presented as advertising, e.g., without a notice.¹³³

Hidden, inaccurate or unfair advertisements are subject to refutation “to prevent and eliminate negative consequences of unfair, inaccurate and hidden advertising”¹³⁴. The “subject” (that includes the distributor of advertisement¹³⁵) of wrongdoing must refute such advertisement within time established by the Ministry of Economy¹³⁶, and all the expenses must be paid by the party that breached the law. Furthermore, the broadcast time, duration, place, means of refutation should be similar to those of the unfair, inaccurate, and hidden advertising. The content of refutation must be agreed with the Ministry of Economy, which can also alter the time, duration, and means of refutation¹³⁷. Moreover, the subject of wrongdoing may be suspended by the Ministry of Economy until it provides the refutation, about which the Ministry must inform all to advertisement contract¹³⁸.

Printed periodicals must place a notice “advertisement” or “on advertisement rights” to mark relevant information. Furthermore, advertisement may not exceed 30 percent of the total volume of periodicals, with the exception of advertisement on front and back covers of periodicals and on front pages of newspapers.¹³⁹ Placement in a periodical publications of a trademark, name of a sponsor, name of an advertiser, their logos, is considered as advertisement.¹⁴⁰

3.4 Supervision and Responsibility

Printed publications may be suspended for 2 months or liquidated by a court decision upon a claim made by the Ministry of Justice.

Suspension for 2 months may be applied for by the Ministry of Justice if a printed publication:

Within a year of being subjected to administrative responsibility for an abuse of freedom of mass media and journalistic freedom, a printed publications commits such an act once more;

If a person without higher education or a foreigner is appointed as an editor (executive editor) of a printed publication.¹⁴¹

¹³³ *Id.*,

¹³⁴ Article 9, law “on advertisement”.

¹³⁵ Article 2.0.4, *id.*

¹³⁶ *Id.*, and Decree of the President №554 (14 July 2015) on implementation of the new law on advertisement.

¹³⁷ Article 9.3, law “on advertisement”.

¹³⁸ *Id.*, Article 9.4.

¹³⁹ *Id.*, Article 22.1.

¹⁴⁰ *Id.*, Article 22.5.

¹⁴¹ Law on mass media, Article 19; Rules “on registration of printed publications”, Article 7.4.

Liquidation of a printed application (or mass media in general) may be applied for by the Ministry of Justice if:

A mass media allows for “publications (broadcasts) of appeals or information that seriously damage the integrity of the state, the security of the country and public order, as well as pornographic materials”;

Ministry of Justice receives information “from entities that have detected illegal financing of mass media by a foreign state body, a foreign natural or legal person”;

A mass media was twice during a year held responsible according to a court decision for biased publications.¹⁴²

In the past, Ministry of Justice could apply to court for a liquidation of a printed publication if it was not registered. Article 3§5 of the law “on mass media” used to have among others a provision that printed publications must be registered, but it was later removed. However, the provision on liquidation still contains a reference to Article 3§5, non-compliance with which triggers the right of the Ministry of Justice to apply for liquidation.

This possibility is also envisaged (in an extended form) by the “Rules on Registration of Printed Publications”, which establishes that the Ministry may apply for liquidation if:

Founder of a printed publication “evades formal application to the Ministry” for registration;

If information submitted for registration is false;

If the Ministry receives information that a printed publication is founded by persons that do not have a right to be founders.¹⁴³

While there is no fine provided for avoiding registration of a printed publication, the Code of Administrative Offenses provides for a fine from 300 to 500 AZN for the “failure to provide or untimely provision of information necessary for conducting statistical observations, or distortion of such reports”¹⁴⁴.

The abuse of freedom of mass media and journalistic freedom also leads to a fine of 200-300 AZN for individuals, 500-700 AZN for officials, 2000 – 3,500 AZN for legal entities.¹⁴⁵ The following constitutes such an abuse:

“Disclosure of information prohibited to disclose by law”;

“Non-implementation of control over the preparation of materials published in a printed publication in accordance with the requirements of the law “on mass media”;

“Publication of information without specifying its source, except for cases stipulated by the law “on mass media”;

“Production or distribution of media products without providing a reference data, or wilful misrepresentation of such a reference”¹⁴⁶.

The law “on mass media” in its turn provides that the executive editor or journalist (author) are liable for breach of the law “on mass media” in cases:

They disclose information disclosure of which is not permitted;

If the editor (executive editor) does not exercise control over the compliance of the published printed material with the requirements of the law;

If they encroach upon personal life of citizens;

For publishing or broadcasting pornographic content;

¹⁴² Article 19, law “on mass media”; Article 7.6, Rules “on registration of printed publications”.

¹⁴³ Rules, Article 7.7.

¹⁴⁴ Article 389, Code of Administrative Offenses.

¹⁴⁵ Article 388, Code of Administrative Offenses.

¹⁴⁶ Id.

If they do not indicate the source of information that they disseminate.¹⁴⁷

From general rule requiring disclosure of sources, there are specific exceptions:

information and materials cannot be disclosed if they were provided to the editor or journalist with the condition to maintain their secrecy;
name of the person who provided the information with the condition not to mention his or her name cannot be indicated;
information related to the preliminary investigation and criminal inquiry (except without consent of relevant interrogator or investigator);
information concerning identity of minors that are suspect, accused or victims, without consent of themselves and their legal representatives.

Otherwise, editor or journalist “cannot be forced to disclose the source of information”, except by a court decision in order to:

protect human life;
prevent a serious crime;
protect a person accused or convicted of a serious crime.

However the law mentions that “the responsibility for the description, article, snapshot or caricature, whose author is not disclosed, falls on the editor responsible for the release, or the journalist”¹⁴⁸.

As the ECtHR held¹⁴⁹:

protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of Contracting States and is affirmed in several international instruments on journalistic freedoms [...] Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected.

In general, according to the position of the ECtHR “the right of journalists not to disclose their sources is not a mere privilege to be granted or taken away depending on the lawfulness or unlawfulness of their sources, but is part and parcel of the right to information, to be treated with the utmost caution”¹⁵⁰. The Court found violations of Article 10 in cases involving detention of a journalist with a view to compelling him to disclose his source of information¹⁵¹; surveillance of journalists and order for them to surrender documents capable of identifying their sources¹⁵²; judicial order requiring news media to disclose a leaked document liable to lead to the identification of their source¹⁵³; police seizure of material that could have led to identification of journalistic sources¹⁵⁴; disclosure order granted to private company justified by a threat of severe damage to its business and to the livelihood of its employees¹⁵⁵; wide powers given to investigative officers who carried out searches at journalists’ home and place of work¹⁵⁶; massive searches of journalists’ places of work, homes and, in some instances, cars in order to identify magistrates having leaked

¹⁴⁷ Article 60, law “on mass media”.

