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The Representative on Freedom of the Media

LEGAL ANALYSIS ON THE LAW OF THE REPUBLIC OF AZERBAIJAN "ON MEDIA"

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Table of contents

Executive summary and recommendations

This Analysis examines the "Law of the Republic of Azerbaijan on Media" (hereinafter, the Law), adopted by the Milli Majlis of the Republic of Azerbaijan on 30 December 2021.

Article 1 of the Law contains a series of definitions of "key concepts". Some of these definitions are problematic in terms of language and scope and have direct implications vis-à-vis the interpretation and impact of provisions included in the rest of the Law. It is therefore recommended to replace the definition of "mass information" with a broader reference to the right to seek, receive and impart information. The definition of "journalist" is very limited and does not encompass the new notion of media and journalism currently embraced by international standards and needs to be amended accordingly. The article separately defines audiovisual media, print media and online media. In order to provide a proper and consistent regulation applicable to different forms of expression and distribution platforms, it is advised to replace this categorisation with a basic separation between written media and audiovisual media (independent from the distribution technology, i.e, terrestrial frequencies, satellite, cable, IP or the open Internet). It is also recommended, in line with regional standards as well as the comparative best practices of the European Union's law, to articulate a basic difference between media services and distribution/transmission services, based on the presence (or lack) of editorial responsibility.

Article 3 refers to the scope of application to the Law, mentioning that it also pertains to "media entities which are located outside the Republic of Azerbaijan and whose activities are oriented to the territory and population of the Republic of Azerbaijan". This expansion of jurisdiction and regulatory powers beyond the sovereign territory of Azerbaijan is incompatible with regional standards and best comparative practices, based on the principle of country of origin. It is recommended to therefore be eliminated.

Article 4 refers to State's responsibilities in the field of the media. No reference is made to the main and most important responsibility of State authorities, consisting of properly protecting and creating the conditions for a full exercise of the fundamental rights to freedom of expression and freedom of information. The reference included in paragraph 7 to the responsibility to "ensure the security of the media space of the Republic of Azerbaijan" sounds extremely vague and may lead to restrictions based on a public order-related (and therefore not acceptable) notion of "security". It is recommended to be repealed.

Articles 7, 8 and 9 refer to possible and very broad restrictions to be potentially imposed on media, based on the provisions included in the applicable legislation on martial law, state of emergency, combatting religious extremism and combatting terrorism. These references are recommended to be replaced, if needed, by clear and specific provisions properly aligned with applicable international standards.

Article 11.4 regulates the activities of foreign media representatives establishing that if "other states impose special restrictions on the professional activities of journalists included in the Media Register, similar restrictions may be imposed in the Republic of Azerbaijan on journalists from the states which imposed those restrictions". Strict reciprocity may lead to the imposition of limits and restrictions that would be incompatible with the way freedom of expression is protected not only by international

and regional standards by also by Azerbaijani national legislation itself.

Article 12 contains very specific, detailed and cumbersome provisions and requirements regarding the adoption, by media organizations, of a logo or emblem, as well as the introduction of possible changes. These concrete regulations and restrictions are clearly excessive and do not respond to any clear and justified necessity.

Article 13 establishes that media entities, in the absence of any agreement or contract, "may only use not more than one third of every piece of information of another media entity and must provide a reference to it". This quantification ("one third") may lead to complex calculations and potential disagreements and conflicts.

Article 14 contains a series of very problematic restrictions and prohibitions regarding media content in general, including disrespect for State symbols, propagation (sic) of terrorism, religious extremism, violence and cruelty (sic), words and gestures with immoral (sic) lexical, humiliation of honour and dignity, and tarnishing of business reputation, actions that are contrary to the protection of health and the environment, and parapsychology (psychics, mediums, etc.), superstition or other kinds of fanaticism, among others. These restrictions are unjustified and unnecessary as they either refer to very open categories which may also include a significant amount of protected speech (disrespect, cruelty, immorality, tarnishing businesses' reputation, fanaticism, etc.), or they lack basic legal certainty and other fundamental requirements regarding categories that would legitimize restrictions to freedom of expression (terrorism, public health, reputation, etc.). These provisions need to be either amended or repealed.

