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Freedom of Expression in Newly
Established Democracies of
Eastern Europe: Azerbaijan in
Focus

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Summary

This paper examines the freedom of expression in a newly established in Eastern Europe democracy, namely in Azerbaijan. Before reviewing the domestic law of Azerbaijan on freedom of expression, the study touches upon a few important thoughts and statements about the interdependence of freedom of expression and democracy. Afterwards it elaborates international binding as well as non-binding standards on freedom expression. It should be noted that all major human rights treaties constitute this freedom: Article 19 of the International Convention on Civil and Political Rights, Article 10 of the European Convention on Human Rights, Article 13 of the American Convention on Human Rights, and Article 9 of the African Charter on Human and Peoples Rights.

Further, the study examines the right to freedom of expression, which is internationally protected under the auspices of the UN Human Rights Committee, the European Court of Human Rights, the Inter-American Court of Human Rights, by dividing it into the right to hold opinions, the right to free expression and the right to freedom of information. The study also shows that application of limitations on freedom expression is strictly supervised by the case-law of the international courts. Thus, there is a three-part test established by the *ECtHR* and the HRC, which is developed to check justifiability of the limitations applied by States. The American case-law test employed by the US Supreme Court to justify the restricting the right to freedom of expression protected under the First Amendment also has been used in the study.

Then the study shifts to the domestic legal framework on freedom of expression, and thus analyzes the freedom of expression law of Azerbaijan. After describing major legislative acts in the relevant field, the study goes on to examine the shortages and gaps in it. The level of protection of freedom of expression in practice also has been observed in the study.

At the end of the paper there are recommendations for the improvement of the protection of freedom of expression in the concerned State directed to the Azerbaijani Government, as well as to Intergovernmental Organisations and international and local nongovernmental organisations.

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**To the memory of Elmar Huseynov, the editor
of an independent Azerbaijani periodical
“Monitor”, who was murdered in March 2005**

Abbreviations

ACHPR	African Charter on Human and Peoples Rights
ACHR	American Convention on Human Rights
AI	Amnesty International
CoE	Council of Europe
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
HRC	UN Human Rights Committee
HRW	Human Rights Watch
ICCPR	International Covenant on Civil and Political Rights
IGOs	Inter-Governmental Organisations
NGOs	Non Governmental Organisations
OSCE	Organization for Security and Cooperation in Europe
PACE	Parliamentary Assembly of the Council of Europe
UDHR	Universal Declaration of Human Rights
UN	United Nations

1 Introduction

One of the main indicators of democracy is freedom of expression. In this respect, analysis of the situation of freedom of expression in newly established democracies of Eastern Europe is seen to be quite important. Azerbaijan,¹ which regained its independence after the collapse of the Soviet Union in 1991, has been chosen for the purpose of the research as an example for these newly established democracies of Eastern Europe. Accordingly, its freedom of expression law will be analyzed in the current research.

Firstly, the author will briefly review binding as well as non-binding provisions of international law that protect freedom of expression and also limitations to this freedom which are permissible under those norms.

After that, it is aimed to examine the Azerbaijan's freedom of expression law in light of its compatibility with the relevant international human rights norms and determine gaps and shortages in it. The thesis will also assess the government's impact on the state of freedom of expression in the country.

Finally, in the concluding part of the research the author will draw out her recommendations for improving the Azerbaijan's national legislation and eliminating shortages in exercising the mentioned freedom.

¹ Azerbaijan has been admitted to the membership to the Council of Europe since 25 January 2001, and thus is politically regarded as an Eastern European country, see also <<http://www.ohchr.org/english/bodies/hrcouncil/groups.htm>> accessed on 18 December 2006.

2 Background

A theory, based upon historical facts, stating that all the main alternatives to democracy - whether of ancient or of modern characters - suffering political, economic, and military failures are doomed to, sooner or later, collapse was not alien to the Soviet communist regime either. With the demise of the Soviet Union in 1991 a number of new independent States in Eastern Europe emerged which declared their governance regime as democratic.² Most of these countries have ratified the core human rights treaties, as well as added to their newly adopted Constitutions special paragraphs which aim to protect basic human rights and freedoms. While these actions seemed like a step towards democracy, they failed to bring about considerable improvement to the situation of human rights in these post Soviet countries.

A number of challenges faced and continue to face the above-mentioned states of which freedom of expression is one. While some often consider this intrinsic right as a luxury, it is in fact a key underpinning of democracy and its proper functioning serves for the development of that democracy. However, it should be mentioned that the level of democracy and restrictions imposed on free expression in these states differ from each other. For instance, the state of freedom of expression in Azerbaijan, a country geographically situated outside of Europe is unsatisfactory in spite of the fact that it is a Party to major human rights treaties and enshrines freedom of expression under Articles 47 and 50 in it's Constitution.³

Sadly though, it should be mentioned that with its very recent war against Armenian aggression, the ongoing dispute over Nagorno Karabakh and other territories occupied by Armenia,⁴ the eight hundred thousand refugees and internally displaced persons living in its territory in poverty, and the

² Armenia, Azerbaijan, Belarus, Georgia, Moldova, Russia, Ukraine, See e.g., <http://www.answers.com/topic/eastern-europe> accessed on 18 December 2006.

³ See *infra* note 54.

⁴ See about this UN SC Resolutions 822 (1993), 853 (1993), 874 (1993), 884 (1993) available at <http://www.un.org/Docs/scres/1993/scres93.htm>

increasing “Dutch disease” syndrome hampering its economy, Azerbaijan can hardly step towards democracy.

Yet, Azerbaijan has been admitted to the membership of the Council of Europe, and also to the temporary membership to the UN Human Rights Council,⁵ ratified the UN Convention on Civil and Political Rights⁶ and the European Convention on Human Rights⁷-all of which impose an obligation on the State, amongst all others, to protect free speech. Thus, in spite of its Constitution, the theoretically-free media and the international obligations, intimidation and even violence against journalists and media outlets which are in opposition to the existing government occur frequently.⁸

The State’s national law on the freedom of expression consists of a number of legislative acts which aim to regulate relations arising in this field, though unsuccessfully. The answer to the question why they do not function in a proper way will be explored below.

⁵ Since 9 May 2006

⁶ See *infra* note 25

⁷ See *infra* note 27

⁸ See, for instance, BBC Country profile: Azerbaijan http://news.bbc.co.uk/2/hi/europe/country_profiles/1235976.stm accessed on 14 December 2006.

3 The importance of freedom of expression for democracy

As has been mentioned in the introduction one of the main indicators which determine democracy is freedom of expression.⁹ Its vital role in ensuring democracy is undisputable and has been recognized by the world wide acclaimed scholars and also in political statements as well as in judgments of international and national courts. As the *Boston Daily Advocate*, had rightly described for instance in 1838, there is a strong link between democracy and freedom of expression:

Democracy is a principle which recognizes mind as superior to matter, and moral and mental power over wealth or physical force. . . . Democracy is also a principle of reform; consequently, it must examine, compare, and analyze, and how can it do this without freedom of inquiry and discussion.¹⁰

Another assessment came from the US Supreme Court with one of its early judgments with regard to the First Amendment where it ruled that freedom of speech plays a fundamental role in a democracy and it ‘is the matrix, the indispensable condition, of nearly every other form of freedom.’¹¹

⁹ See, in this regard e.g., T. Vanhanen *Democratization : A Comparative Analysis of 170 Countries*, Routledge Research in Comparative Politics, New York 2003

¹⁰ “Freedom of Discussion,” *Boston Daily Advocate*, January 3, 1838, at 2. cited in *Democratization : A Comparative Analysis of 170 Countries supra note 9*.

¹¹ *Palko v. Connecticut*, 302 U.S. 319, 327, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937), See also *Federal Election Com'n v. Massachusetts Citizens for Life, Inc.* 479 U.S. 238, 107 S.Ct. 616 U.S.Mass.,1986 , Dec 15, 1986.

