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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

OPINION

ON THE LEGISLATION PERTAINING TO THE PROTECTION AGAINST DEFAMATION

OF THE REPUBLIC OF AZERBAIJAN

Adopted by the Venice Commission
at its 96th Plenary Session,
(Venice, 11-12 October 2013)

on the basis of comments by:

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I. Introduction

1. On 19 September 2012, the Presidential Administration of the Republic of Azerbaijan requested the assistance of the Venice Commission in drafting a Law on Defamation, as part of the National Programme for Action to Raise Effectiveness of Protection of Human Rights and Freedoms and of the execution of two judgments of the European Court of Human Rights (hereinafter the Court) against Azerbaijan[1], in which the Court found violations by Azerbaijan of Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter ECHR).

2. Ms Herdís Thorgeirsdóttir, Ms Maria Fernanda Palma, Mr Richard Clayton, Mr Pieter van Dijk (former member) and Mr Gavin Millar (consultant, Information Society and Action against Crime Directorate of the Council of Europe), were appointed as Rapporteurs.

3. On 29 November 2012, a preliminary exchange of views between the Secretariat of the Venice Commission, the Department for the Execution of the Judgments of the Court and representatives of the authorities of Azerbaijan took place in Strasbourg, on a preliminary Draft Defamation Law submitted by the authorities (hereinafter the Draft Law). It was agreed that the co-operation would cover all related legislative provisions both in force (including criminal law, civil law and media law) and in preparation (see CDL-REF(2013)022rev).

4. On 9 - 12 April 2013, the working group travelled to Azerbaijan and met with the authorities and civil society. The Venice Commission is grateful to the authorities and the participants to the exchanges held during the visit for their co-operation.

5. On 14 May 2013, the Parliament of the Republic of Azerbaijan adopted amendments (promulgated by the President of Azerbaijan on 4 June 2013) to Articles 147 (Libel) and 148 (Insult) of the Criminal Code of Azerbaijan, introducing criminal liability for defamation committed “through a publicly displayed Internet information resource”. There was neither prior information of nor consultation with the Venice Commission with regard to the above amendments. These were transmitted to the Council of Europe at the request of the Secretary General of the Venice Commission.

6. On 19 May 2013, preliminary comments and recommendations of the rapporteurs were sent to the authorities of Azerbaijan, who committed themselves, by official letter sent to the Council of Europe on 29 May 2013, to submitting a revised draft law before end June 2013; a working meeting was to follow. No revised draft was however submitted.

7. The present Opinion is based on the English translation of the Draft Law as well as of related provisions of the Criminal Code, the Civil Code and the Law on Mass Media[2], as provided by the authorities of the Republic of Azerbaijan. Since the translation may not accurately reflect the original version, certain comments and omissions might be affected by problems of the translation.

8. The Venice Commission points out that different versions of the Draft Law had been brought to the attention of its delegation during the visit to Baku. Following its request for clarification,

[1] *Mahmudov and Agazade v. Azerbaijan*, Application No. 35877/04, 18 December 2008, and *Fatullayev v. Azerbaijan,* Application No. 40984/07, Judgment of 22 April 2010
[2] Adopted on 7 December 1999, №769-IQ, as amended

the authorities confirmed that the version of the Draft Law to be considered by the Commission was the one initially submitted, without any explanatory memorandum or report, by the Presidential Administration.

9. The present opinion was adopted by the Commission at its 96th Plenary Session (Venice, 11-12 October 2013).

II. Scope

10. The scope of the present opinion is to assess whether the Draft Law and other relevant statutory provisions meet the European standards on the protection against defamation, in particular Articles 8 and 10 of the ECHR and the principles established by the Court's case law.

III. Background

11. Upon accession to the Council of Europe in January 2001, Azerbaijan committed *inter alia* to guaranteeing freedom of expression and the independence of the media and journalists.[3]

12. However, as reported by various sources[4], 13 years after the country's accession to the Council of Europe, enjoyment of freedom of expression remains considerably problematic in Azerbaijan. Journalists and the media continue to operate in a difficult environment and self-censorship is allegedly high among newspaper editors and journalists, in particular those who seek to expose economic and political corruption in the country. As indicated by the Monitoring Committee of the Parliamentary Assembly in December 2012, although "*repeated calls have been addressed to the authorities […] to delete Articles 147 (defamation) and 148 (insult) from the Criminal Code, which provide respectively for up to three years and up to six months of imprisonment*", the legislative framework - and related practice - with regard to the freedom of expression continue to raise concern.

13. The Council of Europe Commissioner for Human Rights, in his 2013 Report[5] following his visit to Azerbaijan recalls that "*the situation of freedom of expression, including freedom of the media in Azerbaijan has been a long-standing concern among national and international observers*[6]". The Commissioner is *"seriously concerned at the apparent intensification of the practice, highlighted by his predecessor in 2010 and 2011, of unjustified or selective criminal prosecution of journalists and others who express critical opinions. In recent years, several*

[3] See PACE Opinion No. 222(2000) on Azerbaijan's application for membership of the Council of Europe, 28 June 2000.

[4] See PACE Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe, *The honouring of obligations and commitments by Azerbaijan*, Report, 20 Dec 2012; Human Rights Watch, *World report 2012: Azerbaijan*; Institute for Reporters' Freedom and Safety IRFS), *Opinion N° 222, Implementation of the Council of Europe Commitments in the field of fundamental freedoms in Azerbaijan*, June 2013

5 *Report by Nils Muižnieks, Commissioner for Human Rights, following his visit to Azerbaijan from 22 to 24 May 2013*, CommDH(2013)14, 9 July 2013. See also : *Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visit to Azerbaijan*, CommDH(2010)21, 29 June 2010; *Observations on the human rights situation in Azerbaijan*, CommDH(2011)33, 29 September 2011.

[6] See, for example, the Foreword by Frank La Rue, UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, of the International Partnership Group for Azerbaijan (IPGA) report, Running Scared: Azerbaijan's Silenced Voices (2012), who noted that "Although there are not currently as many journalists in prison as there were in 2007, there are now more persons overall imprisoned in connection with exercising their right to free expression."

media workers have been prosecuted and/or sentenced for incitement to national, racial or religious hatred and in some instances terrorism, as well as for hooliganism, tax evasion, drug possession and illegal possession of weapons, with the credibility of the relevant charges being widely challenged. As a result, a number of journalists have to serve long prison terms or carry out corrective labour and/or pay heavy fines. According to the prison census conducted by the Committee to Protect Journalists (CPJ) in December 2012, Azerbaijan ranked among the top countries jailing journalists with nine imprisoned journalists. “

14. In *Mahmudov and Agazade v. Azerbaijan* and *Fatullayev v. Azerbaijan*, the Court found that Azerbaijan had violated Article 10 of the ECHR and, in particular, the right to freedom of expression of journalists. The Court held that the unjustified use of imprisonment as a sanction for defamation had contravened the principle that the press had to be able to perform the role of a public watchdog in a democratic society. The Court found no special circumstances justifying such a sanction, such as incitement to violence or racial hatred, in any of the cases. In *Fatullayev v. Azerbaijan*, it found the reasons invoked to justify defamation as regards the applicant’s statements insufficient, and concluded that the way domestic courts applied the criminal provisions on terrorism to the statements at issue was an arbitrary interference with the freedom of expression. Further applications against Azerbaijan concerning Article 10 ECHR issues are pending before the Court.

15. The legislative process, including the preparation of a comprehensive law on the protection against defamation, is part of the general measures required by the execution of the above judgments and of the National Programme for Action to Raise Effectiveness of Protection of Human Rights and Freedoms, approved by the President of the country in December 2011. The National Programme specifically mentions the aim of decriminalizing defamation.

IV. Standards

A. General

16. Azerbaijan is party to both the ECHR[7] and the International Covenant on Civil and Political Rights[8] (hereinafter, the “ICCPR”).

The right to freedom of expression as an essential foundation of democratic society

17. Article 10 of the ECHR on “*Freedom of Expression”* provides:

> *1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.*
> *2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the*

[7] Signed on 4 November 1950, entered into force on 3 September 1953 and ratified by the Republic of Azerbaijan on 15 April 2002

[8] Adopted by UN General Assembly resolution 2200A (XXI) on 16 December 1966, acceded to by the Republic of Azerbaijan on 13 August 1992

> *protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."*

18. Article 19 ICCPR protects freedom of expression and opinion in similar terms.

19. Article 10 is a qualified right protecting freedom of expression, information and opinion, one of the key foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment.[9] While the first paragraph sets out the positive freedom, the second paragraph sets out the conditions to be met if an interference with freedom of expression by public authority is to be justified.