Article 15 contains a series of restrictions regarding the publication of information regarding criminal investigations, prosecutions or administrative violation cases. Journalists and media must be able to report on criminal and administrative procedures related to cases or events of public interest without the necessary obtention of any prior authorisation or permission.

Article 15.3 refers to the possibility to require journalists and media to disclose the identity of confidential sources. This provision is recommended to be amended and adapted to the series of requirements and language incorporated into the Recommendation R(2000)7 of the Committee of Ministers of the Council of Europe to member states on the right of journalists not to disclose their sources of information.

Articles 18 and 19 contain the provisions applicable to the exercise of the right to deny, correct and response information. Although the provisions included in these articles are essentially in line with international and regional standards, it would be necessary to amend the first paragraph of article 18 to establish the requirement that the disseminated information is untrue or inaccurate, to eliminate the reference to "distort opinions" (as the right to reply can only refer to facts) and to the need to "issue an apology" (which is not recognised as a component of the mentioned right).

Article 21 of the Law allows the use or dissemination of secret audio and video recordings and photographs when the affected person has provided written consent and on the basis of a court ruling. The Law should accept the use of secret or hidden recording techniques in cases of public interest in absence of alternative means, provided that the rights of affected and third parties are protected, and the information disclosed is strictly

necessary in terms of reporting on issues of public interest.

Article 26 of the Law establishes a series of general requirements regarding the establishment of media entities. These are very broad and unnecessary restrictions that may seriously limit the possibility for a relevant number of individuals and legal incorporations to have access to the public sphere. Such restrictions need to be repealed. Limitations included in article 26.4 regarding foreign ownership or funding of media organizations in Azerbaijan are unnecessary and disproportionate and are recommended to therefore be eliminated.

Chapter 3 of the Law is devoted to regulating the provision of audiovisual media services. Chapter 5 refers to the connected matter of licensing audiovisual media. It would be important to reformulate the classification of entities involved in the provision of these services. it is also advised to reformulate and simplify the legal regime established in the mentioned Chapters, to avoid the imposition of excessive burdens and restrictions that would seriously stifle the exercise of the right to freedom of expression in this area.

Article 41.3 establishes the termination of audiovisual licenses in cases presented in a very broad and open to interpretation language (mass riots, enmity, calls for disintegration, purpose of terrorism, …) that may give competent authorities the discretionary power to silence contentious yet protected speech. It is therefore recommended to amend this provision in order to clearly identify specific situations of clear or direct danger of violent acts directly connected to the dissemination of certain messages that might justify the adoption of such exceptional measures, on the basis of a transparent and fair process.

Article 43 of the Law establishes the Council as the body that "regulates the field of audiovisual media in the Republic of Azerbaijan". Based on international and regional standards, and particularly the Recommendation Rec(2000)23 of the Committee of Ministers of the Council of Europe to member states on the independence and functions of regulatory authorities for the broadcasting sector, it is advised to introduce provisions establishing mechanisms that would guarantee the autonomy of the Council (for example, via the collection of their own fees) or eliminate the discretion of political bodies in this field (for example, by establishing a fixed percentage of the annual budget), to leave to the Council the power to take all the relevant decisions regarding its internal structure and staff, to guarantee an independent and transparent selection and nomination process, as well as to avoid an appointment system that basically leaves in the hands of the Government (and therefore to political guidance and interests) the decision on who finally becomes a member of this institution.

Chapter 6 of the Law contains a series of provisions applicable to media entities classified and defined as print media, online media and news agencies. These provisions include some elements that may create unnecessary and unjustified restrictions to the right to freedom of expression. It is important to reiterate the already presented recommendation regarding the need to reformulate and simplify the classification and separation between "traditional" media (including print) and online media. Provisions included in article 59 regarding print media are excessively detailed. It is recommended to introduce a basic definition of publication (on paper and online) based on the notion of dissemination of information and opinions on matters of public interest. Although, according to article 62.1, prior authorisation from State authorities is not required to

establish print and online media organizations, the Law is still excessively interventionist regarding the possibility for such authorities to restrict, suspend or terminate the provision of print and online media services. From a general point of view, responsibilities for the violation of legitimate restrictions of the right to freedom of expression are to be imposed on an individual basis. Only when a media organization continuously and tenaciously engages in flagrant violations of fundamental rights and public interest values (for example, via the dissemination of hate speech) the suspension of the whole organization's operations would be acceptable. Specific provisions included in article 66 regarding the specific banning of the import and dissemination of foreign print media products are not justifiable, as they are based on the mere grounds of geographic origin and are recommended to therefore be eliminated.