See ,in this regard, also *The Right to Privacy of Telecommunications (Cases I BvR 330/96 I BvR 348/99)*, Bundesverfassungsgericht (German Federal Constitutional Court)BverfG (Ger), March 12, 2003, para.73: “The freedom of the media is a foundational feature of a free democracy. A free press and a free radio are therefore of particular importance for a free State”

At the international level, for instance, the Inter- American Court on Human Rights contributed to this issue by its numerous significant judgments:

Freedom of expression is a cornerstone upon which the very existence of democratic society rests. It is indispensable for the formation of public opinion...It represents, in short, the means that enable the community when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society is truly free.¹²

The same point of view has been taken by the HRC which has stated that:

The right to freedom of expression is of paramount importance in any democratic society.¹³

It should be noted that the *ECtHR* has, with regard to the above mentioned issue, the long- standing jurisprudence of which starting point is the Handyside case:

Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man.¹⁴

In its case-law the *ECtHR* has made it clear that freedom of expression is guaranteed not only with respect to popular and *favourably* receivable ideas or information, but also to those that offend, shock or disturb a State or any

¹² Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Advisory Opinion, OC-5/85 13 November 1985, IACHR (Ser.A) para.70

¹³ *Tae-Hoon Park v. Republic of Korea*, 20 October 1998, Communication No. 628/1995, para. 10.3.

¹⁴ *Handyside v. UK*, *Application no. 5493/72*, 7 December 1976, para. 49. This standing point has been reiterated in a number of further heard cases with a bit reformulated form 'Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment'. See. e.g., *Bergens Tidende v Norway*, *Application no. 26132/95*, 2 May 2000, para 48, *The United Macedonian Organisation Ilinden and others v. Bulgaria* (*Application no. 59491/00*)19 January 2006, para.60.

sector of population, since this is the demand of the pluralism, tolerance and broadmindedness without which there is no democratic society.¹⁵

The cardinal importance of the printed as well as broadcasting media for democracy, and that it is incumbent upon them to impart information and ideas on matters of public interest have been underlined by the *ECtHR* not once:

The press plays an essential role in a democratic society... its duty is ... to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest...¹⁶... Although formulated primarily with regard to the print media, these principles doubtless apply also to the audiovisual media.¹⁷

Freedom of expression is not only regarded as an important element of democracy, but also as the cornerstone for ensuring all other human rights and liberties. For instance, the French Declaration of the Rights of Man and Citizen of 1789, which is regarded as the second document after the Magna Carta which recognized human rights at the State level, termed freedom of expression as one of the most precious rights of Man.¹⁸

Another assessment came from the former US president Franklin D. Roosevelt who in the beginning of World War II, in his famous statement to the US Congress named freedom of expression and speech as the first of four foundational liberties upon which, in his opinion, the world peace would exist.¹⁹

¹⁵ *Id.*

¹⁶ De Haes and Gijssels v. Belgium *Application no. 19983/92*, 24 February 1997, para. 37. See also, H. Thorgeirdottir, *Journalism worthy of the name*, Boston 2005, p.27 “it is in the interest of democratic society to enable the press to exercise its vital role as Public Watchdog”. citing the Goodwin v. UK case, 1996.

¹⁷ Jersild v. Denmark, *Application no. 15890/89*, 24 April 1994, para. 31.

¹⁸ See M. Nowak UN Covenant on Civil and Political Rights, Commentary, second edition, 2005, p. 438.

¹⁹ January 6, 1941 Roosevelt Franklin, President of the United States, State of the Union Address to Congress

A prominent scholar in the theory of freedom of expression, professor Emerson, has for instance recognized four separate values served with the protection of freedom of expression: 1. “assuring individual self-fulfillment,” 2. “advancing knowledge and discovering truth,” 3. “provid[ing] for participation in decision making in all members of society” and 4. “achieving a more adaptable and hence a more suitable community, ...maintaining the precarious balance between healthy coverage and necessary consensus.”²⁰

The UN General Assembly, in its term, in one of its first sessions in 1946, adopted a Resolution where it stated that ‘Freedom of information is a fundamental human right and the touchstone of all ... freedoms’²¹

The superiority of this right is explained with that, that it unites civil and political rights into a harmonious world, thus influencing their full enjoyment by a person.²²

²⁰ T. Emerson The system of freedom of expression 15, 1970 cited in M. Redish 'The value of free speech', University of Pennsylvania Law Review, 130, pp.591-645. p.591.

²¹ UN General Assembly, (1946) Resolution 59(1), 65th Plenary Meeting, December 14

²² See generally M. Nowak, *supra note* 18.

4 International normative framework

4.1 The freedom of expression as an internationally recognized human right

4.1.1 The right to freedom of expression in the Universal Declaration of Human Rights

The right to freedom of expression for the first time was internationally recognized by the *Universal Declaration on Human Rights* in Article 19, which reads as following:

Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.²³

It is noteworthy to mention that though the UDHR is not directly binding on States, human rights provisions enshrined in it, including Article 19, are increasingly regarded as having already acquired customary international norm status.²⁴

²³ Article 19 of the UDHR, G.A. Res. 217A (III), U.N. Doc A/810 at 71 (1948)

²⁴ . See , in this regard e.g., *Barcelona Traction, Light and Power Company Limited Case (Belgium v. Spain) (Second Phase)*, ICJ Rep. 1970 3 paras. 33- 34; *A and others v. Secretary of State for the Home Department* (No 2), [2005] UKHL 71; See also, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. Advisory Opinion, I.C.J. Reports 2004; U.S. v. Iran, 1980 I.C.J. Pleadings (Jan. 12, 1980) para. 182, ‘The existence of ... fundamental rights for all human beings ... and the existence of a corresponding duty on the part of every State to respect and observe them, are now reflected, inter alia, in the Charter of the United Nations, the Universal Declaration of Human Rights ...’; United States v. Iran, 1980 I.C.J. 3, (Judgment of May 24)para42, The

4.1.2 The right to freedom of expression in international human rights conventions

Being the cornerstone of all other human rights and serving as a bridge between civil and political human rights the right to freedom of expression has been included nearly in every human rights convention whether international or regional. Thus, the right to freedom of expression is guaranteed under Article 19 of the International Covenant on Civil and Political Rights,²⁵ Article 13 of the American Convention on Human Rights²⁶, Article 10 of the European Convention of Human Rights²⁷ and Article 9 of the African Charter on Human and Peoples' Rights.²⁸

UDHR "is universally regarded as an authoritative elaboration of the human rights provisions of the United Nations Charter. ...many if not all of the rights elaborated in the ... Declaration ... are widely recognized as constituting rules of customary international law." Resolution adopted by the International Law Association, reprinted in International Law Association, Report of the Sixty-Sixth Conference, Buenos Aires, Argentina 1994 , p.29; See ,in this regard, also G.A.Res. 2625 (XXV) (Oct. 24, 1970), *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd Circuit); 'Although the affirmations of the [Universal Declaration of Human Rights] are not binding qua international convention ..., they can bind States on the basis of custom within the meaning of paragraph 1(b) of [Article 38 of the Statute of the Court] ...because they constituted a codification of customary law ... or because they have acquired the force of custom through a general practice accepted as law'. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), 1971 I.C.J. 16, 57 (Advisory Opinion of June 21). Para.75; 'All the rights proclaimed in the Universal Declaration and protected by the principal International Covenants are internationally recognized human rights' *Restatement (Third) of Foreign Relations Law of the United States*, § 702 (1987);

²⁵ 999 U.N.T.S. 171, entered into force Mar. 23, 1976 acceded by Azerbaijan Aug 13, 1992

²⁶ 1144 U.N.T.S. 123, entered into force July 18, 1978.

²⁷ Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, entered into force Sept. 3, 1953. 20 May 1999. ratified by Azerbaijan Apr.15, 2002

²⁸ Adopted 26 June 1981, in force 21 October 1986.

Taking into consideration the space limit and also the relevance of the Conventions to the country, of which national law is decided to be analyzed, only concerned articles of the ICCPR and the ECHR will be reviewed within this paper.

Firstly, it should be mentioned that Paragraphs 1 and 2 of Article 19 of the ICCPR which reads as following:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

and paragraph 1 of Article 10 of the ECHR which is formulated as the following:

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.

more or less in an equal manner protect the right to freedom of expression.²⁹ Thus, both articles protect the right to hold opinions, to express and also receive information and ideas. The strengths and weaknesses of each Article will be discussed below.

²⁹ It should not be understood as protection mechanisms from the violation of the right guaranteed with Article 19 of the ICCPR or Article 10 of the ECHR which are the complaining procedure to the Human Rights Committee and the European Court of Human Rights respectively.