20. The first sentence of the first paragraph of Article 10 provides that '*Everyone'* has the right to freedom of expression' (emphasis added). So the right can be asserted by natural and legal persons alike, such as companies and associations.[10] It can be claimed by citizens and non-citizens. In the media context journalists, editors, proprietors, media organisations, printers and distributors are all entitled to protection under Article 10.

The press as public watchdog and the public's right to receive information

21. Article 10 protects public communications of opinion. At the same time, it protects the right to hold opinions and to receive information and ideas, as well as to impart them. In a landmark judgment on press freedom of 1979, the Court set forth the following general principle: "*not only do the media have the task of imparting [such] information and ideas: the public also has a right to receive them.*"[11] Newspaper/Internet readers or television viewers/radio listeners can therefore assert their right to receive information and ideas, a right which must be considered in any Article 10 case involving the media. Contracting states, in particular their national courts, must duly take into account that, where a person is prevented from communicating, or faces a fine or civil award of damages for doing so, the Article 10 right of both the speaker and the audience is interfered with. This is very important in cases involving speech on political matters or other matters of public concern as the receipt of such ideas and information by the public is essential in a democracy.

22. The role of the press in a democratic society is a vital one. The Court has repeatedly underlined that the press and other media have a special place in a democratic society as "purveyor of information and public watchdog". Hence, they receive particularly strong protection under Article 10. As the Court said in *Bergens Tidende v Norway* (App No 26132/95, Judgment of 2.08.2000, (§52).), *"[…] where […] measures taken by the national authorities are capable of discouraging the press from disseminating information on matters of legitimate public concern, careful scrutiny of the proportionality of the measures on the part of the Court is called for".* [12]

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[9] *Axel Springer AG v. Germany*, Application No 39954/08, Judgment of 7 February 2012, §78

[10] There has been criticism towards allowing companies to sue for libel as, given their immense strength in today's world, this may become a legal weapon that can be used to deter an open, public debate. In the United Kingdom, in the groundbreaking *Derbyshere* case of 1993, the House of Lords held that a public corporation could not maintain an action for libel.
Given the range of other legal means that companies have to protect their commercial reputations, some contend that their right to sue for libel should be limited and that companies should at least have to show substantial financial loss.

[11] *Sunday Times v. the United Kingdom*, Application No. 6538/74, Judgment of 26 April 1979, § 65

[12] See also UN Human Rights Committee, General Comment No. 34 on Article 19 ICCPR

23. While the media must act as a public watchdog according to Article 10 case-law, there is a natural tension between, on the one hand, the public interest in openness and transparency and, on the other hand, the Article 8 interest in the protection of privacy and of reputation. Yet, as stressed by the Court, the structure of these two conflicting provisions is such as to permit a proportionality-based approach to be taken to the reconciliation of the protected rights.

Permissible restrictions on freedom of expression

24. According to the second paragraph of Article 10 and the well-established case law of the Court[13], the exercise of the right to freedom of expression may be subjected to formalities, conditions, restrictions or penalties as are "prescribed by law", pursue one of the legitimate aims identified in an exhaustive manner in the second paragraph of Article 10, and as "necessary in a democratic society". As ruled by the Court, interference by authorities must correspond to a "pressing social need", be proportionate to the legitimate aim pursued within the meaning of Article 10(2), and be justified by judicial decisions that give relevant and sufficient reasoning. Whilst the national authorities have a certain margin of appreciation, it is not unlimited as it goes hand in hand with the Court's European supervision.[14]

25. In most Article 10 cases involving the media, in civil proceedings the interference consists of an adverse judgment, a damages award, the imposition of an order preventing publication ("prior restraint order"), an order requiring publication of a judgment or apology, an order to disclose a source or for the seizure or destruction of material. In the criminal field, interferences consist of, *inter alia*, convictions, fines and prison sentences.

Public interest debate

26. When considering whether an interference with freedom of speech is necessary in a democratic society, the Court gives the strongest protection to political debate on matters of public interest, which it has defined very widely, to cover speech on all matters of general public concern. In this context, "*exceptions to freedom of expression must be interpreted narrowly*"[15], and states have a limited margin of appreciation.

27. In *Lingens v Austria*[16], the Court emphasised the importance of political debate in a free and democratic society:"… *[I]t is […] incumbent on it [the press] to impart information and ideas on political issues just as those in other areas of public interest. Not only does the press have the task of imparting such ideas: the public also has a right to receive them […]The limits of acceptable criticism are […] wider as regards a politician as such than as regards a private individual: unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and must consequently display a greater degree of tolerance[…]*".

28. Thus the limits of permissible criticism depend, to some extent, on the identity of the person being criticised[17] and restrictions on public criticism will be more closely supervised when those attacked are politicians. In its case law, from *Lingens* to more recent judgments, the Court has

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[13] See, *e.g.*, *Sunday Times v United Kingdom,* Application No. 6538/74, Judgment of 26 April 1979, § 49
[14] *Aleksey Ovchinnikov v. Russia*, Application No. 24061/04, Judgment of 16 December 2010, § 44
[15] *Lopes Gomes da Silva v. Portugal*, Application No. 37698/97, Judgment of 28 September 2000, § 30
[16] *Lingens v Austria*, Application No. 9815/82, Judgment of 8 July 1986, §§ 41-42.
[17] *Castells v. Spain*, Application No. 11798/85, Judgment of 23 April 1992, § 46

consistently applied the notion of a high tolerance threshold for criticism directed to politicians, government members and heads of state, and even big corporations, as they wield immense power in today's world. The Court emphasized in the case of *Steel and Morris v. the United Kingdom* the general interest in promoting the free circulation of information and ideas about the activities of powerful commercial entities.[18] The Court held in this case that Article 10 had been violated. Although it is not in principle incompatible with Article 10 to place on a defendant in defamation cases the burden of proving the truth of defamation, the Court considered that when a legal remedy is offered to a large multinational corporation to protect itself from defamatory allegations, also the countervailing interest in an open public debate must be guaranteed by providing procedural fairness and equality of arms to the defendants in such a case. For this reason the notion of high tolerance threshold should also apply to corporations This is particularly important if defamation is concerned.

Sanctions

29. The Court has also developed case law with regard to sanctions. In particular, it has held that the nature and severity of the penalties imposed are factors to be taken into consideration when assessing the proportionality of an interference with the freedom of expression.[19]

30. In its case law regarding defamation, the Court has underlined 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. (*See more under the section 'Defamation'*).

B. Defamation

Rights in play

31. Prohibition of defamation and related legislation raise the issue of the balance to be struck between freedom of expression, as protected by Article 10 ECHR (Article 19 ICCPR) and the right to respect for private and family life, as protected by Article 8 ECHR (Article 17 ICCPR). The right to protection of one's reputation comes under Article 8 ECHR as part of the right to respect for private life.[20] In defamation cases the protection of one's reputation must be weighed against the wider public interest in ensuring that people are able to speak and write freely, uninhibited by the prospect of being sued for damages should they be mistaken or misinformed. Furthermore, as established by the Court in *Handyside v United Kingdom*[21], the protection of Article 10 applies not only to information or ideas that are favourable and inoffensive but also to those that offend, shock or disturb the State or a sector of the population.

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[18] *Steel and Morris v. the United Kingdom*, Application no. 68416/01, Judgment of 15 February 2005.
[19] *Okkçuoglu v.Turkey,* Application No. 24246/94, Judgment of 8 July 1999, § 49; *Skalka v. Poland*, Application No. 43425/98 , Judgment of 27 May 2003, § 41; *Tammer v. Estonia*, Application No. 41205/98, Judgment of 6 February 2001, § 69; *Cumpănă and Mazăre v. Romania*, Application No. 33348/96, Judgment of 17 December 2004, § 111
[20] *Chauvy and Others v. France*, Application No. 64915/01, Judgment of 29 September 2004, §70; *Pfeifer v. Austria*, Application No. 12556/03, Judgment of 15 November 2007, § 3
[21] *Handyside v United Kingdom,* Application No. 5493/72, Judgment of 7 December 1976, § 49

Defences

32. The Court case law sets out distinctions and defences ensuring that competing rights in play in a defamation claim will be balanced in an ECHR compliant fashion:

a) statements of fact;
b) honest value judgments (in particular about public figures);
c) responsible public interest speech/criticism;
d) privilege (or immunity), where the public interest in allowing discussion without risk of suit in defamation outweighs any damage to reputation;
e) subject and author of an alleged defamation.