¹⁴⁸ Article 11, law “on mass media”.

¹⁴⁹ Goodwin v. UK, para 39, 27 March 1996, *available at* <http://hudoc.echr.coe.int/eng?i=001-57974>

¹⁵⁰ The Protection of Journalistic Sources: A Cornerstone of the Freedom of the Press, <https://rm.coe.int/factsheet-on-the-protection-of-journalistic-sources-may2017/16807178d7>

¹⁵¹ Voskuil v. the Netherlands - 64752/01

¹⁵² Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands - 39315/06

¹⁵³ Financial Times Ltd and Others v. the United Kingdom - 821/03

¹⁵⁴ Sanoma Uitgevers B.V. v. the Netherlands [GC] - 38224/03

¹⁵⁵ Goodwin v. the United Kingdom - 17488/90

¹⁵⁶ Roemen and Schmitt v. Luxembourg - 51772/99

information about pending criminal cases¹⁵⁷; insufficient reasons given by Belgian courts to justify searches¹⁵⁸; disproportionate search of the premises of a daily newspaper to determine in what circumstances and conditions journalists had obtained a copy of a confidential draft report¹⁵⁹; searches carried out at the premises of newspapers and at the homes of journalists accused of breaching the confidentiality of a judicial investigation by reproducing passages from records of transcripts of tapped telephone conversation¹⁶⁰; urgent search at journalist's home involving the seizure of data storage devices containing her sources of information¹⁶¹; or a search of professional premises and seizure of the documents intended to identify journalistic sources¹⁶².

Furthermore the Committee of Ministers of the Council of Europe notes "that the protection of journalists' sources of information constitutes a basic condition for journalistic work and freedom as well as for the freedom of the media"¹⁶³, and the Parliamentary Assembly of the Council of Europe recommends that "public authorities must not demand the disclosure of information identifying a source unless the requirements of Article 10, paragraph 2, of the Convention are met and unless it can be convincingly established that reasonable alternative measures to disclosure do not exist or have been exhausted, the legitimate interest in the disclosure clearly outweighs the public interest in the non-disclosure, and an overriding requirement of the need for disclosure is proved."¹⁶⁴

Azerbaijani law would benefit in this regard from clarifying who may force to reveal the sources, providing safeguards against arbitrary requests. Furthermore, removing the provision on the "responsibility" for the information the source of which is not disclosed may also prevent deterrence by journalists and mass media to report on the issues of public concern.

Editorial office or executive editor may be held responsible for an unjustified refusal to provide refutation, reply and correction and for not complying with court decisions¹⁶⁵. Founders, editorial office, publisher and distributor of mass media may be held responsible for:

- breaching anti-trust legislation;
- disclosing sources and information that may not be disclosed, as noted above;
- breaching rules on advertisements;
- breaching rules on sponsorship of mass media;
- breaching rules on publisher's imprint.¹⁶⁶

Founder, and executive editor or editor may be held responsible for unlawful financing by foreigners, foreign state bodies and legal entities of mass media on the territory of Azerbaijan¹⁶⁷.

¹⁵⁷ Ernst and others v. Belgium - 33400/96

¹⁵⁸ Tillack v. Belgium - 20477/05

¹⁵⁹ Martin and Others v. France - 30002/08

¹⁶⁰ Ressiot and Others v. France - 15054/07

¹⁶¹ Nagla v. Latvia - 73469/10

¹⁶² Görmüş and Others v. Turkey - 49085/07

¹⁶³ Recommendation No. R (2000) 7 of the Committee of Ministers to member states on the right of journalists not to disclose their sources of information, available at <https://rm.coe.int/16805e2fd2>

¹⁶⁴ Recommendation 1950 (2011) of the Council of Europe's Parliamentary Assembly, The protection of journalists' sources, available at <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17943&lang=en>

¹⁶⁵ Id., Article 61.1.

¹⁶⁶ Id., Article 61.2.

¹⁶⁷ Id., Article 61.4.

Publisher, distributor and editorial office (executive editor or editor) are held responsible for unlawful production of mass media after a court decision to suspend or liquidate a mass media¹⁶⁸.

Editors and journalists may not be held responsible for incorrect facts distributed in a mass media when:

- such information is distributed by official state bodies or their press services;
- if they are received from information agencies or press services of institutions, enterprises, organizations, political parties and public associations;
- if they are received from another mass media and are not refuted;
- if they are a verbatim reproduction of official speeches of the deputies of the Milli Majlis, representatives of state bodies, municipalities, institutions, enterprises, organizations and public associations, as well as politicians and officials;
- if they are expressed in speeches that are live broadcasts, or are texts that are not subject to editing in accordance with the law¹⁶⁹.

If this provision is extended to cover unambiguously all official reports, it would be in line with the approach of the ECtHR, which held that “the press should normally be entitled, when contributing to public debate on matters of legitimate concern, to rely on the contents of official reports without having to undertake independent research”¹⁷⁰.

3.5 Recommendations

While the law holds that permission is not required for print media, the “evasion” of registration with Ministry of Justice is a ground for the liquidation of the printed publication. Therefore:

- The requirement of registration should either be completely abolished, or made less burdensome.
- Grounds for suspension and liquidation of printed publications should not extend beyond general requirements applicable to the freedom of expression, and provide guarantees against arbitrary action of executive authorities.
- Provisions on disclosure of source discourage journalists from retaining sources of information from disclosure, and this may discourage sources from providing information important for discussions of issues of legitimate public concern.

¹⁶⁸ Id., Article 61.5.

¹⁶⁹ Id., Article 62.

¹⁷⁰ Bladet Tromsø, para. 68.

4 Broadcast media

With regard to broadcast media it must be noted that according to the Council of Europe standards “Member States must ensure that the public has access through television and radio to impartial and accurate information and to a range of opinion and comment reflecting the diversity of political outlook within the country” and that “[a]ccording to the case-law of the European court of Human Rights, it is of the essence of democracy to allow diverse political programmes to be proposed and debated, even those that call into question the way a State is currently organised, provided that they do not harm democracy itself”¹⁷¹.

Furthermore, the ECtHR has addressed various issues on freedom of the broadcast media, such as failure to allocate frequencies to a licensed television broadcaster¹⁷²; accessibility and foreseeability of the domestic law regulating broadcasting¹⁷³; failure to provide reasons for successive refusals to grant a television broadcasting license¹⁷⁴; refusal to grant a broadcasting license¹⁷⁵; insufficient statutory guarantees of independence of public broadcaster¹⁷⁶; general ban on paid political advertising on TV and radio¹⁷⁷; general ban to broadcast live interviews with the spoke persons of organizations condoning terrorist activities¹⁷⁸.