Chapter 7 is focused on the regulation of the activities of journalists. This Chapter contains a series of provisions that are not aligned with applicable international and regional standards. Provisions regarding the need for an individual to obtain a card or any other authorisation from the Azerbaijani authorities in order to be considered and protected as journalists need to be repealed. Establishing specific requisites in order to obtain the professional consideration as journalist (higher education, legal capacity, absence of criminal or administrative infractions record, continuous operation, labour contract, etc.) is also incompatible with applicable standards and therefore is recommended to be eliminated.

Introduction

The present analysis was prepared by Dr. Joan Barata Mir, an independent media freedom expert, at the request of the Office of the OSCE Representative on Freedom of the Media.

This Analysis refers to the "Law of the Republic of Azerbaijan on Media", adopted on 30 December 2021.

The structure of the comment is guided by the tasks formulated by the Office of the OSCE Representative on Freedom of the Media. These tasks include comments on the law by comparing provisions against international media standards and OSCE commitments; indication of provisions, which are incompatible with the principles of freedom of expression and media; and recommendations on how to bring the legislation in line with the above-mentioned standards.

The Analysis first outlines the general international standards on freedom of expression and freedom of information and then presents those particularly referring to media services. These respective standards are referred to as defined in international human rights treaties and in other international instruments authored by the United Nations, the OSCE and the Council of Europe.

Part II presents an overview of the legislation, focusing on its compliance with international freedom of expression standards. The Analysis highlights the most important positive aspects of the law and elaborates on the drawbacks, with a view of formulating recommendations for the review.

Part I. International legal standards on Freedom of Expression and Freedom of Information

General standards

In Europe, freedom of expression and freedom of information are protected by article 10 of the European Convention on Human Rights (ECHR), which is the flagship treaty for the protection of human rights on the continent within the context of the Council of Europe (CoE). This article follows the wording and provisions included in article 19 of the International Covenant on Civil and Political Rights (ICCPR), and is essentially in line with the different constitutional and legal systems in Europe.

Article 10 reads as follows:

> "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 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."

Freedom of expression and freedom of information are essential human rights that protect individuals when holding opinions and receiving and imparting information and ideas of all kinds. It also presents broader implications, as the exercise of such rights is directly connected with the aims and proper functioning of a pluralistic democracy[1].

On the other hand, freedom of expression and freedom of information, as well as the other rights protected in the Convention, are not absolute and therefore may be subject to certain restrictions, conditions and limitations. However, article 10.2 ECHR clearly provides that such constraints are exceptional and must respect a series of requirements, known as the three-part test. This test requires that: 1) any interference must be provided by law, b) the interference must pursue a legitimate aim included in such provision, and 3) the restriction must be strictly needed, within the context of a

[1] See the elaboration of such ideas by the European Court of Human Rights (ECtHR) in landmark decisions such as Lingens v. Austria, Application No. 9815/82, Judgment of 8 July 1986, and Handyside v. The United Kingdom, Application No. 543/72, Judgment of 7 December 1976.

democratic society, in order to adequately protect one of those aims, according to the idea of proportionality[2].

At the OSCE level, there are political commitments in the area of freedom of expression and freedom of information that clearly refer to the international legal standards extant in this area. In particular, the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE in 1990 proclaims the right to everyone to freedom of expression and states that:

> "This right will include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. The exercise of this right may be subject only to such restrictions as are prescribed by law and are consistent with international standards"[3].

Also, the OSCE Ministerial Council Decision 3/2018, adopted by the Ministerial Council in Milan on 7 December 2018, establishes the following:

> "1. Fully implement all OSCE commitments and their international obligations related to freedom of expression and media freedom, including by respecting, promoting and protecting the freedom to seek, receive and impart information regardless of frontiers;
>
> 2. Bring their laws, policies and practices, pertaining to media freedom, fully in compliance with their international obligations and commitments and to review and, where necessary, repeal or amend them so that they do not limit the ability of journalists to perform their work independently and without undue interference (…)"[4].