Statements of facts/value judgments

33. In its case law, the Court has distinguished between statements of fact and value judgments. While the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof. In this respect, the Court has held that "*the requirement to prove the truth of a value-judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10*".[22]

34. However, where a statement amounts to a value judgment, the proportionality of an interference may depend on whether there exists a sufficient factual basis for the impugned statement, since even a value judgment without any factual basis may be excessive[23].

35. Furthermore, a journalist who has made a defamatory statement of facts does not always have to prove its truth to avoid liability. The Court recognises that a defence should be available in case of accusation of defamation where the journalist had acted responsibly and had dealt with matters of public interest - even where the truth of the factual statement cannot be proved in court; for instance, in the context of political debate, in connection with the publication of rumours and allegations, which journalists cannot be required to prove.[24]

Subject

36. The protection given to reputation under Article 10 ECHR will in practice depend on various factors including the extent to which the claimant participates in public life and the extent to which the attack on the claimant relates to his/her official/public activities. The more prominent the subject of defamation is in public life, the more s/he must expect to be attacked and the greater will be the protection for the journalist.

Author

37. It is recalled, with regard to the author of alleged defamation, that national laws must take into account, in line with the Court case law, the vital role of the media as a "public watchdog" in a democratic society. However, the mass media are not the only category that should be entitled to a high level of freedom of expression. Thus, persons who impart information and ideas on matters of public interest and contribute to the public debate on such matters, including

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[22] See *Lingens v. Austria*, § 46; *Mahmudov and Agazade v. Azerbaijan*, § 41
[23] See, for example, *Feldek v. Slovakia*, application No. 29032/95, Judgment of 12 July 2001, §§ 75-76
[24] See *Alithia v Cyprus*, Application No. 17550/03, Judgment of 22 May 2008, §§ 49 - 51

members of campaign groups and elected representatives, should be allowed a high level of freedom of expression, including a certain degree of exaggeration and even provocation as long as they act in good faith and exercise due diligence in order to provide accurate and reliable information. [25]

Penalties

38. Remedies for defamation require the most careful scrutiny. They must take into account the specific circumstances of the case and any sanctions must bear a reasonable relationship of proportionality to the damage to reputation suffered. Excessive punitive measures should be avoided and the imposition of a prison sentence limited to exceptional circumstances.

39. Sanctions for defamation include, in increasing order of severity established by the Court's case law, civil sanctions, criminal sanctions of a pecuniary nature, and criminal sanction with restriction of liberty. According to the Court, in regulating the exercise of freedom of expression in order to ensure adequate protection by law of individuals' reputations, States should avoid taking measures that might deter the media from fulfilling their key role of reporting and alerting the public on matters of public interest[26].

40. The Court has criticised the excessive use of criminal provisions and has stressed that the mere fact that a sanction is of criminal nature, has in itself a chilling effect. Although it has not proscribed criminal provisions on defamation as such, the Court has repeatedly criticised the imposition of criminal sanctions. [27]

41. Furthermore, as it previously had done in *Cumpănă and Mazăre (§ 115)*, the Court emphasised, in *Mahmudov and Agazade v. Azerbaijan* (§ 50) "*that, although sentencing is in principle a matter for the national courts, the imposition of a prison sentence for a press offence will be compatible with journalists' freedom of expression as guaranteed by Article 10 of the Convention only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in cases of hate speech or incitement to violence*".

42. The Venice Commission stresses in this context, as it did in its 2008 *Report on Relationship between Freedom of Expression and Freedom of Religion*, that hate speech "is in contradiction with the Convention's underlying values, notably tolerance, social peace and non-discrimination" and, by virtue of Article 17 ECHR, may not benefit from the protection afforded by Article 10 ECHR[28].

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[25] See Venice Commission, *Interim Opinion on the draft law on amending the Civil Code of the Republic of Armenia*, CDL-AD(2009)037, §20; see also *Steel and Morris v. United Kingdom,* Application No. 68416/01, Judgment of 15 February 2005, § 89; *Pakdemirli v. Turkey,* Application No. 35839/97, Judgment of 22 February 2005, § 33; *Tammer v. Estonia,* Application No. 41205/98, Judgment of 6 February 2001, § 67; *Cumpănă and Mazăre v. Romania*, Application No. 33348/96 Judgment of 17 December 2004, § 102.
[26] *Cumpănă and Mazăre v. Romania*, Application No. 33348/96, Judgment of 17 December 2004, § 113
[27] *Cumpănă and Mazăre v. Romania*, Application No. 33348/96 Judgment of 17 December 2004, § 114; *Azevedo v. Portugal*, Application No. 20620/04 Judgment of 27 March 2008, § 33; *Altug Taner Akcam v. Turkey*, Application No. 27520/07, 25 October 2001, §§ 75 and 82; see also *Belpietro v. Italy*, Application No.43612/10, Judgment of 24 September 2013, § 61
[28] More in general about criminal legislation as a basis for interference with freedom of expression, see the Report of the Venice Commission on the *Relationship between Freedom of Expression and Freedom of Religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to hatred*, (CDL-AD(2008)026), 23 October 2008, § 56; see also *ECRI general policy recommendation No 7 on national legislation to combat racism and racial discrimination* (13/12/2002).

43. Disproportionate damage awards applied in civil proceedings may also entail a severe sanction. It is well established case law of the Court that excessive financial compensations may have a "chilling effect" on freedom of expression[29] and lead to self-censorship,[30] which means that journalists, commentators and others contributing to the discussion on matters of public interest may refrain from so doing to avoid the financial risks involved. When disproportionate, penalties for defamation will result in a violation of Article 10 ECHR[31]. It is, on the other hand, permissible to provide for specific obligations for the media, such as to correct a false statement, to give the complainant a right of reply or to publish a court judgment which finds a statement to be false.

44. In the light of worrying developments affecting freedom of expression, increased consideration has been given in recent years, among the Council of Europe members, to the delicate balance to be struck between protection against defamation and the need for stronger and more effective guarantees for freedom of expression. In a number of cases, specific legislative measures have been adopted (or are under discussion), with a view to decriminalising defamation (fully or partially) or introducing lighter penalties, except in cases where these acts are of a nature to incite hatred, violence or discrimination. "*While there are still countries where defamation continues to be a criminal offence, there is a clear trend towards abolition of sentences restricting freedom of expression and a lightening of the sentences in general*".[32] This trend is in line with the position noted in the case law developed by the Court with respect to the proportionality of criminal sanctions in defamation cases. The Court made reference, in some of its judgments, to the Council of Europe activities in this area.

45. This trend towards abolition of sentences restricting freedom of expression and a lightening of the sentences responds to a long-standing recommendation of the Council of Europe. The Committee of Ministers' 2004 *Declaration on freedom of political debate in the media*[33], *Recommendations 1506(2001)* and *1589 (2003)* of the Parliamentary Assembly, and, more recently, *Recommendation 1814 (2007)* and *Resolution 1577 (2007)* of the Parliamentary Assembly "*Towards decriminalisation of defamation*", are only a few examples illustrating the attention paid by the Council of Europe organs to freedom of expression and opinion and to the need for enhanced guarantees in this field. The Parliamentary Assembly, in particular, has decided to go further, inviting states to repeal or amend criminal defamation provisions and ensure that, in the future, defamatory acts will no longer be punishable by imprisonment, as well as to review civil defamation laws in order to prevent misuse.

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[29] *Tolstoy v United Kingdom*; *Mirro Group Newspapers Limited v. the United Kingdom*, Application No. 39401/04 , Judgment of 18 January.2011, § 201

[30] See Herdís Thorgeirsdóttir, Journalism Worthy of the Name (Kluwer Law 2005).