Moreover, UN Human Rights Committee observed in the opinion on the communication of Agazade and Jafarov that the Republic of Azerbaijan “has failed to justify that the limitation of the authors’ right to freedom of expression resulting from the lack of organization of periodic tenders and the lack of transparency in the allocation of licenses without public tenders was legitimate...” and concluded “that the limitations imposed on the authors to have access to a radio frequency were arbitrary in nature and amounted to a violation of their rights under article 19 (2) of the Covenant”¹⁷⁹.

4.1 Scope

Azerbaijani law regulates broadcast media significantly tighter than the printed media. In addition to general provisions of the law “on mass media” that apply to radio and television broadcasters, additional regulations on registration and licensing, as well as funding, supervision, suspension and liquidation are provided in the law “on television and radio broadcasting”¹⁸⁰. For example, while printed media only has to be registered with the Ministry of Justice, broadcast media must register as broadcasters with the National Television and Radio Council (NTRC), apply for and receive a renewable license for broadcasting from NTRC, and conclude a contract with the Ministry of Transportation, Communications and High Technologies to broadcast on the frequency allocated in the license¹⁸¹.

¹⁷¹ Freedom of Expression and the Broadcasting Media, <https://rm.coe.int/factsheet-on-broadcasting-media-final-rev1august2017/1680735d80>

¹⁷² Centro Europa 7 S.r.l. and Di Stefano v. Italy - no. 38433/09

¹⁷³ Groppera Radio AG and Others v. Switzerland – no. 10890/94

¹⁷⁴ Meltex Ltd and Movsesyan v. Armenia – no. 32283/04

¹⁷⁵ Informationsverein Lentia and Others v. Austria - no. 13914/88; 15041/89; 15717/89; 17207/90

¹⁷⁶ Manole and Others v. Moldova – no.13936/02

¹⁷⁷ Animal Defenders International v. the United Kingdom - no. 48876/08

¹⁷⁸ Betty Purcell and others v. Ireland - no. 15404/89

¹⁷⁹ Human Rights Committee, Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 2205/2012, 16 March 2017, CCPR/C/118/D/2205/2012.

¹⁸⁰ Law “on television and radio broadcasting” № 345-IIQ (25 June 2002), hereinafter referred to as law “on broadcasting”.

¹⁸¹ Article 26.1, law “on broadcasting”; see also decree of the president on the implementation of the law on broadcasting № 794 (5 October 2002).

NTRC consists of 9 members appointed for 6 years renewable term by the President of the Republic of Azerbaijan¹⁸².

The definition of television and radio broadcasting is as follows:

“TV and radio broadcasting is the initial transmission to a certain distance of audible or visual television and radio programs massively distributed by electromagnetic waves in an open or encoded form using satellite, cable or other grounded technical installations and received by television and radio receivers in any number. This concept also includes distribution by legal entities and individuals via satellite using coded installations (cards) and programs re-transmitted by other broadcasters. The term "television and radio broadcasting" does not cover messages or other materials transmitted through a telecommunications system and received by an individual calls (fax-related, electronic data banks and other services of this type)”¹⁸³

Thus broadcasts include television and radio, including cable and satellite, but do not include audio and visual media on internet, such as e.g., YouTube™. Range of regulated broadcasters is defined as an individual or legal entity “registered according to the procedures established by the legislation of the Republic of Azerbaijan or authorised to produce and distribute television and radio programs(transmissions) or provide broadcast retransmission by means of facilities and means decrypting signal codes”¹⁸⁴. According to the law, broadcasters must base their activities on principles of “comprehensiveness, objectivity, completeness and reliability of information, free expression of thoughts by citizens, ideological and political pluralism, neutrality and impartiality, inadmissibility of interference in personal and family life of people, protection of national moral values, observance of professional ethics and moral norms, the quality of programs”.¹⁸⁵

4.2 Licensing requirements

License is required for broadcasting in Azerbaijan¹⁸⁶. Foreign broadcasters must also receive a license using the same procedure as local broadcasters, but having received one must additionally conclude an agreement with the Ministry of Transportation, Communication and High Technologies once they win the competition for a license¹⁸⁷. The state issues an unlimited and free license and allocates a frequency to the public broadcaster¹⁸⁸.

License is acquirable through participation in a competition (tender), except for the state and public broadcaster. Rules and conditions of the competition must be published in the official press at least one month before the deadline for applications. Applicants are required to pay a one-time amount established by the body conducting the competition¹⁸⁹ (NTRC)¹⁹⁰. The following must be taken into account when conducting a tender:

compliance of the applicant's indicators with the conditions of the tender;
creative and technical capabilities of the applicant for the implementation of television and radio broadcasting;
results of open hearings and other competitive procedures¹⁹¹.

The following documents must be submitted to obtain a license¹⁹²:

¹⁸² Article 11, Regulations of the National Radio and Television Council, adopted by the Decree of the President № 795 (5 October 2002)

¹⁸³ Article 1.0.4. of the law on broadcasting.

¹⁸⁴ *Id.*, Article 1.0.13.

¹⁸⁵ *Id.*, Article 3.

¹⁸⁶ Law on broadcasting, Article 14.1.

¹⁸⁷ *Id.*, Article 14.4.

¹⁸⁸ Article 5, law “on public broadcasting” № 767-IIQ (28 September 2004).

¹⁸⁹ Law on broadcasting, Article 15.

¹⁹⁰ *Id.*, Article 11.4.5.

¹⁹¹ *Id.*, Article 15.

- application form established by the NTRC;
- if applicant is a legal entity, a program concept, copies of the document on the state registration and the charter;
- if applicant is an individual, then only program concept;
- information on the creative and technical capabilities required for broadcasting, in the form approved by NTRC;
- confirmation of one-time payment of the tender participation fee.

Application for participation in a tender for issuing a license may be refused on the following grounds:

- application is submitted by a person that does not have a right to apply;
- another broadcaster under the same name carries out activities;
- documents are not prepared in accordance with the requirements of law on broadcasting and the terms of the tender;
- if there is a share of a foreign natural or legal person in the charter capital of the founder;
- if the technical and creative capabilities do not match the conditions of the tender;
- if less than a year has passed after the revocation of the license previously received by the applicant.

The applicant is notified within 3 days about the refusal of application for participation in tender in form preferred by the applicant (written or oral). If the deficiencies that cause the refusal of the application are eliminated, the applicant can again apply for a tender, in which case a second payment from the applicant is not required¹⁹³.

