



Organization for Security and Co-operation in Europe
Office in Baku

Memorandum
On the
Draft Law of the Republic of Azerbaijan on Defamation

Baku
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SUMMARY OF RECOMMENDATIONS

Recommendations on the Scope of the draft Law and Definitions:

- The law on defamation should only protect reputations from false allegations. For this reason, the definition of defamation should be amended to *remove* “damage to reputation by deliberately incomplete dissemination of factual information corresponding to the truth”.
- The definition of defamatory information should be limited to information not corresponding to the truth and which actually results in damage to an individual’s reputation.
- The definition of view should be amended so as to include opinions which have a factual basis.
- Article 9.1.7 should be amended to clarify its meaning and scope.

Recommendations on Defences:

- Article 3.1.8 should be amended so that it is engaged as soon as “reasonable measures”, rather than “all possible means”, have been exercised to ascertain the truth.
- Article 3.1.8 should also be amended so that it applies to all statements on matters of public concern, not just those in the mass media.
- The defences of ‘conscientious interpretation’ and ‘public interest’ in Article 11.3 should not be subject to judicial discretion.
- The protection apparently extended by Article 9.1.7 to ISPs should be extended to all intermediaries in a similar position.

Miscellaneous Recommendations:

- **Moral and Material Damage:** Only the person defamed should be able to claim moral damages and it should be clarified that material damage is limited to actual pecuniary loss.
- **Limitation Period:** the law should make it clear that, in respect of information available over the Internet, dissemination occurs when the material is first uploaded, or re-uploaded (if this happens).

1 INTRODUCTION

In March 2007, the OSCE Office in Baku commissioned an expert of Article 19¹ to prepare an analysis about the fourth version of the draft Law of the Republic of Azerbaijan on Defamation. The OSCE will forward this analysis to the Yeni Nesil Union of Journalists, to its Chairman Mr. Arif Aliyev, who was supported by the OSCE to prepare the last draft of the law. Mr. Aliyev had invited a working group of Azerbaijani media experts, lawyers and Members of Parliament who prepared the last draft version. The working groups consisted of Arif Aliyev, Chairman of Yeni Nesil Union of Journalists, Shahbaz Khuduoglu, Director of the "Chap Evi" publishing house, Yadigar Mememdiy, Chairman of the Democratic League of Journalists, Azay Quliyev, MP, Qanira Pashaeva, MP, Qulamhuseyn Alibeyli, Professor of Law at Baku State University, Leyla Madatova, lecturer at Baku State University, Fuad Suleymanov, independent media lawyer, Rashid Hajili, Director of the Media Rights Institute, Erkin Qadirov, lecturer at Baku State University, and the OSCE Office in Baku.

The latest version of the draft Law of the Republic of Azerbaijan on Defamation is very progressive, meeting international law and practice in almost all respects. The OSCE hopes that the law will be adopted in due course. In this Memorandum, the Expert provides some final comments to fine tune the draft Law to bring it fully into line with international standards and best practice from around the world. This Memorandum analyses the draft Law in light of international standards governing the right of freedom of expression. It is based on a translation of the draft Law provided by the OSCE, and supplements the Memorandum of October 2006 by Article 19 which provided comments on an earlier draft.²

The Expert notes that there have been a number of significant developments in the formulation of the draft Law since the earlier Memorandum, including honing the concept of protection of reputation, the almost complete removal of the subjective concept of dignity and the further promotion of non-litigious remedies. The comments in the present Memorandum are limited to some key final points predominantly concerning the scope of the draft Law, the availability of defences, moral and material damage, the limitation period for material posted on the Internet and the protection of sources.

Section 2 of this Memorandum provides an overview of the history of defamation law in Azerbaijan. Section 3 outlines key concerns with this latest version of the draft Law and our recommendations. For an outline of the applicable international standards which are relevant to the formulation of defamation law in Azerbaijan, the Expert refers readers to the Memorandum of October 2006.³ The Expert hopes that our recommendations and this Memorandum overall is of some use to the drafting committee in their final deliberations.

2 HISTORY OF AZERI DEFAMATION LAW

The Constitution of Azerbaijan, adopted on 12 November 1995, sets the legal framework for the domestic law of defamation of the Republic of Azerbaijan. Article 47 protects the right of freedom of expression, and relevant restrictions on free expression for the protection of reputation are found in Articles 46, 75 and 106.

¹ Sophie Redmond, Legal Officer, Article 19.

² Available at: <http://www.article19.org/pdfs/analysis/azerbaijan-defamation.pdf>.