Standards with regards to the provision of media services

General Comment No. 34 concerning Article 19 of the International Covenant on Civil and Political Rights adopted on 29 June 2011 by the UN Human Rights Committee[5], states the following (para 39):

> "States parties should ensure that legislative and administrative frameworks for the regulation of the mass media are consistent with the provisions of paragraph 3.92 Regulatory systems should take into account the differences between the print and broadcast sectors and the internet, while also noting the manner in which various media converge. <…> States parties must avoid imposing onerous licensing conditions and fees on the broadcast media, including on community and commercial stations. The criteria for the application of such conditions and licence fees should be reasonable and objective, clear, transparent, non- discriminatory

[2] See for example The Sunday Times v. UK, Application No. 6538/7426 Judgment of April 1979.

[3] This document is available online at: http://www.osce.org/odihr/elections/14304.

[4] Available online at: https://www.osce.org/chairmanship/406538?download=true

[5] Available online at: http://www2.ohchr.org/english/bodies/hrc/docs/GC34.pdf.

and otherwise in compliance with the Covenant. Licensing regimes for broadcasting via media with limited capacity, such as audiovisual terrestrial and satellite services should provide for an equitable allocation of access and frequencies between public, commercial and community broadcasters. It is recommended that States parties that have not already done so should establish an independent and public broadcasting licensing authority, with the power to examine broadcasting applications and to grant licenses".

Paragraph 40 of the same document also establishes that:

> "The State should not have monopoly control over the media and should promote plurality of the media. Consequently, States parties should take appropriate action, consistent with the Covenant, to prevent undue media dominance or concentration by privately controlled media groups in monopolistic situations that may be harmful to a diversity of sources and views."

Similarly, the international rapporteurs on freedom of expression, including the UN Rapporteur on Freedom of Expression and Freedom of Opinion, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression, have adopted several joint declarations which included relevant provisions and recommendations particularly focusing on media regulation[6].

There is a valuable and solid interpretative jurisprudence in the CoE, established in the course of decades by the European Court of Human Rights, which also includes the provision of audiovisual media services in their connection with the right to freedom of expression and freedom of information. The case law covers areas including the responsibilities of the State in allocating proper frequencies (*Centro Europa 7 S.r.l. and Di Stefano v. Italy*, 7 June 2012[7]), legal certainty in the regulation of broadcasting (*Groppera Radio AG and Others v. Switzerland*, 28 March 1990[8]), non-arbitrariness in the process of granting a broadcasting license (*Meltex Ltd and Movsesyan v. Armenia*, 17 June 2008[9]), the need to avoid monopolies (*Informationsverein Lentia and Others v. Austria*, 24 November 1993[10]), or the need to properly protect the independence of public service broadcasters (*Manole and Others v. Moldova*, 17 September 2009[11]), among others.

Moreover, the Committee of Ministers and the Parliamentary Assembly of the Council of Europe have developed numerous recommendations and declarations that contribute to clarify, to establish and to develop principles, requirements and minimum standards regarding the effective protection of rights included in Article 10 ECHR, in particular vis-

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[6] See for example the latest Joint Declaration, adopted on 2 May 2018, on media independence and diversity in the digital age, available online at: https://www.osce.org/representative-on-freedom-of-media/379351

[7] Available online at: https://hudoc.echr.coe.int/eng#{"itemid":["001-111399"]}

[8] Available online at: https://hudoc.echr.coe.int/eng#{"itemid":["001-57623"]}

[9] Available online at: https://hudoc.echr.coe.int/eng#{"fulltext":["Meltex%20Ltd%20and%20Movsesyan%20v.%20Armenia"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-87003"]}

[10] Available online at: https://hudoc.echr.coe.int/eng#{"itemid":["001-57854"]}

[11] Available online at: https://hudoc.echr.coe.int/eng#{"itemid":["001-94075"]}

à-vis different aspects related to the provision of media services (including media pluralism and transparency or media ownership, protection of journalists' sources, public service media governance, remit of public service media in the information society, promotion of democratic and social contribution of public media, or the independence and functions of regulatory authorities, among others[12]).