Applicants whose applications are accepted for participation in the tender may be refused a license in the following cases:

- If they are not selected as winners by the results of the tender;
- If the application and documents submitted contain incorrect or distorted information;
- if there is a conclusion of the Ministry of Economy on non-compliance with the antitrust requirements of law on broadcasting and other laws¹⁹⁴;

The decision on refusal to issue a license is provided within 15 days from the date of the announcement of the results of the tender. The decision on refusal to issue a license is sent to the applicant in writing specifying the reasons for the refusal. This decision may be appealed in an administrative procedure or in court within one month period¹⁹⁵.

The decision to issue a license must be made within 60 days from the announcement about conducting the tender, and within 15 days from the announcement of its results. License is valid for a period specified in it, but cannot exceed 6 years¹⁹⁶. License cannot be inherited by successors by the successors of the broadcaster or transmitted to legal entities established

¹⁹² *Id.*, Article 17.

¹⁹³ *Id.*, Articles 18.1 to 18.3.

¹⁹⁴ According to Article 5 of the law on broadcasting, one broadcaster, as well as its structural units, may not distribute more than two television and three radio programs (except for broadcasting over cable networks and broadcasting to foreign countries); and one natural and legal person can be the founder (co-founder) of only one television and radio broadcaster.

¹⁹⁵ Articles 18.4 to 18.5, law on broadcasting.

¹⁹⁶ *Id.*, Articles 19.1 and 22.1.

by it.¹⁹⁷ To receive a license the broadcaster pays the state fee in the amount established by the President of the Republic of Azerbaijan¹⁹⁸.

License is the basis for concluding an agreement with the MTCHT, as well as with other individuals and legal entities with regard to broadcasting¹⁹⁹. License contains the following information:

- name, organizational and legal form and location of the broadcaster;
- type of broadcasting;
- mode of broadcasting (cable, satellite, Internet, terrestrial, ether-cable, etc.);
- broadcast area;
- time of broadcasting;
- period of validity of a license;
- registration number and date of issue of a license;
- frequency of TV and radio broadcasting and the power of the transmitter that broadcasts TV and radio programs at this frequency;
- location of the transmitter;
- intended audience;
- language(s) of broadcasting;
- periodicity and volume of TV and radio broadcasting;
- start date of broadcasting;
- responsibility of the broadcaster for breaching conditions of a license;

NTRC must be notified about any changes in the information specified in the application of the broadcaster and included in the license, within 30 days after the change takes place. Broadcaster may not change any information specified in the license without consent of the NTRC²⁰⁰.

As license is issued for 6 years (license may be issued for a shorter time, if the usage of the allocated frequency is not technically possible), 3 months before the license expires NTRC must publish a notice that the frequency is vacant. If the broadcaster is willing to extend the period of license, it must apply at least 6 months before the expiration, and the license for the vacant will be extended without another tender for 6 more years upon the payment of the license fee²⁰¹.

If the broadcaster “has repeatedly violated the requirements of the legislation during the validity of the license and, despite the warning of the NTRC, these violations were not eliminated as soon as possible, or measures of liability were repeatedly applied to the broadcaster”, then NTRC may announce the frequency as vacant and hold a new tender for it.²⁰² Broadcasting license may be suspended and revoked in the manner elaborated in the section 4.4 below.

4.3 Frequency allocation

Frequencies are a limited resource, although with the implementation of the digital television technologies a constantly expanding one too. Limited frequencies, along with the impact that audio and visual broadcasting may have compared to printed media, are usually considerations used for establishing licensing in broadcasting. Azerbaijani law on

¹⁹⁷ *Id.*, Article 19.3.

¹⁹⁸ *Id.*, Article 19.5.

¹⁹⁹ *Id.*, Article 20.3

²⁰⁰ *Id.*, Article 21.

²⁰¹ *Id.*, Article 22.

²⁰² *Id.*, Article 22.4.

broadcasting provides that the list of television and radio broadcasting frequencies is compiled by the State Committee on Radio and Television Frequencies (SCRTF)²⁰³.

The Committee bases the list on the list of frequencies used in the territory of the country and division of frequency bands. The frequency list also includes information on broadcasters operating at the frequencies used, their licenses and broadcasting areas²⁰⁴.

At least once a year the SCRTF submits to NTRC a list of frequencies that are available for use, and will do so on the basis of NTRC's request as well²⁰⁵. NTRC must publish this list in mass media at least once a year²⁰⁶. A broadcaster that won the tender for license must conclude an agreement with the MTCHT for broadcasting on the channel specified in the license and pay the state fee (determined by the Cabinet of Ministers) for using the frequency. The broadcaster may conclude an agreement with the telecommunications operator²⁰⁷ with regard to technical support for broadcasting based on tariffs determined by the Cabinet of Ministers²⁰⁸.

MTCHT "cannot refuse the to conclude such an agreement without a lawful basis". An "unfounded refusal" to conclude such an agreement may be appealed administratively or in court²⁰⁹. The same entity may both be a broadcaster and provide technical support to broadcasting²¹⁰. In the event that the broadcaster does not pay the fee within the prescribed period, MTCHT may apply to NTRC for suspension of its license until the payment is made²¹¹.

4.4 Funding and advertisements

This section will consider regulations on the sources of income of broadcast media, and in particular restrictions on foreign funding, in the contexts of ownership, sponsorship and advertisement. The regulations concerning advertisement described in the section above also apply to broadcast media.

First of all, only Azerbaijani citizens permanently residing in Azerbaijan or legal entities the authorized capital of which belongs to such citizens may be private broadcasters in Azerbaijan²¹². Furthermore, broadcasters must be registered in state registry, which is maintained by the NTRC. The following cannot be founders of private radio and television broadcasters:

- Persons previously convicted for grave or particularly grave crimes, as well as for "crimes against public morals", and persons with outstanding convictions;
- Persons lacking legal capacity;
- Political parties;
- Religious associations.²¹³

²⁰³ Article 16.1, law on broadcasting. According to its regulations adopted by the decree of the president № 136 (3 October 1996), this committee consists of a chairperson (deputy prime minister), deputy chairman (Minister of Communications and High Technologies), representatives of ministries of communication, defense, internal affairs, state security service, state borders service, and Azerbaijan Airlines company.

²⁰⁴ Article 16.1 and 16.2 of the law on broadcasting.

²⁰⁵ *Id*, Articles 16.3 and 16.4.