³ *Ibid.*

Articles 46, 75 and 106 of the Constitution are the basis for the statutory defamation provisions which have been enacted since 1995 in the Criminal and Civil Codes and then, subsequently, copied into the provisions of the most recent version of the Law on Mass Media enacted in 2001 and the Law on Public TV-Radio Broadcasting 2004. In 2000, there was an official review of the Criminal Code, as part of the Council of Europe accession preparations. There was no substantial change to the criminal defamation provisions.

The defamation provisions enacted since 1995 consist of defining the scope of the protection of reputation in Azerbaijan, outlining the range of remedial measures available for redressing instances of defamation, and imposing additional obligations and penalties on the media in respect of defamation.

Article 46 of the Constitution, which states that everyone has “the right to defend his/her honour and dignity”, is the main basis for the statutory defamation provisions. Article 23 of the Civil Code provides a remedy for the dissemination of information that humiliates a person’s “honour, dignity and business reputation”.⁴ Article 147 of the Criminal Code criminalises defamation, which it defines as the dissemination of false information which defames the honour and dignity of another person or undermines his reputation in public. The penalties for a violation of Article 147 are more than doubled if the defamation is linked with an accusation of a serious crime. Article 148 of the Criminal Code criminalises insult, which it defines as the degrading of the honour and dignity of another person.

The Law on Mass Media 2001 applies, with particular force, both general and specific defamation provisions to the media. Almost wholly repeating Article 23 of the Civil Code, Article 10 of the Law on Mass Media prohibits the dissemination of information through the media that humiliates the honour and the dignity of the citizens, or publishing material which constitutes slander. According to earlier studies prepared on the Law on Mass Media,⁵ the Law imposes the maximum fine of three months’ income if a broadcast licensee is convicted of defamation under the Criminal Code, and Article 19 of the Law allows for a publication to be banned if it is found guilty of defamation three times. Also, Articles 50 and 53 of the Law on Mass Media place conditions on the privilege of accreditation for both local and foreign journalists. Accreditation can be withdrawn if the journalist violates the rules of accreditation, dishonours the body or spreads false information about the body.

Additionally, Article 44 of the Law on Mass Media imposes a right to refutation, correction and reply through the media in respect of any material published which is slanderous or humiliating to dignity or honour. Article 61(1) subjects an editor who refuses to comply with these remedies, without grounds, to unspecified administrative or criminal responsibility. The defences of truth or public interest available to the media under the Law on Mass Media are limited to specific circumstances only under Article 62.

⁴ Article 23 provides for a right of refutation. This is discussed further below – see Note 7.

⁵ Martin, “Comparative Human Rights Jurisprudence in Azerbaijan: Theory, Practice and Prospects”, 14:2 *Journal of Transnational Law & Policy* 215, 234 (2005); Poulton, *Azerbaijan: Press Freedom or Personal Fiefdom?*, (London: 2001); ARTICLE 19, *Memorandum on the Laws of Azerbaijan Relating to the Protection of Reputation* (London: 2004).

Similarly, Article 8.8.8 of the Law on Public TV-Radio Broadcasting 2004 requires the public service broadcaster to respect the privacy, honour and dignity of the citizens. A breach of this provision is governed by the provisions of the Law on Mass Media.⁶

Article 75 of the Constitution states that “[e]very citizen must respect state symbols of the Azerbaijan Republic – its banner, state emblem and hymn”. There is no specific legislative provision implementing this Article of the Constitution.

Article 106 of the Constitution states that the honour and dignity of the President are protected by law. This is implemented in Article 323 of the Criminal Code which criminalises discrediting or degrading the honour and dignity of the President. The penalties are significantly increased if the same deeds are linked with an accusation of a serious crime.

Both the Supreme Court and the Constitutional Court have provided substantial guidance on the development of the law of defamation.⁷ In a 1999 decision, the Supreme Court directed that the right of refutation contained in Article 23 of the Civil Code should be applied in accordance with the procedural rules outlined in the Law on Mass Media. The Supreme Court appears to have been undertaking to harmonise the range of provisions regulating defamatory statements which exist across a number of pieces of legislation.

In 2002, the Constitutional Court provided guidance on the meaning of the phrase “honor and dignity” in Article 46 of the Constitution.⁸ In handing down its ruling in the case, the Court made the following relevant determinations:

- In referring to Article 46, the Court emphasised the fundamental importance of ensuring proportionality with the right of freedom of expression, which is “one of the basic principles of development of society”; and
- the “implementation of the right to protect honour and dignity cannot be accompanied by restriction or complete rejection of other rights”.