[31] In *Tolstoy Miloslavsky v United Kingdom* (Application No. 18139/91, Judgment of 13 July 1995, § 49), the Court found a violation of Article 10 because the damages award against the defendant did not bear a "*reasonable relationship of proportionality to the injury to reputation suffered*". In *Steel and Morris v United Kingdom,* (Application No. 68416/01, Judgment of 15 February 2005, § 96), the Court indicated that a defendant's limited means could be a factor in determining the proportionality of a damages award. The high awards against the defendants were considered excessive "when compared to [their] modest incomes and resources".

[32] "*Study on the alignment of laws and practices concerning defamation with the relevant case-law of the European Court of Human Rights on freedom of expression, particularly with regard to the principle of proportionality*", Council of Europe, Information Society Department, CDMSI(2012)Misc 11Rev

[33] "Defamation or insult by the media should not lead to imprisonment, unless the seriousness of the violation of the rights or reputation of others makes it a strictly necessary and proportionate penalty, especially where other fundamental rights have been seriously violated through defamatory or insulting statements in the media, such as hate speech."

V. Legal framework for the protection against defamation in Azerbaijan

A. Defamation as criminal offence

46. Considering the background circumstances of the Azerbaijan's request for assistance in drafting legislation on defamation, the Venice Commission finds problematic that Articles 147[34], 148[35] and 323[36] of Azerbaijan's Criminal Code retain defamation as a criminal offence. No reference is made to these provisions in the Draft Law submitted to it for assessment.

47. The terms of Article 147 seem to extend the criminal offence beyond the protection that the Draft Law gives to reputation (covering also "*knowingly false information discrediting the honour and dignity of a person"*). It is also noted that, while the Draft Law deals with the more general concept of "defamation", the Criminal Code regulates "libel" as a criminal offence. It is not clear whether the difference in terminology corresponds to two different concepts or is only a matter of translation.

48. Also, a humiliating statement, expressed in an obscene manner, sanctioned under Article 148, may still fall under "information and ideas which offend, shock or disturb" protected by Article 10 ECHR according to the case law of Court. Therefore, the definition should be formulated more precisely and narrowly, along the lines of the reference to insulting statements in Article 2.1.1 of the Draft Law on Protection from Defamation.

49. The sanctions in Article 147, 148 and 323 are, in any event, too severe to be proportionate due to their potentially chilling effect, the potential impact of a criminal record on the individual concerned and, above all, the fact that they leave room for court decisions that potentially lead to deprivation of liberty.

50. In particular, Article 323 on "*discreditation or humiliation of the honour and dignity of the Head of the Azerbaijani State*", foresees a heavy imprisonment sanction - 2 to 5 years - when the honour of the Head of the Azerbaijani State is at stake (see also Article 106 of the Constitution, protecting the "honour and dignity of the President"). In spite of the note indicating that this provision does not apply to public statements related to critical views on the President's

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[34] Article 147.1. reads as follows: "*Libel, that is, dissemination, in a public statement, publicly exhibited work of art or through the mass media, of knowingly false information discrediting the honour and dignity of a person or damaging his or her reputation shall be punishable by a fine in the amount of up to five hundred manats, or by community service for a term of up to two hundred and forty hours, or by corrective labour for a term of up to one year, or by imprisonment for a term of up to six month."*
Article 147.2. reads as follows*: "Libel by accusing [a person] of having committed a serious or especially serious crime shall be punishable by corrective labour for a term of up to two years, or by imprisonment for a term of up to three years*."

[35] Article 148 reads as follows: "*Insult, that is deliberate humiliation of the honour and dignity of a person, expressed in an obscene manner in a public statement, publicly exhibited work of art or in mass media shall be punishable by a fine in the amount of three hundred to one thousand manats, or by community service for a term of up to two hundred and forty hours, or by corrective labour for a term of up to one year, or by imprisonment for a term of up to six months."*

[36] Article 323.1. reads as follows: *"Discreditation or humiliation of honour and dignity of the Head of Azerbaijani State – the President of the Republic of Azerbaijan – in a public statement, publicly exhibited work of art or through the mass media shall be punishable by a fine in the amount of five hundred to one thousand manats, or by corrective labour for a term of up to two years, or by imprisonment for the same term."*
Article 323.2 reads as follows: *"The same acts by accusing [the President] of having committed a serious or especially serious crime shall be punishable by imprisonment for a term of two to five years."*
Note: *Provisions of this Article shall not apply to public statements related to critical views about the activities of the Head of Azerbaijani State – the President of the Republic of Azerbaijan, and the policies pursued under his leadership."*

activities and policies, it remains problematic from the standpoint of Article 10 ECHR case law. It is recalled that, as the Court held in a *Lingens v. Austria*, "*the limits of acceptable criticism are […] wider as regards a politician as such than as regards a private individual*". Furthermore, in the Court's view, the protection of the reputation of the Head of State cannot serve as justification for affording the Head of State privileged status or special protection *vis-à-vis* the right to convey information and opinions concerning him[37].

51. Should any of these provisions be maintained, without confining imprisonment as a sanction to the exceptional circumstances highlighted by the Court ("notably where other fundamental rights have been seriously impaired, as, for example, in cases of hate speech or incitement to violence"), Azerbaijan would still be in breach of the ECHR, as interpreted by the Court.

52. Additional pressure has been added on freedom of expression in Azerbaijan through the recent amendments to Articles 147 and 148 of the Criminal Code, extending the scope of criminal liability to defamatory expressions on the Internet, associated with excessively high sanctions, which were already applicable to defamation in general[38].

53. The Court has paid increasing attention to the challenges raised by the development of new technologies of communication and information, and their impact on freedom of expression and opinion. It has recognised the important role that the Internet plays for media activities generally and for the exercise of freedom of expression[39], and more recently asserted that the Internet has become one of the principal means of exercising the right to freedom of expression and information[40].

54. Hence, seeking a fair balance between the protection of individual's reputation and the freedom to receive or impart information, alongside the proportionality principle, are key requirements for legislators and judges in addressing cases of defamation on the Internet. The recent amendments to the Criminal Code, making defamation on the Internet - without exception - a criminal offense punishable by sanctions ranging up to imprisonment, in their general formulations are not in accordance with the above requirements.

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[37] *Artun and Güvener v Turkey*, Application No. 75510/01 , Judgment of 26 September 2007, § 31; *Mondragon v. Spain*, Application No. 2034/07, Judgment of 15 March 2011, § 55; see also *Colombani v. France*, Application No. 51279/99, Judgment of 25 June 2002 , § 56 ; *Castell v Spain*, Application No. 11798/85, Judgment of 23 April 1992, § 46 ; *Eon v. France*, Application No. 26118/10, Judgment of 14 March 2013, § 55. See also, with regard to excessive protection of the status of the President of the Republic in civil cases, *Pakdemirli v. Turkey,* Application No. 35839/97, Judgment of 22 February 2005, § 52.

[38] These amendments read as follows:
"*1. In Article 147.1 to replace the words "or through a mass medium" with the words ", through a mass medium or through a publicly displayed Internet information resource"*
2. In Article 148 to replace the words "or through a mass medium" with the words ", through a mass medium or through a publicly displayed Internet information resource"".

[39] See also *Recommendation CM/Rec(2007)16 of the Committee of Ministers to member states on measures to promote the public service value of the Internet*; *Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression*, adopted on 21 December 2005

[40] see *Yildirim v. Turkey*, Application No. 3111/10, Judgment of 18 December 2012, § 54; See also *Editorial Board of Pravoye Delo and Shtekel v. Ukraine*, Application No 33014/05, Judgment of 5 August 2011, § 64, where the Court found that *"the absence of a sufficient legal framework at the domestic level allowing journalists to use information obtained from the Internet without fear of incurring sanctions seriously hinders the exercise of the vital function of the press as a "public watchdog". See, mutatis mutandis, Observer and Guardian v. the United Kingdom,* Application No. 13585/88, Judgment of 26 November 1991, § 59: *"In the Court's view, the complete exclusion of such information from the field of application of the legislative guarantees of journalists' freedom may itself give rise to an unjustified interference with press freedom under Article 10 of the Convention."*

55. The Venice Commission finds this step, which goes against the most recent trends in the field of defamation, extremely worrying and disappointing. It regrets that these amendments were adopted while the co-operation with the Venice Commission was on-going. Furthermore, it notes that a first conviction on charges of criminal defamation on line has been handed down in July 2013 - against a Facebook user - and a one-year public labour sentence imposed[41].