²⁰⁶ *Id*, 16.5

²⁰⁷ Defined in Article 1.0.8 of the law "on telecommunications" (№ 927-IIQ, 14 June 2005) as "a legal entity or an individual engaged in entrepreneurial activities that provides telecommunications services on a lawful basis through a telecommunications network owned by her or him".

²⁰⁸ *Id*, Articles 16.6 and 16.7.

²⁰⁹ *Id*, Articles 16.8 and 16.9.

²¹⁰ *Id*, Article 16.10.

²¹¹ *Id*, Article 16.11.

²¹² Article 10.1, law on broadcasting.

²¹³ *Id*, Article 10.3.

If it becomes necessary that legal form or change of ownership or shares of a private broadcaster should take place, NTRC must be informed about it one month in advance. NTRC then within two months provides an opinion about conformity of changes to the law, following which within another month new documents are presented to the NTRC²¹⁴.

Law also regulates sponsorship, defining sponsor in the context of broadcasting as “a natural or legal person not engaged in activities related to broadcasting, financing an individual episode or program in order to promote its name, glorify the brand or enhance the public image”²¹⁵. Broadcasting may be financed by government, local self-government, legal entities and individuals. However, persons producing or selling products advertisement of which is prohibited cannot be sponsors²¹⁶. Foreign legal entities and individuals may only partially sponsor television and radio broadcasts, that is sponsor individual programs or episodes²¹⁷.

Open information about financial assistance of the sponsor should be provided at the beginning and the end of the programs or episodes prepared with sponsorship, with the indication of the brand name, text crediting, or narration, or by other ways stipulated in an agreement.

As with all regulated mass media, news releases and political information programs may not be prepared with the financial assistance of sponsors. Furthermore, intervention of sponsors in the independence, creative and editorial activities of television and radio broadcasters is not allowed²¹⁸.

As to the advertisements (and tele-shopping), they should be accessible and visually and (or) acoustically distinct from the content of the broadcasted programs. Furthermore, hidden advertisement that “that affects the consciousness of the consumer in an unconscious form” is prohibited²¹⁹. The law extensively regulates the manner, length, density and ratio of advertising in broadcasts,²²⁰ and prohibits advertisement of tobacco products, alcoholic beverages, drugs and psychotropic substances, weapons, medicines and even methods of medical treatment not approved by the Ministry of Health²²¹. Furthermore, sessions of the Milli Majlis, official state events, speeches of the President of the Republic of Azerbaijan, speaker of the Milli Majlis and the chairman of the Constitutional Court may not be interrupted by advertisements nor disturbed by titles²²².

It is not allowed to broadcast on television the advertisements that damage:

- dignity, religious and political beliefs of people;
- their health and safety;
- protection of the environment²²³.

Furthermore, television advertising should not have “a harmful effect on the physical, mental and moral development of children and minors”. To this end, advertisement addressed to children or minors, or distributed with their participation “cannot use elements that cause serious harm to the interests of children,” and “children and minors may not be shown in scary situations without any valid reasons”²²⁴.

²¹⁴ Id, Article 10.5.

²¹⁵ Id, Article 1.0.26.

²¹⁶ Id, Articles 36.1 and 36.2.

²¹⁷ Id, Article 36.3.

²¹⁸ Id, Article 36 (4, 5, 6).

²¹⁹ Id, Articles 35.1 and 35.2.

²²⁰ Articles 35.3 - 35.8.

²²¹ Articles 35.10 – 35.12.

²²² Article 35.16.

²²³ Article 35.13.

²²⁴ Article 35.14.

4.5 Supervision and Responsibility

Broadcast media are supervised by the NTRC that not only issues licenses to broadcast, but may also suspend and revoke them. NTRC is funded from budget²²⁵ and consists of 9 members appointed by the President²²⁶. NTRC creates its own apparatus and structural units, maintains a registry of television and radio broadcasters, and establishes technical and quality standards and norms of television and radio broadcasting.

NTRC can apply administrative penalties or bring an action in court with regard to violations of the requirements of law on broadcasting, as well as of the rules and conditions of a license²²⁷. NTRC also announces and conducts tenders for broadcasting licenses²²⁸. When it deems necessary it permits broadcasting of foreign television and radio channels in Azerbaijan in order to cover “socially significant events, elections, important athletic competitions, etc.”²²⁹

NTRC implements control over:

- operation of technical means of broadcasting in accordance with the rules and conditions set forth in the legislation and license;
- rational usage of broadcasting frequency resources;
- broadcasting of programs that can damage physical, mental and moral development of children and minors to be broadcasted when the latter cannot watch them;
- prevention of propaganda of terrorism, violence, cruelty, national, racial and religious discrimination;
- lawfulness of advertising activities;
- compliance with the legislation of Azerbaijan.²³⁰

If broadcasters breach terms of the license, or requirements of the law, NTRC may suspend the license or broadcast of any program for up to one month²³¹.

License may be revoked by a decision of NTRC in the following cases²³²:

- request of the owner of the license;
- if license was received based on information provided by the broadcaster and known to be false by the latter;
- if no broadcast was made within 6 months after receiving a license;
- if the broadcast area specified in the license is not completely covered within one year;
- bankruptcy of the license owner confirmed by a court;
- broadcast is impossible for technical reasons;
- broadcast is not performed for 30 consecutive days or for 60 days in a year;
- license owner is liquidated or dies;

Suspension and revocation of a license may be appealed in court within 30 days from the date of such decision²³³.

License may be revoked by a court decision upon a request by NTRC, when “the television and radio broadcaster issues open calls for violent overthrow of the state system,

²²⁵ Article 3, NTRC Regulations.

²²⁶ Article 11, NTRC Regulations.

²²⁷ 11.4.4, law on broadcasting.

²²⁸ 11.4.5, law on broadcasting.

²²⁹ 11.4.6, law on broadcasting.

²³⁰ 11.5, law on broadcasting.

²³¹ 23.1, law on broadcasting.

²³² 23.2, law on broadcasting.

²³³ 23.3, law on broadcasting.

encroachment on the integrity of the state and the security of the country, incitement to national, racial and religious hatred, organization of mass riots and to terrorism, or deliberately creates conditions for broadcasting of such calls.” Court must consider such claim by NTRC within 15 days and adopt a decision²³⁴.