The right to hold opinions is an absolute right and can not be interfered in any case.³⁰ Furthermore it requires States Parties to the ICCPR and/ or the ECHR under Article 2 or Article 1 respectively to ensure the enjoyment of this right and hence protects from the interference of third parties. However, some scholars state that it is not always clear what actions interfere with one's right to hold opinions and thus it can not be protected in an absolute way.³¹

Further rights constituted both in Article 19 of the ICCPR and Article 10 of the ECHR are the rights to freedom of information and freedom of expression with respect to any kind of ideas and information.

As it is seen from the wording of Article 19.2 and Article 10.1 ideas and information by their substance and ways of communication are not generally limited, however in the last paragraphs of both Articles there are permissible limitations which can be imposed by a State party in some cases of which we will talk in Paragraph 2 of Chapter 4.

The ideas and information can be news, political comments, criticism, advertisements, literature, art, pornography and etc. It shall be noted that their protection level depends on their value, i.e. how important these ideas or information are for a democratic society. For example publications or broadcasting programs which contribute to political or social debate and thus to development of democracy are protected more strongly rather than artistic or commercial expressions.³² The same goes for the ways of communication which can be oral, written, printed communication, art

³⁰ Human Rights Committee, General Comment 10, Article 19, U.N. Doc. HRI/GEN/1/Rev.1 at 11 (1994).

³¹ See, e.g., M Nowak, *supra* note 18 p.442. He analyzes cases from the jurisprudence of the HRC Kang v. Republic of Korea Communication No. 878/1999, Mika Miha v. Equatorial Guinea, Communication No. 414/1990.

³² More on this see. *infra* Paragraph 1.2.2 of Chapter 4. See also C. Owey and R. White, *European Convention on Human Rights*, Third edition, Oxford 2002, p.279.

pieces, assemblies and demonstrations,³³ audio-visual media, other electronic communication, and etc. Ways of communication which target public and reach vast majority of population are usually protected in a higher degree.³⁴

It shall be mentioned that though the protection mechanism of Article 10 of the ECHR is stronger than Article 19 of the ICCPR, its formulation is rather weak. Thus by using the phrase “without interference by public authority” Article 10 intends to limit the protection of freedom of expression to a vertical level only, whereas Article 19 protects the right to seek, receive and impart information and ideas against any kind of interference.

4.1.2.1 The right to freedom of information

Article 19 deliberately lays down this right by declaring everyone’s ‘freedom to seek and receive information and ideas of all kind’, while Article 10 mentions only ‘freedom to receive information and ideas’. In anyway from the recent case law of the *ECtHR* it is more and more becoming clear that Article 10 also constitutes freedom of information, and thus, grants to its right holders freedom in seeking information,³⁵ though unlike Article 19 does not impose on States Parties positive obligation to

³³ With regard to the interdependence between the right to freedom of assembly and association and the right to freedom of expression see *Ezelin v. France Application No. 11800/85*, 29 April 1991, also see *Kivenmaa v. Finland*, Communication No 412/1990, paras. 7.4 and 9.3 the Government of Finland argued that Art 21 (the right of peaceful assembly) must be seen as *lex specialis* in relation to Art. 19. Consequently, the expression of an opinion in the context of a demonstration (whether in favour or against aim of gathering, as in the present case) should be considered only under Art. 21. The HRC however found violation of both provisions. Cited in Nowak, *supra note* 18 p.445.

³⁴ In a number of cases of the *ECtHR* and also the HRC have emphasized that the press and broadcasting media play an important role in informing society. See *infra note* 38.

³⁵ See, for instance, *Segerstedt-Wiberg and others v. Sweden Application no. 62332/00*, 16 June 2006, also *Sunday Times Application no. 6538/74* 29 April 1979 para. 328.

provide with public interest information.³⁶

4.1.2.2 The right to free expression

As mentioned above all kind of expressions are protected by Article 19 and Article 10, but they are subject to the permissible limitations provided for in Paragraphs 3 and 2 respectively. According to the case law of the *ECtHR* and the HRC political and other public interest expressions have more value than artistic or physical feelings.³⁷ Also, certain types of communications, namely the press and the media because of their pivotal role in informing the public,³⁸ merit special protection.³⁹ Though by the wording of Article 10 of the ECHR States are allowed to regulate broadcasting through licensing broadcasting, States Parties carry an obligation to ensure that with licensing regulations the right to freedom of expression is not violated.⁴⁰ Furthermore according to the HRC, for instance, States carry positive

³⁶ Though the *ECtHR* is reluctant to find States parties' obligation to provide information under Article 10, it has found this obligation with regard to other rights protected by the ECHR, such as the right to life. See, in this regard e.g., *Guerra and others v. Italy*, *Application No. 14967/89* 19 February 1998, para.60

³⁷ See, for instance *X. v. UK*, *Application no. 5178/71*, 12 October 1978 cited in *Thorgeirdottir*, *supra note 18*, p.26, *Sener v. Turkey*, ECHR, *Application 26680/95* 18 July 2000, para. 40. See also "freedom of expression" *Oxford Dictionary of Law*. Ed. Elizabeth A. Martin and Jonathan Law. Oxford University Press, 2006. *Oxford Reference Online*. Oxford University Press

<http://www.oxfordreference.com.ludwig.lub.lu.se/views/ENTRY.html?subview=Main&entry=t49.e1631> accessed on 21 December 2006

Also, some scholars argue that in an American practice expressions have conditionally been divided into 3 categories: speeches of "high value", "low value" and "no value". For example the US Supreme Court has deemed to pornography be "no value" speech, thus subject to a complete ban ; and it has deemed adult books and movies and commercial speech "low value" , thus subject to regulation beyond that to which "high value" speech is subject. *Central Hudson Gas Electr. Corp. v. Public Service Commission of New York*, 447, US 557 (1980)(commercial speech); *Young v. American Mini Theatres*, 427 U.S. 50 (1976) (adult books and movies); *Miller v. California*, 413 US 15 (1973) (pornography). cited in L. Alexander 'Legal Theory: Low value speech' *Northwestern University Law Review*, 83, pp.547/54. 1993 p.547.

³⁸ *Sunday Times v. UK*, *supra note 35*, paras. 65,66. *Robert W. Gauthier v. Canada*, Communication No 633/1995, See also Chapter 3, p.14.

³⁹ *Id.*

⁴⁰ See, e.g., Concluding observations on Lebanon UN doc. CCPR/C/79/ Add.78 (1998) para.24.

obligations to take effective measures in order to prevent whether governmental⁴¹ or private monopoly over the media.⁴²

It is noteworthy to mention that that the printed media is not subject to any kind of prior control.⁴³

⁴¹ See, in this regard e.g., Concluding observations on Guyana UN doc CCPR/79/Add.121. (2000) para19.

⁴² See, in this regard e.g. Concluding observations on Italy, Undoc. CCPR/C/79/Add37 (1995) paras. 10,17.

⁴³ There is a number of cases from the jurisprudence of the *ECtHR* as well as the HRC which repatriate it.

4.2 Permissible limitations to freedom of expression

Paragraph 3 of Article 19 of the ICCPR stipulates that the right to freedom of expression may be subject to some restrictions for respect of the rights or reputations of others and for the protection of national security or of public order (*ordre public*), or of public health or morals. Though wording of Paragraph 2 of Article 10 in some instance differs from the formulation of Paragraph 3 of Article 19, the case-law of the protection mechanisms of both Articles⁴⁴ has proved that limitations permissible to freedom of expression are relatively the same in both Articles.

It should be noted that according to the case-law of these mechanisms any restrictions to freedom expression must be construed narrowly. As the *ECtHR* has stated:

a principle of freedom of expression ... is subject to a number of exceptions which must be narrowly interpreted.⁴⁵

Further, the HRC while elaborating restrictions to Article 19 of the ICCPR ruled that a restriction on freedom of expression may never jeopardize the right itself.⁴⁶

The European case law test

⁴⁴ Or Conventions.

⁴⁵ (See, *mutatis mutandis*, the *Klass and others* judgment of 6 September 1978, Series A no. 28, p. 21, para. 42) cited in *Sunday Times v. the UK*, Ser A, 1979, para. 65; See also, Final Report by Danilo Turk and Louis Ioinet, Special Rapporteurs, UN.Doc. E/CN.4/Sub.2/1992/9 (14 July 1992), paras.20,25 : 'In interpreting the legal norms, the principle [of freedom of expression] must be interpreted broadly and the permissible restrictions restrictively...The presumption is always in favour of freedom of expression, i.e. in favour of the principle'

⁴⁶ Human Rights Committee, General Comment 10, Article 19, U.N. Doc. HRI/GEN/1/Rev.1 at 11 (1994).para.4.