56. The Commission acknowledges that, despite the trend towards decriminalization or introducing lighter penalties, there are still countries where defamation is not only a criminal offence but also subject to prison sanctions. However, in most cases, the relevant penal provisions are reportedly not or rarely enforced. [42]

57. The Commission takes positive note of the information provided by the authorities that, since 2009, a moratorium on criminal liability for defamation is applied, and that all cases concerning defamation have been dealt with in civil proceedings. The Commission, however, stresses that, as held by the Court, 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[43]. It, moreover, recalls that the legislative process under discussion in the present Opinion is linked to two judgments of the Court having condemned Azerbaijan for violation of freedom of expression, and urging Azerbaijan to limit the circumstances allowing imprisonment for defamation. The Commission notes in this context that one of the criticisms voiced by the journalists the rapporteurs met during the visit to Baku was that journalists who express criticisms of the Government are targeted for close scrutiny by the police and have been subject to prison sentences.

B. The Draft Law on the Protection against Defamation

58. As stated by Article 1 ECHR, Contracting States, including Azerbaijan, must ensure that their domestic body of law is compatible with the ECHR. While in virtue of Article 8 ECHR a defamation law should provide an effective means to a person whose reputation has been damaged to seek redress, according to Article 10 ECHR, defamation laws may not disproportionally interfere with freedom of expression and a vigorous public debate essential to any democratic society. They must be drafted with care to ensure that they comply with the standards set forth in the limitation clauses in paragraph 2 of Article 10 ECHR. They must meet the rule of law requirement under Art 10(2) ECHR, i.e. be precise and accessible and secure effective respect for both the right to protection of reputation under Article 8 ECHR and freedom of expression under Article 10 ECHR.

59. The Draft Defamation Law constitutes a welcome effort to legally regulate and delineate protection from defamation as a restriction of freedom of opinion. Yet, several important issues of principle must be stressed at the outset.

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[41] Council of Europe, Committee of Ministers, 1179 DH meeting (24-26 September 2013), Communication from an NGO (Media Rights Institute) (12/09/2013) in the cases *Mahmudov and Agazade* and *Fatullayev* against Azerbaijan, Applications No . 35877/04 and 40984/07 – Rule 9.2 of the Rules of the Committee of Ministers

[42] "*Study on the alignment of laws and practices concerning defamation with the relevant case-law of the European Court of Human Rights on freedom of expression, particularly with regard to the principle of proportionality*", Council of Europe, Information Society Department, CDMSI(2012)Misc 11Rev

[43] *Altug Taner Akcam v.Turkey*, Application No. 27520/07, Judgment of 25 January 2012, §§ 75 and 82

60. The Draft Law appears to be insufficiently concerned with the key principles set out by the Court's case law. It is also noted that a number of key concepts which the Draft Law should clearly set out, in a single introductory section, as the foundation for the domestic law provisions pertaining to defamation, are missing: reputation as an aspect of Article 8 ECHR; the right to receive information and ideas under Art 10 ECHR; the hierarchy of types of expression, with political/public interest speech at the top; the watchdog role of the press; and the need for particularly careful scrutiny of the necessity for/proportionality of interferences with the media's right to freedom of expression as well as of damages in civil defamation cases.

61. While some of the principles and concepts mentioned indirectly appear in the Draft Law, the structure, the ordering and the language used throughout its provisions - too convoluted and often technically inadequate - need substantial improvement.

62. The Draft Law may also be found as overly detailed and prescriptive. This seems, however, to respond to a critical need to provide guidance in the implementation of the future law. In the specific case of Azerbaijan, such an approach, based on clear definitions and rules - if fully in line with the above principles - may help ensure the proper interpretation and application of the relevant international standards by domestic courts.

Article 1 - The Purpose of the Law

63. Article 1 appears too general and the rights and freedoms referred to in its provisions are not clearly named. The key principle of balancing freedom of expression and legitimate public interests, indirectly mentioned by the reference to the "legitimate public interests" protected by Articles 3.5 and 3.6 of the Constitutional Law on Regulation of Enforcement of Human Rights and Freedoms, should be duly specified.

64. It is also recommended, with a view to improving the understanding of the various aspects involved in defamation cases and related judicial reasoning, that a specific reference to the ECHR and other applicable international instruments be made in the introductory provisions. A clear statement on the ECHR's principles and their position in the hierarchy of domestic legal instruments affecting freedom of expression, in line with Article 148.II[44] and Article 151[45] of the Constitution of Azerbaijan, may be helpful. As already suggested in paragraph 60 above, the Draft should reflect and consistently address the key principles enshrined in Article 10 ECHR and developed by the Court. Where appropriate, the Draft may explicitly state principles such as: the need for careful scrutiny of restrictions to freedom of expression in terms of necessity and proportionality, the essential role of the press and media as public watchdog and the public's right to receive information, the importance of political debate and the very limited scope for restricting political expression on matters of public interest, the fact that "expression" covers both statements of fact and opinions, criticism and speculation and that the protection of Article 10 applies also to information or ideas that offend, shock or disturb, as well as the fundamental requirement of proportionality of sanctions and awards.

[44] Article 148.II reads as follows: *"International agreements wherein the Azerbaijan Republic is one of the parties constitute an integral part of legislative system of the Azerbaijan Republic".*

[45] Article 151 reads as follows: *"Whenever there is disagreement between normative-legal acts in legislative system of the Azerbaijan Republic (except Constitution of the Azerbaijan Republic and acts accepted by way of referendum) and international agreements wherein the Azerbaijan Republic is one of the parties, provisions of international agreements shall dominate."*

Article 2 - Main Definitions

Article 2.1.1

Defamation should only cover untrue statements

65. The definition of the terms "*defamatory statements*" and "*insulting statements*" determines what kind of expression may result in liability under civil law. The definition in Article 2.1.1 uses the term "*defamatory statements*". The term "*defamation*" would however seem to be more appropriate since the Draft Law refers to statements, publication or dissemination about an identifiable person that lowers the person's reputation in the eyes of reasonable members of the community (see also § 85).

66. What appears clearly missing from the text of Article 2.1.1 is that defamatory statements must be false or untrue. In established human rights case law, defamation is seen as the act of making untrue/inaccurate statements of facts about another person, affecting his/her reputation. The Court has held that truth should be a defence to a charge of defamation.[46] Hence it is recommended that "false or untrue" be added in Article 2.1.1.

67. Additionally, in the definition of "*defamatory statements*", the second limb ("as well as…") should be amended so as to refer to "*insulting statements*" targeting a specific natural or legal person or legal entity. A general reference to "*insulting statements*" may easily lead to an interpretation and application which would not be in conformity with Article 10 ECHR as interpreted by the Court[47], i.e. that this provision is applicable not only to "information" or "ideas" that are received or regarded as inoffensive or as a matter of indifference but also as those that offend, shock or disturb the State or any other sector of the population. Moreover, the expression *"ethical norms commonly recognized"* raises a problem of subjectivity and distinction between law and ethics. Also, the term "indecently", which appeals to a subjective, and therefore uncertain, judgment, which does not enable the person concerned to reasonably predict the wrongfulness of his/her conduct, should be replaced by "gravely" or "seriously".

68. There is also a need to harmonise the provisions of the Draft Law with those in the Civil Code. The definition of defamation provided by the Draft Law should be included or referred to in Article 23.1 of the Civil Code, where "information which discredits his/her honour etc." is formulated in a much broader sense. Article 23.1 mentions the proof of accuracy as a ground for disclaiming liability, but not that of consent, provided for in Article 9.2 of the Draft Law.

69. It also recommended that the proposed definition be harmonised with Article 10 of the Law on Mass Media, on "inadmissibility of abuse of freedom of media", which would also benefit from more precise language.