From recent practice, NTRC suspended and revoked license of ANS TV in 2016 for propaganda of terrorism when it announced an interview with a US based cleric Fethullah Gulen, following the coup attempt in Turkey in July of 2016. ANS TV was afterwards shut down by a court decision.²³⁵

Broadcasters must to ensure the following responsibilities are met when preparing programs:

- give priority to education and culture and prevent overloading of airwaves by commercial, informational or other programs of the same type by balancing programs;
- create the conditions for ensuring the right of everyone to freely present their thoughts and views with the condition that the principles of neutrality, impartiality, comprehensiveness, completeness and reliability of information are observed, and persons preparing the program are directly responsible before the law;
- to prevent humiliation of honor and dignity of people, undermining their business reputation, to respect the rights and freedoms of individuals guaranteed by the Constitution of the Republic of Azerbaijan;
- to provide fair commentary on facts and events, not to allow one-sidedness;
- not to propagate terrorism, violence, cruelty, national, religious and racial discrimination;
- to ensure the use of the state language in the programs;
- comply with state’s technical standards in the field of broadcasting;
- to provide social educational and informational broadcasting for the deaf and those with poor hearing;
- consistently implement the protection of national moral values;
- state and public broadcasters must allocated not less than 20 minutes every months for social advertising on the prevention of HIV at a favourable time.²³⁶

Special rules are adopted by NTRC for programs with content that may harm children and minors, such as programs with obscene and violent content, as defined in the section on obscenity above.²³⁷

Broadcasters are required to:

- provide thematic diversity of programs;
- not to spread pornographic materials;
- not to interfere with the broadcasting and reception of the programs of other broadcasters;
- respect personal and family life, business reputation, honour and dignity of people;
- observe professional ethics during broadcasts;

²³⁴ 23.4 and 23.5, law on broadcasting.

²³⁵ See “Azerbaijani TV Station Closed Over 'Interview' With U.S.-Based Turkish Cleric Accused By Ankara In Coup”, *available at*. <http://www.rferl.org/a/azerbaijani-tv-station-shut-down-gulen-interview-turkey/27867890.html>.

²³⁶ Article 32, law on broadcasting.

²³⁷ *Id*, Article 33.

- respect the right to reply;
- provide copies of control phonograms to NTRC;
- create conditions for the free presentation thoughts and views of everyone;
- ensure impartiality and neutrality of information;
- perform other duties established by the law on broadcasting.²³⁸

Material and moral damage caused by broadcasters is established by courts, and the upper limit of moral damage may not exceed the three-months' salary fund of a television and radio broadcasting company²³⁹.

4.6 Recommendations

While the European Convention explicitly allows licensing of broadcasting, the requirements and procedures for licenses should provide essential guarantees of fairness and foreseeability. While broadcast media understandably evokes concerns that are not applicable to printed expression, due to its possibility to accessing the emotional state of the audience to a greater extent, the content regulations should not be in general more restrictive than those generally applicable to other kinds of expression.

In particular:

- There should be a requirement for NTRC to regularly conduct tenders for available broadcast frequencies.
- The grounds for arbitrary interferences of executive authorities on the access to broadcasting should be limited. As of now, a broadcaster must receive a license from NTRC, conclude an agreement with the MTCHT, and Ministry of Economy might block a permit by concluding that the broadcaster is acting in breach of competition rules.
- The decision to suspend a license should be afforded a judicial guarantee, rather than be based on NTRC's decision.
- Grounds for revoking a licence should be narrowly construed to limit possibilities of arbitrary revocations. As a rule, the restrictions on broadcasted information should not be significantly broader than the restrictions on freedom of expression in general.

²³⁸ Id, Article 40.2.

²³⁹ Id, Article 42.

5 Internet regulation

5.1 Scope of Regulation

Internet is considered a “mass media” according to Azerbaijani law (section 3.1 above), and general regulations and rules therefore also apply to information available on the Internet. It must be noted that according to the Council of Europe standards with regard to freedom of expression on the internet, “any measure taken by State authorities or private-sector actors to block, filter or remove Internet content, or any request by State authorities to carry out such actions must comply with the requirements set by Article 10 of the Convention. They must in particular be prescribed by a law which is accessible, clear, unambiguous and sufficiently precise to enable individuals to regulate their conduct. They must at the same time be necessary in a democratic society and proportionate to the legitimate aim pursued.”²⁴⁰

In Azerbaijan, from March 2017 amendments to laws “on telecommunication”²⁴¹ and “on information, informatisation, and protection of information”²⁴² were adopted that provide for extensive powers of executive authorities and far-reaching regulation of the internet in Azerbaijan. In this section I will describe the current situation, scope of regulation and requirements to internet in the country.

Most significant amendments are the new provisions in the law ‘on information’ that target internet directly. This law now provides for regulation of “internet information resources” that are defined as “an information resource created on the internet, which is used in order to disseminate information, and which can be addressed by a domain name or other signification determined by its owner”²⁴³.

Telecommunication operators are defined as “a legal entity or an individual engaged in entrepreneurial activity that provides telecommunications services on a legal basis through a telecommunications network owned by it”, and provider as “a legal entity or an individual engaged in entrepreneurial activity that provides telecommunications services using the network of a telecommunications operator”²⁴⁴. Telecommunication is defined in a general fashion as “remote transmission and reception of any signals, sounds and images using electrical or electromagnetic means of communication (cable, optical, radio communication, etc.)”, and telecommunication network as “a set of various kinds of facilities and devices, united in a single technical and technological system for providing telecommunications”²⁴⁵.

State regulates following areas of telecommunications activities:

- organization of the use of the numbering resource;

²⁴⁰ See “Freedom of Expression, the Internet and New Technologies”, at <https://rm.coe.int/factsheet-on-freedom-of-expression-internet-and-new-technologies-11aug/1680738366>; See also cases of Ahmet Yıldırım v. Turkey - 3111/10; Cengiz and Others v. Turkey 38870/02; and Kharitonov v. Russia 10795/14; See also Recommendation, CM/Rec(2016)5[1] of the Committee of Ministers to member States on Internet freedom, articles 2.2 , 2.4; See also Recommendation CM/Rec(2015)6 of the Committee of Ministers to member States on the free, transboundary flow of information on the Internet.

²⁴¹ Law “on telecommunication” № 927-IIQ (14 June 2005). The amendments are adopted by the law № 540-VQD (19 March 2017). See also Decree № 277 (9 August 2005) of the president on implementation of the law on telecommunication (with amendments of 16 March 2017).

²⁴² Law “on information, informatisation, and protection of information” № 460-IQ (3 April 1998). The amendments are adopted by the law № 539-VQD (10 March 2017). This law is hereinafter referred to as law “on information”. See also Decree № 729 (19 June 1998) of the president on implementation of the law on information (with amendments of 16 March 2017).

²⁴³ Article 2, law “on information”.

²⁴⁴ Articles 1.0.8 and 1.0.9, law on telecommunication.

²⁴⁵ Article 1.0.1 and 1.0.2, law on telecommunication.