Restrictions can only be applied if they meet a three-part test established by the *ECtHR* (also by the HRC) with respect to limitations to freedom of expression. Thus, they must be *prescribed by law*, *serve to a specific legitimate aim* and *be necessary in a democratic society* which also includes *the test of proportionality* in the jurisprudence of the HRC. With regard to the term “*necessary*” the *ECtHR* has ruled that:

"necessary" in this context does not have the flexibility of such expressions as "useful", "reasonable", or "desirable", but implies the existence of a "pressing social need" for the interference.⁴⁷

Vague or broadly defined restrictions are unacceptable because they go beyond what is strictly required to protect the legitimate interest.⁴⁸

The American case-law test

The US Supreme Court has developed its ‘*clear and present danger*’ test which justifies the restricting the right to freedom of expression protected under the First Amendment. This test requires to prove that either immediate serious violence was expected or was advocated, or that the past conduct of the applicant furnished reason to believe that his advocacy of violence would produce immediate and grievous action:

[T]o justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced...[N]o danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent

⁴⁷ *Dudgeon v. UK*, (*Application. No. 7525/76*), 22 October 1981.para. 51.

⁴⁸ ‘When freedom of the press is at stake, any restrictions must be clearly established so that anyone may know precisely what activities are prohibited’ Report on the Situation of Human Rights in Nicaragua, Inter-AmComm’n on Hum Rts, O.A.S., Doc. QE/ Ser.L/V/II.53, doc.25 (1981). Para 6.;

that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehoods and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression.⁴⁹

⁴⁹ *Whitney v. California* 274 U.S. 357 (1927) at 376, See also Concurring opinion of Judge Benello , *Ceylan v. Turkey*, *Application no. 23556/94*, 4 April 1999.

5 International “Soft law” standards on freedom of expression

5.1 International and regional documents

Because freedom of expression and information is so vital to the proper functioning of democracy and realisation of all other human rights international organizations made an effort to adopt in addition to binding norms a number of declarations and resolutions in this sphere.⁵⁰ These “soft law” standards have been appointed to deal with different aspects of freedom of expression in detail which have not been quite deliberately described in normative provisions, and ergo advice governments as well as other responsible actors how to effectively implement legal norms of freedom of expression. In many of these documents, affirmative action, *inter alia*, is required from States. Consequently, States are not only required to maintain freedom of expression and prevent its violation, but also to advance it.

It ought to be mentioned that, though these soft law standards do not have direct binding impact on States, they nevertheless have an important role to play in promoting freedom of expression and information by defining

⁵⁰ See e.g. The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Freedom of Expression and Access to Information, UNDoc. E/CN.4/1996/39, The right to freedom of opinion and expression UN Doc E/CN.4/RES/2004/42, The right to freedom of opinion and expression UN Doc. E/CN.4/RES/2002/48, The Public’s Right to Know: Principles on Freedom of Information Legislation . Annex II Report E/CN.4/2000/63, Declaration on Fundamental Principles concerning the Contribution of the Mass Media to Strengthening Peace and International Understanding, to the Promotion of Human Rights and to Countering Racism, Apartheid and Incitement to War, 28 November 1978, Inter-American Declaration of Principles on Freedom of Expression, 19 October 2000, The Amsterdam Recommendations on Freedom of the Media and the Internet, 14 June 2003, Bishkek Declaration, Fifth Central Asia Media Conference “Media in Multi-Cultural and Multi-Lingual Societies”, OSCE, Bishkek 17-18 September 2003; The Sofia Declaration on Press Freedom and Pluralism, 13 September 1997, The Declaration of Principles on Freedom of Expression in Africa, Banjul, The Gambia (2002). There are also multiple Recommendations and Declarations adopted by the CoE with respect to the right to freedom of expression . See *infra* note 52.

standards nearly in all accepts of this freedom. Besides, as most of these documents have been adopted by international organisations with a number of States in their membership, the recommendations they include are likely to be considered by these member States, taking into consideration that failing to do so can negatively influence membership status. For us it would be interesting to review UN declarations and CoE recommendations adopted for pertaining and promoting the mentioned freedom.

5.2 Recommendations in UN documents

In 2003, for instance, the UN Commission on Human Rights adopted a Resolution on the Right to Freedom of Opinion and Expression⁵¹ where it noted the importance of the Johannesburg Principles on National Security, Freedom of Expression and Access to Information and the Principles on Freedom of Information Legislation and reiterated a number of principles contained there. The Resolution called upon member States ,among all other actions, to promote a diversity of ownership of media and of sources of information, including through transparent licensing systems and effective regulations on undue concentration of ownership of the media in the private sector, to take all measures to investigate threats and acts of violence, against journalists, especially to implement effective measures to enable women freely to communicate on their own behalf or through intermediaries and to facilitate the effective participation of women in decision-making levels, also to adopt and implement policies and programmes to promote awareness of and disseminate information and education on prevention and treatment of HIV/AIDS, through media and all other appropriate means. All of these obligations require States to take positive actions.

⁵¹ *Id.*

5.3 CoE recommendations

At the European level, the CoE has adopted a number of Recommendations, Resolutions and Declarations, which cover very different type of relations arising in the field of freedom of expression.⁵² Though these documents are not *per se* legally binding, they nevertheless, indicate a trend of legal opinions of the member States.

In one of its very first Resolutions the CoE Consultative (Parlm.)Ass. laid down an interesting point of view with regard to the member States' positive obligations in respect of the right to freedom of information, which is never directly recognized by the *ECtHR*:

[The right to freedom of expression] shall include freedom *to seek*, receive, impart, publish, and distribute information and ideas. There shall be *a corresponding duty for the public authorities to make available information on matters of public interest within reasonable limits* and a duty for mass communication media to give complete and general information on public affairs.(emphasis added)⁵³

⁵² Resolution 1003 (1993) On the Ethics of Journalism, , PACE., Resolution 1142 (1997)1 On Parliaments and The Media, , PACE, Recommendation 1589 (2003)[1] , Freedom of expression in the media in Europe, PACE, Recommendation 1641 (2004)1 Public service broadcasting, , PACE, CM Recommendation No. (81) 19 of the Committee of Ministers to Member States on the Access to information held by public authorities, CM Declaration on the Freedom of Expression and Information, 29 April 1982, CM Declaration on the Protection of Journalists In Situations of Conflict and Tension, 3 May 1996, Recommendation No. R (96) 10 of the Committee of Ministers on the Guarantee of the Independence of Public Service Broadcasting and Recommendation 1641 (2004) “Public service broadcasting” of the PACE, Recommendation No. R (99) 1 of the Committee of Ministers on measures to promote media pluralism, CM Declaration on freedom of political debate in the media, adopted on 12 February 2004, CM Declaration of the Committee of Ministers on the guarantee of the independence of public service broadcasting in the member states, adopted on 27 September 2006 and etc.

⁵³ Resolution 428 (1970), CoE, Cons (Parl.) Ass., 30 January 1970 cited in P. Van Dijk, G. van Hoof , Theory and Practice of the European Convention on Human Rights. Kluwer Law International, 1998.

The CM and the PACE have adopted Recommendations on Access to information held by public authorities and on Parliaments and the Media respectively. Through these documents it has been recommended to the Member States, amongst all others, to ensure greater openness of parliamentary work, including committee meetings, and to consider this question not only as a matter of communication policy but also as an important political priority with direct implications for the functioning of democracy. With regard to ensuring the right to freedom of information the CM recommended that any request made to public offices for information shall be decided upon within a reasonable time and a public authority refusing access to information shall give the reasons on which the refusal is based, according to law. A refusal of information shall be subject to review on request.

Other important Recommendations adopted by bodies of the CoE are the Recommendations on Public service broadcasting and on the Guarantee of the Independence of Public Service Broadcasting. In these documents the CoE bodies by stressing the specific role of public service broadcasting recommends the governments of the Member States to include in their domestic law governing public service broadcasting organizations provisions guaranteeing their independence, to bring the standards set out by the CM of the CoE to the attention of authorities responsible for supervising the activities of public service broadcasting organisations as well as to the attention of the management and staff of such organisations.