70. Furthermore, it is not clear how the definition of "*defamatory statements*" in Article 2.1.1 of the Draft Law relates to the definitions of "libel" and "insult" in Articles 147 and 148 of the Criminal Code. It is noted in this context that, in Article 147.2 of the Criminal Code, "by accusing" should read: "by knowingly falsely accusing", since a mere accusation - e.g. by an

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[46] *Castells v. Spain*, Application No. 11798/85, Judgment of 26 March 1992, § 48.
[47] See *Handyside v. the United Kingdom*, Application No. 5493/72, Judgment of 7 December 1976, § 49; *Fatullayev v. Azerbaijan*, Application No. 40984/07, Judgment of 22 April 2010, § 86; see also UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, GE.08-11210.

alleged victim or vigilant citizen - does not constitute libel.

71. Although the Draft Law only relates to civil responsibility (as confirmed by its Chapter II dealing with judicial protection), according to its Article 1, the purpose of the future law seems to be much wider. According to the authorities of Azerbaijan, the aim of the current legislative process is to move towards decriminalisation of defamation by providing increased guarantees in the civil defamation law. In order to reach that aim, a simultaneous change in the Criminal Code would be essential, by which the Criminal Code would only retain the possibility of prosecuting and punishing defamation, libel and insult when these acts constitute an incitement to hatred, violence or discrimination. At any rate, to avoid overlapping or lacunas, harmonisation or at least co-ordination of different regulations and related legislative processes is essential.[48]

Article 2.1.2 -*"Public" dissemination*

72. The definition in the Draft Law appears to be in accordance with the requirement of Article 10 §1 ECHR and Article 19 § 2 ICCPR, providing for "dissemination in any form". Republication of a defamatory statement, where the person republishing is aware or has reason to be aware, of the defamation, may be included under the definition of dissemination.

Article 2.1.3 - *Opinion*

73. It is recommended not to define "opinion" or to give an enumeration of the styles/categories of expression of an opinion in the law itself, as this may lead to too restrictive an approach in the interpretation and application of the future law. An Explanatory Memorandum may provide examples, but it should be left to jurisprudence to develop the notion of "opinion". In addition, the use of the term "value judgment" would be preferable since it reflects the Strasbourg Court case law and is clearer than "opinion".

Article 2.1.4 - *Statement of public interest*

74. Similar considerations may apply to the attempt to list categories of expression in the public interest and the use of the word "any" ("any statement).

75. It is well established case law concerning Article 10 ECHR that the protection of expressions that are of public interest is an essential requirement of a democratic society, deserving the highest guarantees. Nevertheless, statements of public interest are difficult to frame in a strict category as matters that may have an impact in society and on the general welfare of the whole may be hard to identify beforehand. By listing some topics but not others judges may be encouraged to limit the categories of public interest speech, whereas the aim of the Court's case law is the opposite. It requires recognition that the categories of public interest speech are not closed ones, and, moreover, that it is not the topic that determines the scope of protection but rather the nature/content of the speech in issue in the particular case.

[48] See Venice Commission, Interim Opinion on the draft law on amending the Civil Code of the Republic of Armenia, CDL-AD(2009)037.

76. According to the case law of the Court, the definition of what constitutes a subject of general interest will depend on the circumstances of the case. Also, the Court has recognized that such an interest is not only involved where the publication concerns political issues or crimes but may also be involved where it concerns sporting issues or performing artists.[49] It is thus recommended not to provide a list of categories of public interest statements in the law itself.

Article 2.1.5 - Public figure

77. The Draft Law defines public figure as any person who is subject to legitimate public interest, including top state officials and persons in other categories, listed in Article 2.1.5.

78. Obviously, politicians, prominent business people, high ranking civil servants, members of royal families, famous athletes and celebrities, fall under the scope of public figure.[50] Certain facts relating to the private lives of public figures, particularly politicians, may indeed be of interest to citizens, and it may therefore be legitimate for readers, who are also voters, to be informed of those facts. As held by the Court, "*a fundamental distinction needs to be made between reporting facts - even controversial ones - capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions, for example, and reporting details of the private life of an individual who […] does not exercise official functions. While in the former case the press exercises its vital role of 'watchdog' in a democracy by contributing to 'impart[ing] information and ideas on matters of public interest […]', it does not do so in the latter case*".[51]

79. The same observation may be made as in relation to Article 2.1.4. It is not obvious, *e.g.*, why "persons attracting public attention due to their specific actions or important events of public concern" by definition are "public figures". It is recommended that the definition be focused on the criteria characterising public figures rather than the categories public figures may belong to.

Article 2.1.6 - Moral damage

80. The Draft Law includes among the definitions proposed that of "moral damage caused by defamation". Since it is not obvious that "physical suffering" comes under the concept of "moral damage", it is recommended to leave out the word "moral" and to limit the term defined in Article 2.1.6 to "damage caused by defamation".

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[49]See J*ersild v. Denmark,* Application No. 15890/89, Judgment of 23 September 1994, § 31; *White v. Sweden*, Application No. 42435/02, Judgment of 19 September 2006, § 29; *Egeland and Hanseid v. Norway*, Application No. 34438/04, Judgment of 16 April 2009, § 58; and *Leempoel & S.A. ED. Ciné Revue v. Belgium*, Application No. 64772/01, Judgment of 9 November 2006, § 72: *Nikowitz and Verlagsgruppe News GmbHv. Austria*, no. 5266/03, Judgment of 22 February 2007, § 25; *Colaço Mestre and SIC-Sociedade Independente de Comunicação, S.A. v. Portugal*, Applications Nos. 11182/03 and 11319/03, Judgment of 26 April 2007, § 28; and *Sapan v. Turkey*, Application No. 44102/04, Judgment of 8 June 2010, § 34.

[50] *Axel Springer v. Germany*, Application No. 39954/08, Judgment of 7 February, 2012, § 98; *Van Hannover v. Germany*, 59320/00, judgment of 24 September 2004, § 63. See also Council of Europe's Parliamentary Assembly *Resolution 1165 (1998) on the Right to Privacy,* which provides that public figures are persons holding public office and/or using public resources and, more broadly speaking, all those who play a role in public life, whether in politics, the economy, the arts, the social sphere, sport or in any other domain.

[51] See *Van Hannover v. Germany*, Application no. 59320/00, judgment of 24 September 2004, § 63

Article 3 - General Rules Governing Restrictions on Freedom of Expression

81. Article 3 may be seen as an attempt to formulate the Article 10(2) ECHR methodology. This might be unnecessary if the Draft Law from the outset made reference, as recommended, to the basic principles governing limitations of freedom of expression related to defamation, explained the inter-relationship between the ECHR and domestic law and, in particular, the primacy of ECHR principles over national law. Such an approach would avoid misunderstandings or misrepresentations of the ECHR principles when interpreting and applying the law. In addition, the rules listed in the Draft Law cannot all be said to adequately reflect Article 10(2) ECHR.

82. In Article 3.1.1, the restriction has not only the purpose but also the effect of protecting the legitimate aims. Not only is it not possible for the legislator to stipulate the effects the law must have in concrete cases, but also, in administrative decisions and actions affecting freedom of expression, the ultimate effect cannot always be guaranteed in advance. Such a requirement might limit the cases of legitimate restrictions to a very large extent and should be reconsidered.

83. The requirement, in Article 3.1.3, that the aims pursued be "vital for democracy" is not a correct implementation of the language used in Article 10(2) ECHR. The aims listed in Article 10(2) cannot all be said to meet that criterion, *e.g.* "protection of the reputation of others" or "preventing the disclosure of information received in confidence". It is recommended to list, or refer to, the Article 10 ECHR aims. The same holds true for the words "as a last resort in a democratic society". It is recommended to use the words "necessary in a democratic society" of Article 10 ECHR or "pressing social need" as developed in the case law of the Court.[52]

84. Taking into account the above remarks, it is recommended that Article 3 be reconsidered. Increased attention should also be paid to the need for harmonizing the provisions of the future defamation law, the Civil Code and the Law on Mass Media, in line with Article 10 ECHR, both in terms of scope of protection and of acceptable restrictions.

Article 4 - The Right to Bring Action

85. It is not clear why, under Article 4.2, an action may not be brought on behalf of a group of persons. In this respect it is worth mentioning that Article 34 ECHR grants the right of application to the Court also to "*any (…) group of individuals claiming to be the victims of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto*". Since protection from defamation is implied in Article 8 ECHR in conjunction with the second paragraph of Article 10 ECHR, vulnerable groups in society may be rendered defenceless against defamation if they are not allowed to use their collective strength to claim defamation. Hence, it is recommended to not exclude that a defamation claim may be brought by or on behalf of a group of persons whose reputation is attacked by the same defamatory statement/s.