Following these decisions and Azerbaijan’s accession to the Council of Europe, in 2001, a lengthy process of discussions began to reform the country’s defamation laws. In 2004, members of the legislature started working together with stakeholders such as the Yeni Nesil Journalists’ Association, and this process was accelerated in March 2005 when the President of Azerbaijan personally declared a moratorium on public officials and institutions instituting libel and defamation suits against the media. Unfortunately, this moratorium was not respected and by September 2006, at least five journalists and a number of newspapers were facing criminal and civil defamation cases.⁹ Since this time, there has been a demonstrable commitment to implementing the practical moratorium into law. The draft Law of Defamation that is the subject of this Memorandum is the latest product of the on-going discussions. It has been formulated and edited through several versions and it decriminalises defamation and provides a broad range of practical civil remedies. The Expert believes it would make a vast improvement in striking the correct balance between the right to freedom of expression and the protection of reputation in Azerbaijan.

⁶ Law on Public TV-Radio Broadcasting 2004, Article 32.3.

⁷ Decision #7 of the Supreme Court of Azerbaijan, 14 May 1999.

⁸ On Interpretation of Articles 21 and 23 of the Civil Code of Azerbaijan Republic, 31 May 2002.

⁹ Representative on Freedom of the Media - Organisation for Security and Co-operation in Europe (OSCE), *Press Release: OSCE media freedom representative asks Azerbaijan’s present to help stop new wave of prosecution of journalists, urges legal reform*, 4 September 2006, http://www.osce.org/fom/item_1_20231.html.

3 ANALYSIS OF THE DRAFT LAW

3.1 Scope and Definitions

3.1.1 Definition of Defamation

Defamation has been defined in this version of the draft Law, unlike in the version we analysed in our October 2006 Memorandum. The first part of the definition – damage to reputation by dissemination of false defamatory information – is unproblematic. The second part – which defines defamation as damage to reputation by “deliberately incomplete dissemination of factual information corresponding to the truth” (see also Article 4.1, on the right to protect reputation) – could pose a significant risk to balancing protection of reputations and the right of freedom of expression for two reasons. First, correct factual information should not be considered to be defamatory to a person’s reputation. The law of defamation should serve to protect individuals against *unwarranted* attacks on their reputation, rather than to protect them regardless of whether or not their good reputation is deserved. Even incomplete dissemination of the truth, unless this effectively conveys a falsehood, should be protected. This provision could place an undue burden on day-to-day news reporting by imposing a substantial editing responsibility on the mass media to ensure that any news report concerning an individual was wholly complete in terms of factual information, in order that any critical comments concerning an individual should not be contextualised by other mitigating circumstances, or other relevant factors. For these reasons, only *false* statements should attract liability in defamation.

Second, the second limb of the definition of Defamation is extremely vague and the scope of application is decidedly unclear. Such drafting poses a risk to freedom of expression through creating a ‘chilling effect’ as individuals steer well clear of the zone of prohibited speech for fear of sanction. In other words, vague provisions affect not only the targeted speech but a wide penumbra around it. As a result, legitimate debate, including that concerning public officials whose actions should be open to a high degree of public scrutiny, may be inhibited.

Frank, critical discussion concerning individuals which is based on facts should not be subject to the law of defamation. We strongly recommend that the second limb of the definition of Defamation is removed from the draft Law.

3.1.2 Definition of Defamatory Information

Defamatory information is defined as factual material affecting reputation. To constitute defamation, as noted above, it should normally apply only to false statements of fact, whether this is clarified under this definition or the related definition of defamation.

While this definition has clearly been crafted with care to strike a careful balance between protection of reputation and free expression, the Expert notes that a number of different terms apply to the threshold for infringement, including “direction unfavorable for them”, “by forming a negative opinion about them” and “lead to diminishing or losing of respect for them”. This could lead to confusion and conflicting results. Furthermore, the standard for some of these is very low. The Expert recommends that this provision be amended so as to refer only to information which actually results in damage to an individual’s reputation.

3.1.3 *Definition of View*

The term ‘view’ is defined in Article 3 as an opinion without factual basis and then views are accorded protection against defamation liability in Article 11.2. While the Expert recognises the effort to make a clear distinction between statements of fact and statements of opinion, reflecting international standards, it is unrealistic to require an opinion to have no factual basis whatsoever, and this deprives the provision of much of its protective potential. It may be noted that the promotion of responsible and ethical comment in the mass media would benefit more from protection of opinions which are based on some factual content. Accordingly, the Expert recommends the definition of view be amended to remove the phrase “...which has no factual contents...”.

3.1.4 *Subjects of Liability for Defamation*

Article 9.1.7 refers to defamatory information that has been disseminated on the Internet. The drafting of this provision was somewhat unclear to the Expert – although this may have been a problem created through the translation process. It appears to the Expert that it Article 9.1.7 makes more sense if the last clause of the sentence reads “...or has **uploaded** it as his/her own information” (emphasis added).