It is particularly important to quote the Council of Europe's Recommendation CM/Rec (2011) 7 of the Committee of Ministers to member states on a new notion of media:

> "Despite the changes in its ecosystem, the role of the media in a democratic society, albeit with additional tools (namely interaction and engagement), has not changed. Media-related policy must therefore take full account of these and future developments, embracing a notion of media which is appropriate for such a fluid and multi-dimensional reality. All actors – whether new or traditional – who operate within the media ecosystem should be offered a policy framework which guarantees an appropriate level of protection and provides a clear indication of their duties and responsibilities in line with Council of Europe standards. The response should be graduated and differentiated according to the part that media services play in content production and dissemination processes. Attention should also be paid to potential forms of interference in the proper functioning of media or its ecosystem, including through indirect action against the media's economic or operational infrastructure"[13].

Last but not least, the European Convention on Transfrontier Television also establishes a common set of rules with regards to this specific media service among CoE member States[14].

[12] Available online at: https://www.coe.int/en/web/freedom-expression/committee-of-ministers-adopted-texts and https://www.coe.int/en/web/freedom-expression/parliamentary-assembly-adopted-texts

[13] Available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cc2c0

[14] Available online at: https://rm.coe.int/168007b0d8

Part II. Overview of the legal reform

Content and scope of the legislation

The law that is the object of this analysis is titled "Law of the Republic of Azerbaijan on Media", adopted on 30 December 2021. The version used by this expert is an unofficial translation into English provided by the OSCE.

According to its brief preamble, the objective of this Law is to "determine the organisational, legal and economic bases of activity in the field of media, as well as general rules for the acquisition, preparation, transmission, production and dissemination of mass information."

The law includes the following Chapters:

- Chapter 1 on general provisions, including definitions of key concepts and other basic principles, rights and responsibilities.
- Chapter 2 on the different types of media entities.
- Chapter 3, focused on audiovisual media services.
- Chapter 4 on the competent regulatory body in the field of audiovisual media services.
- Chapter 5 on licensing of audiovisual media services.
- Chapter 6 on print media, online media and news agencies.
- Chapter 7 on the regulation of journalists' activities.
- Chapter 8 on the Media Register.
- Chapter 9 on final provisions.

Analysis of the provisions of the Law in light of applicable international standards

Key definitions

Article 1 of the Law contains a series of definitions of "key concepts". Some of these definitions are problematic in terms of language and scope and have direct implications vis-à-vis the interpretation and impact of provisions included in the rest of the Law.

Firstly, the mentioned article contains a definition of the concept of "mass information" ("information which is published and (or) disseminated by media entities for the purpose of imparting to an unlimited number of persons, and the acquisition, transmission, production and dissemination of which are not limited by the laws of the Republic of Azerbaijan"). This notion seems connected to the terms "mass media", or the same concept of "mass information" (*massovoi informatsii*) still used in the post-Soviet world. Such concepts usually refer to traditional journalism and media thus excluding other forms of dissemination of information[15]. Considering the need, according to international standards, that general media laws regulate and protect all forms of dissemination of

[15] See Richter, Andrei (2016): "Defining media freedom in international debates", *Global Media and Communication*, 1-16.

information, including non-traditional ones, the mentioned notion is too limited and may restrict the protection provided by the Law to the exercise of the right to disseminate information by any possible means. It is therefore recommended to replace it with a broader definition of the right to seek, receive and impart information.

Secondly, article 1 also contains a definition of "journalist" ("a person who works on the basis of an employment agreement at a media entity or individually based on copyright on the basis of an independent contractor agreement, whose main activity is to continuously collect, prepare, edit, produce and transmit information, as well as to express an opinion (to comment) on that information, and who performs this activity for the purpose of gaining an income"). This definition is very limited and does not encompass, as mentioned in the previous paragraph, the new notion of media and journalism currently embraced by international standards, thus also limiting the protection to be granted by the State to those exercising the right to seek, receive and impart information. Therefore, this definition needs to be amended accordingly.

Thirdly, the above-mentioned article separately defines audiovisual media, print media and online media. In order to provide a proper and consistent regulation applicable to different forms of expression and distribution platforms, it is advised to replace this categorisation with a basic separation between written media (either on paper, online or any other format) and audiovisual media (independent from the distribution technology, i.e, terrestrial frequencies, satellite, cable, IP or the open Internet). This would facilitate a more consistent approach and the adoption of regulatory frameworks that avoid introducing arbitrary, discriminatory or inconsistent burdens or restrictions.