86. The suggestion in Article 4.3 that statements about a dead person can be actionable at the suit of his/her relatives, if the statements cause damage to "their rights and interests", is questionable in circumstances of public debate concerning public figures. Defamation laws may not in practice stifle freedom of expression and should not be applied with regard to those forms of expression that are not, of their nature, subject to verification[53]. In particular, it may be argued

[52]See *Fatullayev v. Azerbaijan*, Application No. 40984/07, Judgment of 22 April 2010, § 82
[53] CCPR/C/GC/34.

that a right to sue in defamation for the reputation of dead people might be abused to prevent a robust public discourse related to historical events. Nevertheless, practices vary in Europe in this field.[54] It is noted also that Article 23.1 of the Civil Code extends access to court to protect "the individual's honour and dignity after his/her death" to "the interested parties", which may comprise a broader group than "the dead person's first and second degree relatives" (in the Draft law). It is recommended that the two provisions be harmonized.

87. In Article 4.4, in the English translation "should have known" should read "reasonably could have known". Also the time limit of six months for bringing a court action is not reflected in Article 23 of the Civil Code.

88. Finally, the provisions of Article 4.6 require explanation and adequate contextualisation, as they may enable core state bodies to sue in defamation where this cannot be justified (*i.e.* simply by giving them some limited profit-making function).

Article 5 - Respondents for Defamation Claims

89. Regarding statements made in mass media (Article 5.1.1), it is essential to underline that it is the "author" of the defamatory statement that should be held liable for untrue statements, if the journalist is only quoting the author. The Court has emphasized that to punish a journalist for assisting in the dissemination of statements made by another person in an interview, would seriously hamper the contribution of the press to discussion of public matters.[55]

90. In relation to Articles 5.1.1 and 5.1.3, identifying journalists and editors as being liable for statements made in mass media or in material being subject of mass public dissemination, the law should place the primary legal liability in damages on the publisher who employs the journalist/editor, and who should bear all or most of the financial liability, as an incentive to ensure high journalistic standards in the media outlets.

91. Similarly, speech writers should not be made liable for the speech that a public figure is giving (Article 5.1.2), and persons working in public administration should not be held liable for material "which is the subject of mass public dissemination" (Article 5.1.3). If such material evidently contains errors, they should be corrected. The same comment applies to Article 5.1.4 and 5.1.5 in relation to the individuals involved in preparing official statements/documents. Primary liability should be imposed on the employing entity - state, municipal and other public authorities - for potentially "defamatory" material prepared/published. It should also be made clearer in the text that the public body may be held co-responsible for a statement by an individual person only if the statement concerned was made in the exercise of a public function.

92. Concerning statements made on line (Article 5.1.6), as there is a clear move from print to Internet journalism, it is increasingly important that equivalent defences are provided in defamation laws to those who act, respectively, as mere conduits for the passage of information on the Internet or who host websites. It is also important that hosts are required to set up an effective (self-policing) notice and takedown procedure. Requiring a complainant to go to court

[54] For example, in the United Kingdom, the defamation law does not permit claims for defamation for the reputation of dead people, due to the serious chilling effect that such claims would have on freedom of expression, especially by historians, and the difficulty of establishing defences in such cases. Though, in other Council of Europe states this is possible. In France, defamation against a deceased person is punishable, according to the 1881 Law on the Press Freedom, only where the authors have intended to harm the honour or reputation of the living relatives.

[55] *Jersild v. Denmark*, Application No 15890/89, Judgment of 23 September 1994, § 35

to get an order for takedown does not sufficiently protect the right of the person defamed. In addition, this discourages Internet service providers from taking responsibility, once on notice, for the websites they host. More generally, though not legally binding on Azerbaijan, European Union Directive 2000/31/EC[56] and the defences set out therein may be used as a helpful reference in establishing the defences available to the various forms of internet service providers. Article 5.1.7 appears to be an incomplete draft and should be reviewed.

Article 7 - Presumptions in Cases on Protection from Defamation

93. It is pre-eminently the task of courts to do justice when resolving disputes and to ensure due process of law. Thus, the provisions of Article 7.1 to 7.4 may be seen as an unnecessary and inappropriate interference with the reasoning and judgment of the competent court.

94. Should this approach be intended as a way to help achieve an Article 10 ECHR compliant approach, it would be fundamental that the guidelines contained in those presumptions are in line with the ECHR principles. From this point of view, the provisions of Article 7 raise concerns.

95. First, while they are called presumptions, the said provisions are not cast as presumptions of law (i.e. presumptions that one or other side in the case would have to rebut) and are formulated in a rather confusing manner - they simply specify that “any doubt” on a particular issue should be resolved one way rather than the other.

96. Second, in the case of Article 7.2 (identification of public figures) and 7.3 (determination of legitimate public interest matters), the “doubt” method is subject to any specific provision of “the law applied in the case” which would stipulate the contrary. Since the reference to the “law applied in the case” is very vague, one may assume that reference is made to the general law of Azerbaijan. In the absence of more specific indications, it is difficult to see which implications such provisions may have for the law of defamation and/or freedom of speech.

97. In addition, while necessary[57], art 7.5 dealing with the protection of journalistic sources needs increased clarity and contextualisation to be fully in line with Art 10 ECHR. Only an overriding requirement in the public interest could justify interference with the protection of sources.[58] Therefore, any provision in defamation law which empowers a court to order disclosure of a journalistic source must be built in this protection.

Article 8 - Proof in Cases on Protection from Defamation

98. The requirement of proof on the part of the plaintiff in Article 8.1.2 and 8.2 is too heavy a burden, if not an impossible task, in view of what would have to be proven, *e.g.* the extreme character of the statement or that the statement of public interest is false. This approach is in contrast to the main tradition in European countries where respondents must prove that facts are true and not false[59].

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[56] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), Official Journal L 178 , 17/07/2000

[57] The Court, in the landmark case of *Goodwin v. the United Kingdom,* Application No. 17488/90, Judgment of 27 March 1996, § 39, stated that: “*Protection of journalistic sources is one of the basic conditions for press freedom*”.

[58] See Council of Europe 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

[59] According to the Court, when evaluating the proportionality of the interference with freedom of speech, procedural rules concerning the right of defence and the burden of proof may be relevant (see *McVicar v. United Kingdom*,

99. It is also important to emphasize the “public interest” defence (with regard to Article 8.1.2, as well as 8.1.3 and 8.2) and the fact that the Court’s case law has firmly established the democratic right of the public to receive information and ideas of all kinds, even if sometimes not entirely confirmed. This covers investigative journalism which may require the coverage of matters that are under investigation and alleged misconduct that has not yet been definitely proven.

100. Similarly, value judgments may be defamatory but a broad defence arises under Article 10 ECHR. As held by the Court, “*a requirement of proof with regard to value-judgments infringes the freedom of opinion itself, which is a fundamental part of the right to freedom of expression*”.[60] The requirement of proof in Article 8.1.3 is not in line with the relevant case law concerning Art 10 ECHR and should be reconsidered.

Article 10 - Privileged Statements

101. Privileged statements are also a defence to defamation. In some ways, the absolute privilege granted under Article 10.1 is very wide, covering for example, in Article 10.1.1, statements made by persons appearing before municipal committees. This formulation may provide insufficient protection of the Article 8 ECHR right to reputation and needs to be reconsidered.

102. Under Article 10.1.1, members of the legislator and other representative bodies are immune from defamation suits for statements made in the course of these bodies’ and their respective structures’ proceedings. The Draft should more clearly state that these persons enjoy the above privilege only in the exercise of their public function.

103. On the other hand, there is a startling omission in that, although there are strong public interest reasons under Article 6 ECHR and Article 10 ECHR, statements made, *e.g.* by judges, parties or witnesses, in connection with judicial proceedings are not mentioned among of privileged statements. It is strongly recommended that this defence be included in the Draft Law. This defence also allows the fair and accurate reporting of these statements in the media, as it results from the Strasbourg case law, where the high importance of court reporting under Article 10 ECHR is well established[61].