Another Recommendation adopted by the CM of the CoE is directed to ensure the independence of Regulatory Authorities for the broadcasting sector. The CM in the Recommendation emphasizing the importance for democratic societies of the existence of a wide range of independent and autonomous means of communication called the Member States to provide for adequate and proportionate regulation of broadcasting sector, ergo to establish independent regulatory authorities for the broadcasting sector. Guidelines concerning the independence and functions of regulatory

authorities for the broadcasting sector have been annexed to the Recommendation with the purposes to assist the Member States in establishing a genuinely independent regulatory body.

In the Recommendation on Media Pluralism the CM stressed that the Member States should take positive measures in order to promote political and cultural pluralism as this is one of the requirements of Article 10 of the ECHR.

6 National approach to freedom of expression in a model of Azerbaijan

6.1 The law on freedom of expression in Azerbaijan

6.1.1 Introduction to the domestic law of Azerbaijan

The focus of the attention so far in this research has been on international standards of freedom of expression. Now we shift to the domestic legal framework in this field and will review Azerbaijan's media and other legislation related to freedom of expression. In fact, there is a vast amount of laws and other legislative acts that concern freedom of expression in one way or another. Therefore, for the purpose of this study only legislative acts, which directly affect freedom of expression, will be analyzed.

First, it should be mentioned that since the Republic of Azerbaijan has ratified the ICCPR and the ECHR it carries an international obligation under Articles 2, 19 and Articles 1, 10 respectively to protect and promote freedom of expression and information within its jurisdiction. It is important to note here that when domestic legislative acts, apart from the Constitution itself and constitutional acts adopted by a referendum, collide with international agreements of which Azerbaijan is a Party to, provisions of those agreements shall overrule. This is according to the Constitution of the country.⁵⁴ However, since Azerbaijan is a dualist state, international conventions ratified by Azerbaijan cannot be applied in country courts directly unless they are incorporated into the national legislation with a specific legislative act. Therefore, it is important to look at national legislative acts, which in effect regulate relations arisen in the field of freedom of expression in order to know what legal protection Azerbaijani people possess with respect to their right to free expression.

⁵⁴ The Constitution of the Republic of Azerbaijan, adopted on 12 November 2005, amended on 24 August 2002, Article 151.

Firstly, it should be noted that the Supreme Law of the State - the Constitution includes a complete Chapter on fundamental human rights and freedoms. This Chapter contains two Articles which provides protection for freedom of expression:

Article 47 Freedom of speech and thought

1. Everyone has the right to freedom of thought and speech
2. Nobody shall be forced to promulgate his/her thoughts and convictions or to renounce his/her thoughts and convictions
3. It is prohibited to propagate and provoke racial, national, religious and social discord and animosity.

Article 50 Freedom of information

1. Everyone is free to search, acquire, transfer, prepare and distribute any kind of information
2. Freedom of the mass media is guaranteed. State censorship over the mass-media and press is prohibited.

The only possible limitations to freedom of expression cited in Articles 47 and 50 are prohibition *to propagate and / or incite racial, national, religious and social discord and animosity*,⁵⁵ though the phrase of “social discord and animosity” is already weakens the protection of this freedom by being very broad and vague. These are not the only limitations at the constitutional level. There is the Constitutional Act of 2002 on Regulation of the Exercising of Human Rights and Freedoms⁵⁶, which lays down a number of restrictions to be imposed on the rights derived from Articles 47 and 50 of the Constitution. Thus, Article 4 of the mentioned Act stipulates that freedom of expression may be subject to restrictions for the protection of the State’s security, territorial integrity, public safety, health and morals, public order, rights and reputations of others, for the prevention of disorder

⁵⁵ Alike the ICCPR and the ECHR the Azerbaijani Constitution considers freedom of expression as a right from which can be derogated in time of public of emergency.

⁵⁶ 24 December 2002, No 404-IKQ.

or crime, for preventing the disclosure of information received in confidence, or for maintaining the impartiality of the judiciary.⁵⁷

Besides the Constitutional provisions, there are laws, decrees, orders and state programs adopted for regulating issues in the realm of freedom of expression. Most relevant from them are the Law on Information, Informatisation and the Protection of Information of 1998,⁵⁸ the Law on Freedom of Information of 1998,⁵⁹ the Law on Mass Media of 1999,⁶⁰ the Law on Broadcasting of 2002,⁶¹ the Law on Obtaining Information of 2005,⁶² the Law on Telecommunication of 2005,⁶³ the Law on Public TV-Radio Broadcasting,⁶⁴ the Presidential Decrees on Presidential Decrees on Increasing the State Care on Mass Media of 2001,⁶⁵ on Confirming the Statute of the National Broadcasting Council of 2002,⁶⁶ on Implementation of the Law on Obtaining Information of 2005, the State Programme for Improving of the State of the Mass Media of 2002 and etc.

It ought to be noted that these legislative acts are not concrete and explicit in terms that in some cases they repeat or even collide with each other. Furthermore albeit their quantity they are not able to cover all relations arising in the field of exercising freedom of expression and information. We will discuss this issue in Paragraph 2 of Chapter 6 as in this paragraph⁶⁷ our aim is to enumerate relevant acts and to describe the sphere they cover.

⁵⁷ The Law was adopted after Azerbaijan has accessed to the ECHR and thus intends to bring the Constitution into line with the ECHR, interestingly though only by adding limitations rather than broadening level of protection of freedom of expression. It should be noted that Article 1 of the Act nevertheless states that this Act cannot in anyway limit the protection level of the rights and freedoms as are established by the Constitution.

⁵⁸ 3 April 1998 No 460-IQ.

⁵⁹ 19 June 1998 No 505-IQ.

⁶⁰ 7 December 1999 No 769-IQ.

⁶¹ 25 June 2002 No 345-IIQ.

⁶² 30 September 2005 No 1024-IIQ.

⁶³ 14 June 2005 No927-IIQ.

⁶⁴ 28 September 2004 No 767-IIQ.

⁶⁵ 21 July 2001, No.542.

⁶⁶ 5 October 2002.

⁶⁷ Author means Paragraph 1 of Chapter 6.

6.1.2 The Freedom of Information Laws

The Law on Information, Informatisation and the Protection of Information regulates the searching, obtaining, possessing and imparting of information. The Law especially aims to protect storage and distribution of information. It divides information into two categories: public information and “closed” information to which public access is restricted. According to Article 10 closed information consists of either “state secrets”⁶⁸ or confidential information.

With regard to the right to freedom of information, Article 12 stipulates that every natural or legal person is entitled to have access to the information stored about them and to verify its correctness and the purposes of its storage. However, Article 12 foresees that this can be restricted in some situations defined by the legislation of Azerbaijan, without noting the name and relevant provisions of the legislative acts.

Another legislative act in the relevant field is the Law on Freedom of Information of 1998. This Law was adopted before the Azerbaijan’s acceptance to the CoE as it was one of the conditions to be fulfilled for being adopted to the membership of the organisation. Though the Law has very progressive provisions and provides for everyone’s right to freedom of information, it is not potent, since it is a declarative law and needs additional legislative acts to be adopted in order to ensure the implementation of the rights and freedoms it constitutes. This kind of legislative act finally was adopted after 7 years and this Act is the Law on Obtaining Information of 2005.

As has already been mentioned the Law on Freedom Information of 1998 possesses positive provisions for ensuring freedom of information:

⁶⁸ State secrets are regulated by the Law on State Secrets of 2004 which enumerates the list of state secrets which is not explicit and also the list of information which cannot be added to state secrets which is not complete.

- openness of information and complete freedom for its exchange
- the right to apply to governmental bodies for obtaining information
- the right to reapply from the rejection on providing requested information
- the storage of personal data related to religion only with the agreement of a person about whom the data is stored
- prohibition of the storage of personal data showing person's belonging to a political party

There are also provisions that restrict access to information. For example, the Law adds information about the environment to the list of information, which can be restricted.

The last provision of the Law on Freedom of Information constitutes that people violating this Law shall be brought into responsibility according the legislation, without referring to a concrete legislative act though.

As has been mentioned this Law declares only general principles and concepts on freedom of information without defining a procedure of obtaining information. Therefore another legislative act has been adopted, which in a more or less manner intends to regulate relations in the field of freedom of information. Thus, the Law on Obtaining of Information of 2005 which consists of 58 Articles aims to define the legal bases for ensuring the right to freedom of expression guaranteed under Article 50 of the Constitution.⁶⁹ It divides information into 2 categories as previous laws, determines responsibilities of governmental bodies in providing information as well as rights of physical and legal persons to obtain information, and the procedure for obtaining information from public bodies. It also constitutes establishment of the Information Ombudsman for controlling faithful fulfilment of the provisions of the Law by public officials, thus is entitled to ensure exercising the right to freedom of information.