Recommendations:

- The law of defamation should only protect reputations from false allegations. For this reason, the definition of definition should be amended to *remove* “damage to reputation by deliberately incomplete dissemination of factual information corresponding to the truth”.
- The definition of defamatory information should be limited to information not corresponding to the truth and which actually results in damage to an individual’s reputation.
- The definition of view should be amended so as not to include opinions which have a factual basis.
- Article 9.1.7 should be amended to clarify its meaning and scope.

3.2 Defences

3.2.1 *Conscientious Interpretation*

Article 11.3, in tandem with the definition in 3.1.8 of conscientious interpretation, provides a form of the ‘reasonable publication’ defence to editorial staff and journalists. This was one of the recommendations concerning Article 14.1 in the version of the draft Law which Article 19 analysed in October 2006.¹⁰ At the same time, if Article 11.3 is to be a true ‘reasonable publication’ defence, it should require *only* that reasonable measures be taken to benefit from its protection. At present, pursuant to Article 3.1.8, conscientious interpretation applies only where editorial staff or journalists “use all possible means” to attempt to verify the accuracy of the information before dissemination. This is an unduly onerous obligation, which has the potential to stifle the free flow of information.

The Expert also reiterates an earlier comment concerning the scope of availability of this defence in a modern information society. It is not only the mass media which should benefit

¹⁰ Note 2, Section 3.3.

from its protection; there are many circumstances in which non-journalists such as academics or civil society activists might unintentionally publish false facts with a view to informing the public and under circumstances where it was reasonable to do so. Such persons perform just as important a public interest role in contributing to a diversity of information and ideas.

The Expert notes, at the same time, that Article 11.3 also applies where the information in question is deemed to be of public interest. This might provide the basis for a broader public interest defence. If this is the intention, this should be clarified.

Furthermore, the Expert notes that it appears from the use of the term ‘can’ in Article 11.3 that the court has a discretion as to whether or not to release a person from liability once it has been established that the defence of conscientious interpretation or public interest information applies. This discretion significantly undermines the effectiveness of the defence and, thus, the free flow information.

3.2.2 Defence of innocent publication

The defence of ‘innocent publication’ – to protect publishers, graphic design companies, etc. – applies to those who unknowingly publish or contribute to the publication of a defamatory statement, who have not been careless or in any way responsible for the statement. Earlier versions of the draft Law consistently contained clauses protecting ISPs on the basis of ‘innocent publication’. There are a number of others who face liability for a defamatory statement under Article 9.1.8 of the draft Law, such as newspaper boys and printers. They should also be protected as innocent publishers.

Recommendations:

- Article 3.1.8 should be amended so that it is engaged as soon as “reasonable measures”, rather than “all possible means”, have been exercised to ascertain the truth.
- Article 3.1.8 should also be amended so that it applies to all statements on matters of public concern, not just those in the mass media.
- The defences of ‘conscientious interpretation’ and ‘public interest’ in Article 11.3 should not be subject to judicial discretion.
- The protection apparently extended by Article 9.1.7 to ISPs should be extended to all intermediaries in a similar position.

3.3 Moral and Material Damage

This version of the draft Law, in common with earlier versions, distinguishes between moral damage and material damage. Article 3.1.6 defines moral damage as the “moral or physical anguish which a natural person suffers” as a result of the dissemination of false defamatory information. The Expert welcomes the distinction drawn in the draft Law between moral and material damage, the intangible and tangible components of compensable harm, and the cap imposed on the amount of damages payable for intangible harm (see Article 10.5). Proportionality of compensation for defamation is essential for striking the correct balance between the protection of reputation and freedom of expression.

At the same time, the Expert recommends a couple of minor clarifications. It should be quite clear that only the person who has been defamed can claim moral damage. This is not

intended, for example, to benefit a family member or other relative. Furthermore, the definition of material damage is somewhat unclear. There is no definition in Article 3, only a brief description in Article 10.2, namely “real damages or lost profits”. It is assumed that material damage is intended to be limited to actual financial loss and this should be made clear.

Recommendation:

- Only the person defamed should be able to claim moral damages and it should be clarified that material damage is limited to actual pecuniary loss.

3.4 Limitation Period

The Expert notes that the potential ambiguity in previous versions as to when the six-month limitation period for defamation suits has been clarified in Article 15.1 of the latest version of the draft Law. The Expert recommends that further clarification be provided in respect of dissemination of information on the Internet.

Recommendation:

- The law should make it clear that, in respect information available over the Internet, dissemination occurs when the material is first uploaded, or re-uploaded (if this happens).