Finally, this article also contains separate definitions of the notions of platform broadcaster, infrastructure operator, multiplex operator, platform operator, and on-demand broadcast service provider. Once again, these definitions introduce excessive and unjustified differentiations that may negatively affect legal certainty and potentially lead to unnecessary restrictions. It is recommended, in line with regional standards as well as the comparative best practices of the European Union's law, to articulate a basic difference between media services and distribution/transmission services, based on the presence (or lack) of editorial responsibility. The latter needs to be understood as the capacity to adopt a final decision regarding the offer of a programme for broadcasting in accordance with a fixed programing schedule or for on demand viewing from a catalogue. According to this, it is thus recommended to replace the mentioned set of definitions with the following ones:

a) Audiovisual services provider (either traditional broadcasters or on-demand services providers), based on the notion of editorial responsibility.
b) Platform/distribution/transmission services as those provided by operators that do not take editorial decisions regarding the content they facilitate.
c) A possible distinct reference to multiplex operators, considering the specific characteristics and technical constraints connected to the provision of terrestrial digital broadcasting.

It is also important to note in the Law that in some cases one single entity may be considered to fall under more than one category, depending on the nature of the provided services and due to the growing tendency towards convergence in the media sector.

Scope of the Law

Article 3 refers to the scope of application to the Law, mentioning that it also pertains to "media entities which are located outside the Republic of Azerbaijan and whose activities are oriented to the territory and population of the Republic of Azerbaijan". This expansion of jurisdiction and regulatory powers beyond the sovereign territory of Azerbaijan is incompatible with regional standards and best comparative practices, based on the principle of country of origin. Establishing by Law such extraterritorial powers may lead to problems of enforceability as well as possible conflicts and inconsistencies with the exercise of legitimate regulatory powers by other States in their own territory.

State responsibilities in the field of the media

Article 4 refers to State's responsibilities in the field of the media. Although most of them are aligned with applicable international and regional standards, two remarks are necessary to make:

a) It is important to note that no reference is made to the main and most important responsibility of State authorities, consisting of properly protecting and creating the conditions for a full exercise of the fundamental rights to freedom of expression and freedom of information.
b) The reference included in paragraph 7 to the responsibility to "ensure the security of the media space of the Republic of Azerbaijan" sounds extremely vague and may lead to restrictions based on a vague notion of "security" (for example, so-called "information security" or "cultural security").

Restrictions to freedom of expression in exceptional or emergency circumstances

Articles 7, 8 and 9 refer to possible and very broad restrictions to be potentially imposed on media, based on the provisions included in the applicable legislation on martial law, state of emergency, combatting religious extremism and combatting terrorism. It is not possible, within the context of this analysis, to provide an in-depth analysis of the mentioned legislation. However, it is important to note that all participating States of the Organization for Security and Co-operation in Europe committed themselves to maintaining freedom of expression and freedom of information under such situations, "with a view to enabling public discussion on the observance of human rights and fundamental freedoms as well as on the lifting of the state of public emergency." It was in this regard, that they pledged to "take no measures aimed at barring journalists from the legitimate exercise of their profession other than those strictly required by the exigencies of the situation." [16]

Therefore:

a) Possible restrictions to the right to freedom of expression and freedom of information (particularly those that might be particularly intense or burdensome) need to be properly defined and delimitated by media laws and not through mere references to other pieces of legislation.
b) The mentioned sector-specific legislation contains very general and broad powers

[16] Document of the Moscow Meeting, 1991, https://www.osce.org/files/f/documents/2/3/14310.pdf

that allow Azerbaijani authorities to intervene and impose restrictions to many fundamental rights. These provisions do not contain clear, specific and sufficient safeguards to guarantee that those measures will respect the principles of legality, necessity and proportionality, particularly vis-à-vis freedom of expression and the activities of media and journalists.

Therefore, the references included in the mentioned articles must be replaced, if needed, by clear and specific provisions properly aligned with applicable international standards.