⁶⁹ The Preamble of the Law, *supra note* 62.

The Law also has transitional provisions that require governmental bodies within a limited time to take steps in order to bring their activities into line with the provisions of the Law. Amongst all others, it is required that governmental bodies establish their web sites and include public interest information enumerated in the Law.⁷⁰

6.1.3 The Freedom of Speech Laws

The Law on Mass Media of 1999 was adopted to guarantee the people's right to free expression, i.e. the right to seek, receive, prepare, transfer, produce and impart information. It declares the complete freedom of the Mass Media in Azerbaijan and that establishment, ownership, use or exploitation of the mass media, or the right to seek, receive, prepare, transfer, produce and impart information through the mass media cannot be restricted. Exceptions from this principle are the situations considered by the legislation. The working principles of the Mass Media shall rely on professionalism, objectiveness and truthfulness of information. The language used in the Mass Media is the state language - Azerbaijani, however Mass Media organs can employ State's minority languages and other widely spoken world languages. State censorship of the Mass Media is prohibited. State bodies, municipalities, enterprises, voluntary associations, officials and political parties cannot in any way censor or ban the dissemination of information through the Mass Media unless they are the authors of information. Public bodies carry responsibility to share information about their activity with the Mass Media and respond questions of the representatives of the Mass Media in due time.

Article 10 of the Mass Media Law constitutes misuse of media freedom and prohibits using the Mass Media for the following purposes:

-disclosure of secrets protected under the law

⁷⁰ *Ibid*, Article 38.

- forcible overthrow of the constitutional order, attacks on the integrity of the State, advocating war, the use of force or brutality, arousing ethnic, racial or social discord or intolerance,
- using the name of a prestigious source to disseminate hearsay, lie or a prejudiced publication which demean the honour and dignity of citizens, pornographic material or calumnies
- committing other illegal acts.

Regulation of the printed and broadcasting media

The Law on Mass Media stipulates a seven-day notice to the appropriate government body prior to the establishment of a printing press however, government authorization is not required for its creation. On the other hand, establishing a broadcasting enterprise requires a broadcasting license from a regulatory body.⁷¹

The activity of a media outlet can be suspended or shut down only by a court decision or by a decision of the founder of the cooperation. With respect to broadcasting media it should be mentioned that the National Broadcasting Council can, at its discretion but only in situations prescribed in law, suspend the broadcasting of a broadcasting enterprise for a two months period.⁷²

The National Broadcasting Council

⁷¹ According to the Presidential Decree of 2002 this body is the National Broadcasting Council which functions on the basis of the Broadcasting Law and also its Statute.

⁷² Article 43 of the Law on Mass Media of 1999.

Pursuant to the Broadcasting Law of 2002 and Article 109.32 of the Constitution⁷³, the country's President appoints members of the National Broadcasting Council and confirms the Statute of the Council. The National Broadcasting council consists of nine members of which three are elected for two years, other three for four years and the rest three for six years. Reelection is possible although it is not clear for which terms. In turn the members elect the Chief and its deputies.

According to the legislation on broadcasting the Council is an independent body financed by the State budget.

Pursuant to the Law on Broadcasting of 2002 and the Statute of the National Broadcasting Council's functions, amongst all others, include the followings:⁷⁴

- to hear and determine licensing applications
- to realise control over the fulfillment of broadcasting legislation by broadcasters
- to monitor that broadcasters not to propagate terrorism, violence, national, religious and racial discrimination
- in case of violation of broadcasting regulations to apply to a court
- to prepare a unique development conception for broadcasting sphere and implement it
- to issue orders and regulations
- to apply sanctions in case of violation of legislation on broadcasting and other legislative acts

⁷³ Article 109.32 states that the President settles all other questions which under the present Constitution do not pertain to the competence of the Parliament [Milli Majlis] of the and courts.

⁷⁴ See the Law on Mass Media, the Law on Broadcasting and the Statute of the National Broadcasting Statute.

The establishment of the Public TV-Radio Broadcasting

Pursuant to the Law on Public TV-Radio Broadcasting of 2004 the main purpose of public broadcasting is to ensure the general interests of population of Azerbaijan – of the entire society as well as of its different groups - in social, scientific, cultural, educational, entertaining and other fields and to prepare accurate and balanced information aimed at reflection of freedom of speech and thought, and of different views and opinions.

Management of the Public-TV Radio Broadcasting is conducted by the Broadcasting Council and the Director General. Candidates for membership of the Broadcasting Council are nominated by NGOs not engaged in political activity, creative and civil associations as well as by the Azerbaijan Confederation of Trade Unions, the Media Council and the Azerbaijan Academy of Sciences and elected by the country's Parliament, i.e. by Milli Mejlis. Thus, Paragraph 4 of Article 17 stipulates that the members of the Broadcasting Council shall be elected by the Parliament in composition of 9 members: three members are elected for 2 years, three members – for 4 years and three members – for 6 years. The members elect the Chairman of the Council.

According to Article 3 of the Law on Public TV-Radio Broadcasting of 2004 public broadcasting is performed on basis of the following principles:

- independence;
- objectivity, impartiality and accuracy of information;
- . -pluralism and tolerance;
- . - estrangement from political interests;
- conciliation and ensuring of public interests;
- universality;
- diversity;

The Public TV-Radio Broadcaster performs its activities on the basis of a license issued by the appropriate State body, i.e. by the National Broadcasting Council.

Although according to the Law programmes of public broadcasting shall be disseminated in the official language of the Republic of Azerbaijan i.e in Azerbaijani,⁷⁵ broadcasts in languages of national minorities residing in the territory of Azerbaijan Republic may be included in programmes of public broadcasting.⁷⁶

One-sided preference to or propaganda of political views in programmes of public broadcasting are prohibited. Different points of views, approaches to problems, comments and analysis are required to be presented on alternative grounds and in the form of discussions in accordance with principles of pluralism and tolerance.

Sanctions for violating the freedom of expression legislation

Article 6 of the Law on Obtaining Information lays down the responsibility of governmental officials as information holders for the violation of the right of access to information. Furthermore, according to the Presidential Decree on the Implementation of the Law “On Obtaining information”, a legislative act shall be adopted to consider concrete sanctions for the violation of the Law.

The Administrative Offences Code of 2002 constitutes sanctions for not providing a journalist with information in due time or from refusing to provide with non-confidential information. (Article 186) The Criminal Code constitutes sanctions for the interference with the journalist’s professional

⁷⁵ Law on Public TV- Radio Broadcasting *supra note*64 Paragraph 1 of Article 12.

⁷⁶ *Ibid*, Paragraph 3.

activity, i.e. for forcing him/her with the use of violence or without to impart or to prevent from imparting information.

There are in the Civil and Criminal Codes sanctions on libel and defamation. Articles 21 and 1097 of the Civil Code of 2000 for example, constitute civil responsibility for libel and business reputation. Articles 147, 148 and 323 of the Criminal Code of 2000 even criminalise defamation, and foresee sanctions in the form of imprisonment.

6.2 Analysis of the Azerbaijani law in view of its compatibility with international standards

To begin with, it should be mentioned that despite the fact that Azerbaijan has ratified almost all human rights conventions and adopted a huge amount of legislative acts in order to bring its domestic law in line with international human standards, its national legislation nevertheless remains far from this. It is because legislative acts are neither concrete nor explicit and they can repeat or even collide with each other in some cases. Besides, legislative acts are not capable to regulate all issues arising in the field they have been considered to cover.

The legislation in the field of freedom of expression is not an exception, and thus there are gaps and collisions too. Furthermore, changes and amendments to other legislative acts which are required to be made with the entering into force of new laws are not made in due time. Consequently, it is clear that not only does the existing law fail to properly protect freedom of expression, but it also restricts or even violates it at times.

Collision of Laws:

The Law on Broadcasting states that broadcasting of a television or radio can be suspended only with a court's decision and for a maximum seven day period.⁷⁷ The provision of the Law on Mass Media however, stipulates that the National Broadcasting Council is entitled to suspend broadcasting of a broadcaster for up to two months.⁷⁸

Laws repeating each other:

The Law on Information, Informatisation and the Protection of Information of 1999 and the new Law on Obtaining Information of 2005 cover nearly

⁷⁷ Article.23.1.