104. In this connection, clarification is needed concerning the defence under Article 10.1.4. The person or body in charge of the report should not be responsible for its contents, unless the plaintiff puts a well-reasoned argument that certain defamatory statements included in the report are not a reflection of the information reported.

105. Privileged statements under Article 10.3.1 and 10.3.2 include republished statements that have not been refuted by the complainant. In essence the statement must be on a matter of public interest and republished by a journalist without adoption. Yet, the basis of the defence that the statements have not been refuted by the complainant may leave insufficient protection

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Application No. 46311/99, Judgment of 7 May 2002, §§ 83-87. The Court also held that “*in principle it is not incompatible with Article 10 to place on a respondent in defamation proceedings the onus of proving to a reasonable civil standard of proof (that is, on the balance of probabilities) that the defamatory statements were substantially true*”; *Europapress Holding d.O.O. v. Croatia*, Application No. 25333/06, Judgment of 22 October 2009, § 63. See also *Steel and Morris v. United Kingdom*, Application No. 68416/01, Judgment of 15 February 2005, § 93.

[60] *Lingens v. Austria*, Application No. 9815/82, Judgment of 8 July 1986, § 46

[61] See *Sunday Times v. United Kingdom*, Application No. 6538/74, Judgment of 26 April 1979, § 65

for the right to privacy[62]. It is thus important that the journalist/publisher who cannot verify the truth of the statement acts responsibly by making clear that the defamatory allegations are not being adopted or agreed with.

106. In Article 10.3.3, the exception on liability for "dissemination of statements that mass media is not able to edit or is not obliged to edit due to technical or legal reasons" is formulated in too vague and wide terms and is likely to discourage responsible broadcasting/streaming. The broadcaster must always seek to avoid unlawful defamatory statements being made in live broadcasts, for example by giving warnings to contributors before the live section of the programme or taking care over the questioning techniques of interviewers; or, if they are made, seek immediately to provide context and balance, for example by making clear that it does not stand by or adopt the statements or that there is no proof for them.

Article 11 - Reasonable Defence

107. Article 11 appears to be an attempt to encapsulate the developing Art 10 ECHR defence of responsible journalism on a matter of public interest. The Court's case law recognises that a defence should be available in defamation where the journalism was responsible and on matters of public interest, - even where the truth of the factual statement cannot be proved in court.[63] As previously stated, such allegations are close to value-judgments and to require their proof is in the view of the Court impossible to fulfil and constitutes in itself an infringement of freedom of opinion. On the other hand, the Court has underlined that the media, when directly accusing specific individuals by mentioning their names and positions, are placed "*under the obligation to provide a sufficient factual basis for their assertions*"[64].

108. The provisions of Article 11 need to be improved to more closely reflect the Court's approach of the reasonable defence. In particular, the concepts of responsible journalism and balance on a matter of public interest should be properly set out and emphasised. The Article should indicate that the medium used for dissemination of the statement may be important for its reasonableness, and specifically refer to the media and its special role of 'public watchdog'.

Article 12 and Article 13

Types of Remedies and Damages

109. In its current form, this section of the Draft Law is skeletal and raises serious problems from the perspective of the ECHR principles and case law relating to civil sanctions imposed for defamation.

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[62] The media can repeat a statement on the internet or through a broadcast almost as soon as it is made. In many cases there will be no time for a complainant to exercise a right of refutation before the republication. According to the Court case law (*Jersild v Denmark,* Judgment of 23 September 1994*)*, news reporting based on interviews *"whether edited or not, constitutes one of the most important means whereby the press is able to play its vital role of "public watchdog". Therefore, "The punishment of a journalist for assisting in the dissemination of statements made by another person in interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so"* (§ 35).

[63] See for example *Alithia v Cyprus*, Application No. 17550/03, Judgment of 22 May 2008, §§ 49 - 51.

[64] *Mahmudov and Agazade v. Azerbaijan*, Application no. 35877/04, 18 December 2008, § 45

110. First, its provisions seem to only relate to cases where the respondent is a person or entity able to arrange for a publication. Since a defendant may also be a person who made a defamatory statement in, *e.g.,* a speech, it is not clear who could be ordered to publish a correction or reply.

111. Also, Article 23 of the Civil Code is in certain respects more specific about remedies. Especially, it specifies where the information complained of has to be refuted or corrected. On the other hand, Article 23.4 of the Civil Code does not explicitly mention non-pecuniary damage, while Article 13 of the Draft law does.

112. Second, although the Draft Law contains an indirect reference in Article 3.1.7 to how the damage awards should be estimated, no mention is made, in the more specific Article 13, of the key requirement of proportionality of damages. Furthermore, the absence of upper limits on the awards and the absence of any mention of the economic condition of the respondent, both in the Draft Law and in the Civil Code, may lead to exorbitant awards and imposition of fines which might jeopardise the very existence of certain media. It is noted in this connection that Article 50 of the Law on Mass Media provides for additional penalty of journalists being stripped, following a court decision, of their accreditation if they publish defamatory information.

113. It is recalled that, as emphasized in the Court's case law, excessive civil sanctions should be avoided and proportionality between damage awards and the injury to reputation suffered should be secured, both in the normative framework and in the application of norms by courts. A "*lack of adequate and effective safeguards at the relevant time against a disproportionately large award*" constitutes a violation of Article 10 EHRC.[65]

114. To provide adequate and effective safeguards against disproportionate civil sanctions, Article 13 needs substantial revision. In particular, the requirement of proportionality of damages, as well as a cap on awards, must be introduced expressly and emphasized. It is recommended that Article 23 of the Civil Code be reviewed in the same way and that the provisions of the two legal acts be harmonized.

VI. Conclusions

115. The effort made by Azerbaijan to legally regulate and delineate protection from defamation as a restriction of freedom of expression, is a welcome development, as is the commitment, in the 2011 National Programme for Action to Raise Effectiveness of Protection of Human Rights and Freedom, to improving the legislation in order to decriminalize defamation.

116. The Draft Law on the Protection against Defamation is a positive first step in devising comprehensive civil legislation in this field. It aims at providing efficient guarantees for the protection of reputation, while safeguarding free enjoyment of freedom of expression, including the right to receive and impart information and uncensored and unhindered journalism.

117. However, in its current form, the Draft Law is, in many respects, not in line with the applicable ECHR principles and case law and fails to ensure adequate implementation of the country's obligations in this field. Moreover, it seems to have been prepared in complete

[65] *Tolstoy Miloslavsky v. United Kingdom*, Application No. 18139/91, Judgment of 13 July 1995, § 51; see also, *Maronek v. Slovakia*, Application No. 32686/96, Judgment of 19 April 2001, § 53

isolation from other parts of domestic law and no progress has been made towards decriminalizing defamation.

118. Additional drafting is required to increase clarity, bring definitions and rules in line with the ECHR concepts and language, as well as with the interpretation provided by the Court. Specific reference to the ECHR and other applicable international instruments could be made in the Draft. Also, the Draft Law has to reflect and consistently address, throughout its provisions, key concepts, principles and distinctions enshrined in Article 10 ECHR and developed by the Court. These include the essential role of the press as public watchdog and the public's right to receive information, the importance of political debate in a free and democratic society as well as the fundamental requirement of proportionality of restrictions to freedom of expression and the chilling effect of disproportionate sanctions and awards. Where appropriate, the Draft may benefit from explicitly stating these principles.

119. The Venice Commission notes with regret that, in spite of the rapporteurs' preliminary recommendations, no measures have been taken to address the shortcomings identified therein, review the Draft Law in a wider context and bring it in conformity with the applicable standards. It finds it worrying that, in spite of the authorities' repeatedly stated commitment to work towards decriminalization of defamation in co-operation with the Venice Commission, defamation is still associated with excessively high criminal sanctions, including imprisonment. Its scope has been even widened to online expressions.

120. The Venice Commission considers it essential to ensure that regulations dealing with defamation are formulated in a way that prevents unduly severe rules and sanctions and is of the view that strong and effective remedies - while proportionate - can be provided through civil law. A comprehensive and consistent approach - development of strong and efficient civil law provisions, coupled with the removal/substantial amendment of the relevant criminal provisions - is necessary to ensure the compatibility of the legislation with the requirements of the ECHR.

121. The Venice Commission remains at the disposal of the authorities of the Republic of Azerbaijan for further assistance.