Foreign correspondents

Article 11 regulates the activities of foreign media representatives in the territory of Azerbaijan. Paragraph 4 of this article particularly establishes that if "other states impose special restrictions on the professional activities of journalists included in the Media Register, similar restrictions may be imposed in the Republic of Azerbaijan on journalists from the states which imposed those restrictions". It is obvious this strict reciprocity may lead to the imposition of limits and restrictions that would be incompatible with the way freedom of expression is protected not only by international and regional standards, such as the Helsinki Final Act, but also by Azerbaijani national legislation itself. It is important to underscore that the human right to freedom of expression and freedom of information is protected, according to international law, vis-à-vis "everyone", including non-nationals in a foreign territory. The fact that third countries violate freedom of expression standards would not be a sufficient basis in itself to justify the adoption of reciprocal measures at the national level. Therefore, this provision needs to be eliminated.

Media logos

Article 12 contains very specific, detailed and cumbersome provisions and requirements regarding the adoption, by media organizations, of a logo or emblem, as well as the introduction of possible changes. These concrete regulations and restrictions are clearly excessive and do not respond to any clear and justified necessity stated in the law. Adopting a specific logo or emblem is part of the expression rights of each media company, as well as of their own commercial and entrepreneurial freedom. Therefore, these provisions must be eliminated (with the only exception of the restrictions related to the use of official emblems).

Use of information

Article 13 establishes that media entities, in the absence of any agreement or contract, "may only use not more than one third of every piece of information of another media entity and must provide a reference to it". This provision is in principle reasonable and in line with similar rules existing for example, in European Union law. However, this quantification ("one third") is not grounded on any basis and in addition may lead to complex calculations and potential disagreements and conflicts. It is therefore recommended, when it comes to the use content quotas in general, to refer to the applicable rules in the field of copyright/intellectual property.

In addition to this, it would also be advisable to establish a series of criteria regarding the identification of high public interest events in order to consequently grant media organizations that do not have exclusive transmission rights the permission to use

excerpts of such broadcasts for news programmes only.

Requirements regarding information published and disseminated by the media

Article 14 contains a series of very problematic restrictions and prohibitions regarding media content in general, including disrespect for State symbols, propagation (sic!) of terrorism, religious extremism, violence and cruelty (sic!), words and gestures with immoral (sic!) lexical, humiliation of honour and dignity, and tarnishing of business reputation, actions that are contrary to the protection of health and the environment, and parapsychology (psychics, mediums, etc.), superstition or other kinds of fanaticism, among others.

It needs to be reminded that the European Court of Human Rights (ECtHR) has established since its first decision on freedom of expression (*Handyside v United Kingdom)*[17], that such right does not only cover ""information" or "ideas" that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society"".

Regarding for example the desecration of national symbols, in the case of *Christian Democratic Party v Moldova*[18] the ECtHR considers that the burning of flags can be, in certain contexts, a legitimate way to disseminate political opinions: "In the present case also the Court finds that the applicant party's slogans, even if accompanied by the burning of flags and pictures, was a form of expressing an opinion in respect of an issue of major public interest, namely the presence of Russian troops on the territory of Moldova.

When it comes to terrorism, the United Nations Special Rapporteur on the promotion and protection of fundamental human rights and freedoms in the fight against terrorism has emphasized the need to restrict the criminalization of expressions to cases in which there is a "message to the public with the intention of inciting the commission of a terrorist crime, provided that such conduct, whether it advocates a terrorist crime or otherwise, leads to a risk of one or more crimes of such a nature being committed".[19]

Considering all these standards, it can be concluded that some of the above-mentioned restrictions are unjustified and unnecessary as they either refer to very open categories which may also include a significant amount of protected speech (disrespect, cruelty, immorality, tarnishing businesses' reputation, fanaticism, etc.), or they lack basic legal certainty and other fundamental requirements regarding categories that would legitimize restrictions to freedom of expression (terrorism, public health, reputation, etc.). These provisions need to be either amended or repealed.