- licensing of telecommunications;
- certification in the field of telecommunications;
- application of tariffs for telecommunications services and the use of radio frequencies;
- securing a healthy competitive environment and antitrust measures in the telecommunications sector;
- organization of the use of radio frequencies;
- reciprocal interconnection between operators;
- registration of telecommunication operators and providers²⁴⁶.

5.2 Supervision and Responsibility

New Article 13-1 of the law “on telecommunication” requires registration of internet operators and providers in Azerbaijan with the Ministry of Transportation, Communication and High Technologies (MTCHT). Providers and operators must register within 15 days since the start of provision of services, and must inform MTCHT about any changes to the registered information within 10 days after change takes place²⁴⁷. Rules for registration are to be established by the MTCHT, and operators and providers will have 2 months to apply for registration²⁴⁸.

After the latest amendments, telecommunication providers have responsibilities that were previously applicable to operators only²⁴⁹. These include:

- carrying out activities in accordance with laws and regulations in the field of telecommunications;
- to perform the duties assigned according to the contract concluded with the service subscriber;
- not violate the rights of consumers;
- on the basis of the subscriber's request, to ensure the safe use of Internet information resources to protect from the information that damages children's health and development;
- conclude interconnection agreements (only operators);
- in the course of sale and use of communications facilities, to include required information in contracts with individuals and legal entities and databases of subscribers (operators only);
- to ensure that applicants' data is entered into the single database online in electronic form when activating telephone numbers (land (wired), mobile) in the network of operators (operators only);
- provide high-quality telecommunications services in accordance with established standards, norms and rules;
- comply with the regulations of traffic in accordance with regulatory legal acts;
- provide free use for subscribers and users of the telecommunications network to call specialized emergency services;
- when restricting the provision of telecommunications services, also provide to the extent possible, communication with specialized emergency services;
- create conditions for on-site inspection of the means and structures of telecommunications used to the authorized representative of MTCHT in accordance with the procedure established by the law²⁵⁰;

²⁴⁶ Id., Article 6.

²⁴⁷ Law on telecommunications, Article 13-1.1.

²⁴⁸ Article 2 of the law № 540-VQD on amendments to the law “on telecommunication” (specifying transitional measures).

²⁴⁹ Law on telecommunications, Article 33.2.

²⁵⁰ Id., Article 33.1.

- register with MTCHT and provide information about any changes to registered information within 10 days²⁵¹;
- to respond and provide information required by the MTCHT, courts, and law enforcement organs within 3 working days (if the request is marked as urgent because the information may lose its relevance during this period, to reply instantly, and if this is not possible within 24 hours)²⁵².

Providers and operators are not responsible for the content of messages transmitted over telecommunications networks, unless otherwise provided for by law²⁵³. It is the responsibility of the providers and operators to register with MTCHT within 15 days and report any changes to registered information within 10 days of the change. MTCHT can indicate that there are shortcomings in the documents and give operators and providers applying for registration 15 days to remedy them and apply again.²⁵⁴

As to the law on information, it provides for the registration of “az” country code top-level domain names by the national administrator²⁵⁵ and national registrar²⁵⁶ of domain names. National administrator of domain names maintains a registry of registered domain names and provides for usage of registry information based on requests²⁵⁷. Information to be registered in this registry, as well as rules for registration and usage of “az” country code top-level domain names are determined by the MTCHT²⁵⁸.

Furthermore, law on information establishes personal responsibility²⁵⁹ for “owners” (defined as “persons that have ownership or usage rights to an internet information resource, freely determining usage of and rules for placement of information on such resource”²⁶⁰) of internet information resources (hereinafter ‘IIR’) with regard to the content of such resources. If the owner of an IIR or a domain name is a legal entity, the website should provide “in readable format and place its name, organisational-legal form, email address” and if the owner is an individual, then “first name, last name, father’s name and email address”²⁶¹. Owners of IIR or domain names must not allow distribution on the IIR of the following information:

- “propaganda and financing of terrorism, as well as methods and means of terrorism, information about training for purpose of terrorism, as well as open calls for terrorism”;
- “information on the propaganda of violence and religious extremism, open calls directed to evocation of national, racial or religious enmity, violent change of the constitutional order, territorial disintegration, violent seizure or maintenance of power, organisation of mass riots”;
- state secrets;
- “instructions or methods for producing firearms, their component parts, ammunition, and explosive substances”;

²⁵¹ *Id.*, Article 33.1.9-1.

²⁵² *Id.*, Article 33.1.9-2.

²⁵³ *Id.*, Article 43.1.

²⁵⁴ *Id.*, Articles 43.4 and 43.5.

²⁵⁵ Article 2 of the law “on information” defines national administrator as the “authorised person in charge of the administration of “az” country code top-level domain names”.

²⁵⁶ *Id.*, national registrar is defined as “domain registration service provider in the “az” country code top-level domain names area, in accordance with the agreement signed with the national administrator”.

²⁵⁷ *Id.*, Article 13-1.2.

²⁵⁸ *Id.*, Article 13-1.3.

²⁵⁹ *Id.*, Article 13-2.1.

²⁶⁰ *Id.*, Article 2.

²⁶¹ *Id.*, Article 13-2.2.

- “information on preparation and usage of narcotic drugs, psychotropic substances, and their precursors, about locations of their unlawful acquisition, as well as information on location of and methods of cultivation of plants containing narcotic substances”;
- “pornography, including information related to child pornography”;
- “information on organisation of and incitement to gambling and other unlawful betting games”;
- “information disseminated with a purpose to promote suicide as a method of solving problems, justifies suicide, provides basis for or incites to suicide, describes the methods of committing suicide, and organises commission of suicide by several individuals or organised group”;
- “defamatory and insulting information, as well as information breaching inviolability of private life”;
- “information breaching intellectual property rights”;
- other information prohibited by the laws of the Republic of Azerbaijan.²⁶²

If the owner of IIR or of its domain name discovers such information or receives an appeal that such information is provided on the IIR, she or he must ensure that such information is removed from the resource.²⁶³ Furthermore if a host provider is in such a situation, it must take measures to ensure the removal of such information by the owner.²⁶⁴

5.3 Access restrictions

Moreover, the law not only prohibits such information on the internet, but also provides for the following measures to prevent such information from appearing. MTCHT can issue a written warning²⁶⁵ to the owner of IIR, owner of its domain name, and to the host provider. If the information is not removed within 8 hours after such written warning, MTCHT can appeal to a court to restrict access to the IIR²⁶⁶.