⁷⁸ Article 43.

the same sphere, though the Law on Obtaining Information is more progressive and includes positive provisions for ensuring the right to freedom of information. However, this law is not perfect either and has not been completely implemented despite the fact that more than a year has passed since its adoption.

Delays in the implementation of newly adopted laws:

The six months term considered by the Law on Obtaining Information of 2005 for nominating the Commissioner on Freedom of Information has passed a long time ago, however the Commissioner is yet to be nominated. According to the same Law, governmental bodies have to create official websites that include all kind of information enumerated in the Law. At the time of the writing of this report, the information required by law remains missing on the websites of the governmental bodies and some government offices still have not set-up official websites.

That same law also requires a corresponding executive body (i.e. the Cabinet of Ministers) to adopt regulations on storage and protection of documents by information holders which is also yet to be adopted.

Gaps in the legislation:

The Law on Freedom of Information, for instance, constitutes that people violating this Law shall be brought into responsibility according the legislation, without referring to a concrete legislative act.

There are very few sanctions in the legislation which foresee punishment for the violation of freedom of expression and information. These include only the sanctions in the Administrative Code for not providing a journalist, and not an ordinary citizen, with information in due time. Also, the sanction only constitutes administrative responsibility, but not that a government official shall carry responsibility to disclose the information that s/he has denied to provide. Furthermore, the Criminal Code does not contain any

sanctions for repeated or severe infringements of the rights of access to information and free expression. The only provision, it constitutes, is a sanction for the interference with the journalist's professional activity.

Therefore amendments should be made to the Criminal and Administrative Offences Codes to include sanctions for violating the legislation on freedom of expression and information. In the Administrative Code it should be affirmed that government officials who refuse to provide open information shall be held administratively responsible and should be obliged to provide information which s/he has denied before. The Criminal Code should constitute sanctions for the repeated and severe infringements of the right of access to information. It also should be mentioned that, sanctions have to be imposed for refusing publicity open information not only to journalists, but also to ordinary citizens as well.

Vague provisions:

The phrase "Social discord and animosity" constituted in Article 50 of the Constitution is a vague and broad term may easily be abused for the purpose of restricting freedom of expression and therefore violating that right. In international human rights law, it is a well-established principle that vague or broadly defined restrictions are unacceptable, because they are beyond what is strictly required to protect the legitimate interest.⁷⁹

Vague terms , broad concepts or unclear statements can also be found in other freedom of expression laws. For instance, Article 40 of the Broadcasting Law requires broadcasting enterprises to ensure *variety* of the programmes broadcasted, and also to ensure *objectiveness* of the information imparted.

⁷⁹See *supra* note 48.

Provisions that are in direct breach of the international freedom of expression norms:

According to the freedom of expression laws, a body regulating, among others, the licensing of broadcasters is established by the President of the country. Thus, the country President appoints Members of the National Broadcasting Council upon his discretion. This is in direct violation with international standards, as it is clearly set out by both national courts and international bodies that bodies with regulatory powers ought to be independent from executive powers. The HRC has expressed concern about the lack of independence of regulatory authorities on a number of occasions. For instance in its Concluding Observations on Lebanon's Second Periodic Report the HRC expressed its concern over a media law:

The Committee therefore recommends that the State party review and amend the Media Law of November 1994, as well as its implementing decree, with a view to bringing it into conformity with article 19 of the Covenant. It recommends that the State party establish an *independent* broadcasting licensing authority, with the power to examine broadcasting applications and to grant licences in accordance with reasonable and objective criteria⁸⁰

The UN Special Rapporteur on Freedom of Opinion and Expression has also emphasized the need for independent regulation of broadcasting:

There are several fundamental principles [relating to broadcasting] which, if promoted and respected, enhance the right to seek, receive and impart information. These principles are...laws governing the registration of media and the allocation of broadcasting frequencies must be clear and balanced; any regulatory mechanism, whether for electronic or print media,

⁸⁰ *Annual Report of the UN Human Rights Committee*, 21 September 1997, UN Doc. A/52/40.

should be independent of all political parties and function at an arms-length relationship to Government...⁸¹

The CM of the CoE in its Recommendation on the Independence and Functions of Regulatory Authorities for the Broadcasting Sector, which has been mentioned in Chapter 4, also stressed the importance of ensuring independence of the regulatory body for the broadcasting media:

The rules governing regulatory authorities for the broadcasting sector, especially their membership, are a key element of their independence. Therefore, they should be defined so as to protect them against any interference, in particular by political forces or economic interests.⁸²

The Organization of American States has shown the same point of view.⁸³

Further it should also be mentioned that the freedom of expression legislation does not constitute any provision on the accountability of the National Broadcasting Council, though it is as important to consider the accountability of the National Broadcasting Council as to ensure its independence.

The Law on Freedom of Information of 1999 includes the information about the environment to the list of information which can be restricted. This provision is *per se* against to the international provisions on the protection of environment and freedom of information. For instance, the Aarhus Convention to which Azerbaijan is a Party, requires the State Parties to take measures in order to make information about environment open:

⁸¹ Annual Report of the Special Rapporteur to the UN Commission on Human Rights, 29 January 1999, UN Doc E/CN.4/1999/64, para.16.

⁸² *Recommendation on the Independence and Functions of Regulatory Authorities for the Broadcasting Sector*, (2000) 23, adopted 20 December 2000.

⁸³ See Principles 12 and 13 of the *Inter-American Declaration of Principles on Freedom of Expression*, adopted at the 108th regular session, October 2000. See also *Access to the Airwaves*, Principle 10.

Each Party shall endeavour to ensure that officials and authorities assist and provide guidance to the public in seeking access to information, in facilitating participation in decision-making and in seeking access to justice in environmental matters.⁸⁴

Another colliding rule with international human rights law is for example Article 47 of the Broadcasting Law, which obliges journalists to verify correctness of the information they receive before imparting it. Or Article 7 of the National Broadcasting Council requiring the Council to prepare a unique development conception for broadcasting sphere and implement it.

Also there are a number of unproportional sanctions for abusing freedom of expression in the criminal legislation of Azerbaijan. For instance, the Criminal Code provisions which criminalise defamation or disclosing state secrets are inconsistent with human rights norms as they are severe forms of punishment for this kind of misconduct.

⁸⁴ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters , 25 June 1998, 2161 UNTS 450, accessed by Azerbaijan on 23 March 2000.

6.3 Existing practice in the field of freedom of expression in Azerbaijan

The situation of freedom of expression and information in Azerbaijan has improved notably in comparison with the past century, when the dictatorial regime of the former Soviet Union institutionally suppressed freedom of expression. However, the atmosphere necessary for promoting and protecting freedom of expression in Azerbaijan is yet to be created. Although prior censorship has been abolished, a number of legislative acts have been adopted in order to simplify the process of creating a private media outlet, the Public TV-Radio Broadcasting has been created and other effective steps have been taken, the Media in Azerbaijan still can not be considered completely independent.

The media outlets that try to function, in the true sense of the word, independently face major barriers and suffer from the impediments to their work by governmental officials which, *inter alia*, include limitations to accessing printing houses, unfair distribution of networks, imposition of crippling fines from government-initiated defamation cases and harassment of journalists.⁸⁵ Journalists have also been physically attacked by unknown assailants who continue to escape from responsibility due to a lack of proper investigation, thus leaving an impunity climate for the assaulting of journalists.⁸⁶

⁸⁵ See e.g. Public Statement of AI Eur 55/006/2006 (Public) 9 August 2006, <<http://www.amnestyusa.org/countries/azerbaijan/document.do?id=ENGEUR550062006>> Accessed on 10 January 2007; HRW, Human Rights Overview: Azerbaijan <http://hrw.org/english/docs/2006/01/18/azerba12226.htm>, HRW Report on Media in Azerbaijan, 4 August 2004, <<http://baku.usembassy.gov/latest/HRW%20Report%20on%20AZE.pdf>> accessed on 10 January 2007; Article 19's Letter to the Azerbaijani President, 25 July 2006, <<http://www.article19.org/pdfs/letters/azerbaijan-letter-on-attacks-on-media.pdf>> accessed on 10 January 2007.

⁸⁶ *Ibid.*

In some cases, independence and impartiality has cost journalists their lives. For instance, Elmar Huseynov, independent journalist, founder and editor of the outspoken weekly *Monitor*, was shot dead in his apartment building in March 2005. The weekly regularly published materials criticising the Azerbaijani authorities and President on allegations of corruption among high-level government officials. The publication of *Monitor* stopped after Huseynov's death and therefore effectively silenced.⁸⁷ The assassin remains at large nearly two years after the crime⁸⁸

Meanwhile, correspondent of the *Azadlig* newspaper narrowly escaped an attempt on her life on December 25, 2006. It is believed that her assailant wanted to force the reporter to stop writing critical articles.⁸⁹

Last year the "Ruh" Azerbaijani Journalists' Protection Committee carried out media monitoring for the first six months of 2006.⁹⁰ The results of the monitoring revealed that the state of media freedom in the country is far from satisfactory. The main problem, according to the results of monitoring, is that journalists are unable to access information they need to obtain. The adoption of the new Law on Obtaining Information is not of much help either, since its implementation has been delayed.

The Committee also monitored 29 civil and criminal cases where journalists were acted as a respondent. According to the monitoring results defamation

⁸⁷ AI USA , Azerbaijan
<<http://www.amnestyusa.org/countries/azerbaijan/document.do?id=ENGEUR550062006>>,
Accessed on 12 January,
Reporters Without Borders <www.rsf.org/article.php3?id_article=12774> Accessed on 6
January, Turan Information Agency, Assassination of Elmar Huseynov.
<http://www.turaninfo.com/public/urgentf/monitor/monitor_en.htm> Accessed on 12
January 2007, See more about Elmar Huseynov BBC Profile: Elmar Huseynov, <
<http://news.bbc.co.uk/2/hi/europe/4315439.stm>> Accessed on 12 January 2007.

⁸⁸ Day.az <<http://www.day.az/news/politics/67937.html>> in Russian. Accessed on 15
January 2007.

⁸⁹ Baku Today, OSCE, US concerned at 'violence' against journalists,
<<http://www.bakutoday.net/view.php?d=31404>> Accessed on 15 January 2007.

⁹⁰ See the Report in Azerbaijani , Media Forum,
http://www.mediaforum.az/articles.php?article_id=20060719062424207&page=05&lang=az
> Last accessed on 15 January 2007.

cases and politically motivated charges against journalists in the first half of 2006 decreased in comparison with the last half of 2005. However, politically motivated charges against journalists critical of the government is a common ploy aiming to informally suppress opposing views and expression.

The criminal case of well-known satirist Mirza Sakit Zakhidov is an example of this practice. He was arrested on 23 June 2006 and charged with the possession of and intention to deal in illegal narcotics. However, Sakit Mirza's colleagues and human rights activists in Azerbaijan believe that his arrest is politically motivated in response to the harsh political criticisms he includes in his poems often published in *Azadlig*, *Bizim Yol*, and *Baki Bulvari*.⁹¹

Though access to internet in Azerbaijan is generally not restricted, the government has from time to time blocked some local sites mainly operated from abroad that harshly criticize government's policy or high ranked authorities and their families.⁹²

Recently the country's biggest private broadcaster ANS was shut down by the decision of the National Broadcasting Council on the base that its license ended and it could not be renewed because they had violated the broadcasting law.⁹³ Nearly two weeks later, i.e on 11 December 2006, the National Broadcasting Council again acting in its discretion decided to allow ANS to continue its broadcasting "temporarily".⁹⁴

⁹¹ AI's Public Statement, *supra note* 85.

⁹² See e.g., IFEX, Government blocks two websites for criticising economic policy, <<http://www.ifex.org/en/content/view/full/80378/>>, accessed on 12 January 2007

⁹³ See, e.g. UNDP Azerbaijan Development Bulletin, <<http://www.un-az.org/undp/bulnews44/m4new.php>> accessed on 12 January 2007

⁹⁴ News Voice of America, <<http://www.voanews.com/azerbaijani/archive/2006-12/Aze-anscman.cfm?CFID=97481917&CFTOKEN=51900361>> in Azerbaijani. accessed on 12 January 2007.

Unfortunately, this incident reveals that in Azerbaijan the law and justice system do not always decide which media outlet violates or abides by the laws, or who can be subjected to restrictions permissible under freedom of expression guarantees and how. Rule of law remains amiss in a country where executive powers decide all of these issues under their own discretion.

7 Recommendations

In line with the analysis above, the following recommendations on the improvement of the protection of freedom of expression in the country seem pressing. It is a hope that the Azerbaijani government takes them into consideration.

Legal measures :

- To make amendments and changes to the relevant legislative acts in order to eliminate collisions and gaps in the laws on freedom of expression. Specifically, amendments should be made to the Criminal and Administrative Offences Codes so as to include sanctions for violating the legislation on freedom of expression and information. Besides the Criminal Code provisions, which criminalise defamation should be replaced with Civil and Administrative Offences Code provisions.
- In order to ensure implementation of the Law on Obtaining Information to adopt Regulations on receiving enquiries from questioner about obtaining information, as well as on storing, completing and protecting documents
- To adopt necessary legislative acts in order to ensure implementation of the human right conventions ratified by Azerbaijan into national legislation, and thus to enable their application by the country courts

Positive measures:

- To provide freedom of information training to all public officials
- To carry out public education about the right to free access to information (with specific attention to the country's outlying regions);
- To educate governmental officials about the culture of respecting of the right to freedom of expression
- To facilitate civil society's active participation in the discussion of public interest matters

Preventing measures:

- To take all measures to investigate impartially threats and acts of violence, against journalists

Implementing measures:

- To ensure transparent election of the Commissioner on Information in a time span stipulated
- To take measures for populating and launching governmental bodies' websites according to requirements of the Law "On obtaining information"
- To appoint government officials on information or create relevant sectors at governmental offices in order to simplify the process of obtaining information
- To ensure the establishment of the National Broadcasting Council through the transparent election of its members by a representative organ of the State, i.e , by Milli Mejlis

- To ensure that the Law constitutes a concrete serving term for the Members of the National Broadcasting Council. It should, according to international standards, be at least four years.

The Law also should include provisions on accountability of the National Broadcasting Council. The Council normally should submit its annual report about its activity during a passed year to Milli Mejlis.

Recommendations to IGOs and International NGOs:

- to pay more attention in the implementation of laws after achieving their adoption by the government

Recommendations to local NGOs and civil society activists

- to raise public awareness on the rights to freedom of expression and to freedom of information
- to more actively coordinate with IGOs and international NGOs
- to make efforts in strengthening their mediator role between government and civil society
- to increase public trust to their activities, with different ways of conduct, for example to make transparent the distribution and use of grants received from IGOs and international NGOs and from other relevant institutions.

Conclusion

The study which consists of seven Chapters can provisionally be divided into two parts. The first part of the paper has described international binding as well as non-binding norms, which protect freedom of expression. Through analysing the case law of HRC, *ECtHR*, and the US Supreme Court, where it is relevant, it has been attempted also to show the limitations on freedom of expression which are permissible under international law and in what way they can be used according to the International as well as American (the US) practice.

The second half of the study has elaborated the domestic law of Azerbaijan in the field of freedom of expression and information. It has been the aim of the author to thoroughly examine the Azerbaijan's freedom of expression legislation in the light of its compatibility with the relevant international human rights standards and the implementation of this legislation into practice.

It has been observed through the research that although more than a decade has passed since Azerbaijan has turned into democratic government, freedom of expression is still limited in this State. The national legislation is not efficient enough for protection of freedom of expression and information, and hence is in need of being amended. Considering this the author in Chapter 7 has drawn a list of legal measures that have to be taken by the Government into consideration in order to bring the national law of freedom of expression in line with the relevant international standards.

When it comes to the application of the legislation into practice it shall be noted that the existing state of freedom of expression in the country is not sufficient either. Thus, there are artificially created barriers to freedom of expression, which, amongst all others, include informal limitations to accessing printing houses, unfair distribution of networks, imposition of

crippling fines from government-initiated defamation cases and harassment of journalists. There are even cases of assaults against journalists.

Nevertheless, the author is in a hope that the state of freedom of expression in Azerbaijan can be improved in a short time of period provided the concerned Government and other responsible actors take into account their legal and moral obligations to protect and promote freedom of expression and join their efforts to achieve this goal.

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