If there is an “urgent situation of danger to the interests of the state and society protected by law, or real threat to life and health of individuals”, access to the IIR can be restricted by a decision of MTCHT²⁶⁷. If MTCHT takes such a decision, it at the same time must apply to a court, and the access restriction remains in force until a court decision is made²⁶⁸. A court must consider MTCHT appeal and make a decision within 5 days, while an appeal of such decision does not postpone its execution²⁶⁹.

Finally, law provides for the establishment of a “List of Information Resources that contain information prohibited for distribution”. Information resources are placed on that list by MTCHT if there is a decision by MTCHT or a court about restricting access to an IIR. Rules concerning the contents of this list, its composition, supervision of its enforcement, and arranging for reciprocal contacts between host and internet providers are to be determined by the MTCHT²⁷⁰. MTCHT can add an IIR to this list based on an individual request if the IIR owner does not ensure removal of prohibited information, and there is a court decision prohibiting distribution of such information²⁷¹.

²⁶² *Id.*, Article 13-2.3.

²⁶³ *Id.*, Article 13-2.4.

²⁶⁴ *Id.*, Article 13-2.5.

²⁶⁵ *Id.*, Article 13-3.1.

²⁶⁶ *Id.*, Article 13-3.2.

²⁶⁷ *Id.*, Article 13-3.3.

²⁶⁸ *Id.*, Article 13-3.4.

²⁶⁹ *Id.*, Article 13-3.5.

²⁷⁰ *Id.*, Article 13-3.6.

²⁷¹ *Id.*, Article 13-3.8.

Once an IIR is listed, internet and host providers must immediately restrict access to it, and notify owner of the IIR in this regard²⁷².

The law provides that IIR owners, domain name owners, host providers and internet providers may be held responsible for violations of these provisions²⁷³.

5.4 Recommendations

The regulation of the internet envisaged by the recent legislation is according to some sources already applied with regard to websites critical of government. Websites, such as Radio Free Europe (www.azadliq.org) may only be accessed through proxies in Azerbaijan. Together with provisions concerning criminal liability for defamation on the internet, that do not require a complaint by the victim, and other broad categories of expression prohibited on the internet, the provisions of legislation may well constitute online censorship. It is therefore recommended that:

- Whereas the extension of responsibility for content owners of internet resources and host providers may result in self-censorship by hosts and owners, the law should restrict liability of such owners and hosts.
- Grounds for responsibility for expression on the internet should not in principle be wider than the restrictions for expression in general.
- The restrictions on access to internet resources should be based on a court decision, rather than decision and listing by the MTCHT.
- Whereas the establishment of the 'blacklist' of internet resources administered by an executive authority essentially is a form of censorship prohibited by the Constitution and the law "on mass media", it is suggested that this provision is reconsidered.

²⁷² *Id.*, Article 13-3.7.

²⁷³ *Id.*, Article 13-4.

6 Overview

Several general trends may be observed in the legal regulation of the freedom of expression in Azerbaijan. First, there is an increasing criminal liability for defamation, in particular, following the introduction of heavy penalties for anonymous defamation. Secondly, broad categories of information are removed from the media and public discussions as confidential or classified. Thirdly, broadly formulated prohibitions on calls to violent, and vaguely defined extremist activities, and general prohibition of religious literature. Finally, application of these provisions, as evidenced in the exemplary decisions of ECtHR, is nothing but arbitrary.

Furthermore, while printed media is least regulated, it is nevertheless subject to registration by the Ministry of Justice that has the power to initiate court proceedings to shut down a publication that “evades” registration, or delay registration based on formal requirements to founders and name of the publication.

Moreover, NTRC exercises close oversight and control over the broadcast media, and due to the lack of the requirement in law to hold tender competitions for broadcast licences, does not in practice issue such licenses for protracted periods of time.

Finally, recent amendments criminalising any anonymous offensive statements on the internet, together with the MTHCT power to blacklist internet resources, and establishing liability of host providers and owners of internet resources for their contents, demonstrates attempts to inhibit freedom of expression on the internet beyond general restriction on expression already provided for in the legislation.

The following recommendations have been suggested in this report:

- With regard to hate speech and incitements violent action, laws would benefit by more specific definitions of content of prohibited calls, as well as guidance as to the context of prohibited utterances and probability of harm being inflicted by them.
- Definitions of calls or justification of religious extremism as they stand are too vague to be considered as “law” for the purposes of the Article 10 of the Convention, and should be clarified to provide guarantees against arbitrary application.
- Prohibitions of religious literature should provide guidance on what constitutes such literature.
- Provisions on defamation in criminal law context should make a distinction between facts and opinions, provide for a defence of truth, and make opinions subject to higher protection against perceptions of offensiveness.
- Provisions concerning defamation on the internet should emphasize the protection of the victim by requiring latter’s complaint, because otherwise they pursue no legitimate purpose (“protection of rights of others”).
- Penalties for civil and criminal defamation must be proportionate and not discourage free and uninhibited discussion on issues of legitimate public interest.
- Provisions on defamation should provide a higher protection for criticism of public officials and civil servants.
- Provisions on confidential information should be less restrictive with regards to the scope of the classified and confidential information (e.g. commercial secrets), and provide for at least minimal protection for disclosures done in the public interest.
- The requirement of registration for printed publications should either be completely abolished, or made less burdensome.

- Grounds for suspension and liquidation of printed publications should not extend beyond general requirements applicable to the freedom of expression, and provide guarantees against arbitrary action of executive authorities.
- Provisions on disclosure of source discourage journalists from retaining sources of information, and this may discourage sources from providing information important for discussions of issues of legitimate public concern.
- There should be a requirement for NTRC to regularly conduct tenders for available broadcast frequencies.
- The grounds for arbitrary interferences of executive authorities on the access to broadcasting should be limited. As of now, a broadcaster must receive a license from NTRC, conclude an agreement with the MTCHT on usage of the frequency, and Ministry of Economy might block a permit by concluding that the broadcaster is acting in breach of competition law.
- The decision to suspend a license should be afforded a judicial guarantee, rather than be based on NTRC's decision.
- Grounds for revoking a licence should be narrowly construed to limit possibilities of arbitrary revocations. As a rule, the restrictions on broadcasted information should not be significantly broader than the restrictions on freedom of expression in general.
- Whereas the extension of responsibility for content owners of internet resources and host providers may result in self-censorship by hosts and owners, the law should limit liability of such owners and hosts.
- Grounds for responsibility for expression on the internet should not be wider than the restrictions for expression in general.
- The restrictions on access to internet resources should be based on a court decision, rather than decision and listing by the MTCHT.
- Whereas the establishment of the 'blacklist' of internet resources administered by an executive authority essentially is a form of censorship prohibited by the Constitution and law "on mass media", and should be reconsidered.