In addition to these, the prohibition regarding the publication or dissemination of "information about a person being guilty" without a valid court decision may be excessive and detrimental for the exercise of the right to freedom of expression. According to international standards and best practices, journalists shall properly inform about the

[17] http://hudoc.echr.coe.int/eng?i=001-57499
[18] http://hudoc.echr.coe.int/eng?i=001-72346
[19] Report dated December 22, 2010, number A/HRC/16/51: https://documents-ddsny.un.org/doc/UNDOC/GEN/G11/105/22/PDF/G1110522.pdf?OpenElement

details of ongoing or finished legal proceedings, particularly with regards to a proper presentation of the facts and a proper contextualization of the stage and consequences of each decision taken by judicial authorities. Therefore, they must not be prevented from expressing their own views and opinions on the case or even to publish their own findings and conclusions (even if they may diverge from what is being discussed by the court). The only (exceptional) limit would concur in cases when it can be clearly justified by the court that the "parallel" reporting by the media truly endangers or balks the outcome and fairness of the judicial investigation. Therefore, the mentioned prohibition must also be eliminated.

Cases when information must not be disseminated, and the sources of information must not be disclosed

Article 15 contains a series of restrictions regarding the publication of information regarding criminal investigations, prosecutions or administrative violation cases. As mentioned in the previous epigraph, journalists and media must be able to report on criminal and administrative procedures related to cases or events of public interest. These activities shall take place without the necessary obtention of any prior authorisation or permission. Legislation can only introduce very specific and justified restrictions in this area regarding aspects such as the preservation of the identity of victims (in cases where there is an overriding interest in this sense) or in circumstances where public access to the case details may seriously harm the outcome of the ongoing investigations and other necessary formalities.

Article 15.3 refers to the possibility to require journalists and media to disclose the identity of confidential sources. These provisions are in principle correct although several important safeguards present in existing Council of Europe standards (for example, the absence of reasonable alternative measures) are not included. It is therefore recommended that this provision is amended and adapted to the series of requirements and language incorporated into the Recommendation R(2000)7 of the Committee of Ministers of the Council of Europe to member states on the right of journalists not to disclose their sources of information.[20]

Right to access to information

Article 17 contains a series of specific rules regarding the right to obtain information from public bodies by journalists and media institutions. Considering the very specific nature of this right, it is recommended for the Law to refer to the specific legal provisions existing in this area, particularly the Law of the Republic of Azerbaijan "On Access to Information" of 19 June 1998. It is not the object of this analysis to determine the correctness of such law in terms of applicable standards[21]. However, it is important to underscore the advantages to have a single piece of legislation covering all aspects of the exercise of the right to access to information (including by media and journalists).

The right to deny, correct and respond

Articles 18 and 19 contain the provisions applicable to the exercise of the right to deny,

[20] https://rm.coe.int/16805e2fd2
[21] See the analysis published by the Council of Europe in 2017. Available online at: https://rm.coe.int/azerbaijan-analysis-of-legislation-on-access-to-information-december-2/16808ae03c

correct and response information. These rights are connected to the dissemination of information that "tarnishes an individual's dignity and honour, an individual's or a legal entity's business reputation, or libel and insults, and distorts opinions". It also entitles affected individuals or incorporations to "demand that the media entity deny and correct the false information and issue an apology".

Although the provisions included in these articles are essentially in line with international and regional standards, it would be necessary to amend the first paragraph of article 18 to establish the requirement that the disseminated information is untrue or inaccurate, to eliminate the reference to "distort opinions" (as the right to reply can only refer to facts) and to the need to "issue an apology" (which is not recognised as a component of the mentioned right but goes against freedom of expression).

Publication of secret information

Article 21 of the Law allows the use or dissemination of secret audio and video recordings and photographs only in very specific cases: when the affected person has provided written consent and on the basis of a court ruling.

The use of secret or hidden recording mechanisms is a journalistic practice that may raise serious legal and ethical issues. It is also clear that journalists must aim at obtaining information using means that do not involve such deceptive practices. However, in some cases there might be an overriding interest to obtain information of *significant public interest* in absence of viable alternative means. Therefore, the Law should accept the use of secret or hidden recording techniques in the mentioned cases, provided that the rights of affected and third parties are protected, and the information disclosed is strictly necessary in terms of reporting on issues of public interest.

Media entities

Article 26 of the Law establishes a series of general requirements regarding the establishment of media entities. They include problematic exigencies such as being a citizen of Azerbaijan with a permanent residency in the country, as well as the prohibition to establish a media entity in the cases of persons previously convicted of serious or particularly serious crimes, as well as crimes against public morality, persons whose convictions have not been served or revoked, persons who are regarded by a court as having no or limited legal capacity, political parties (except print media) and religious organisations (except print media).

Freedom of expression and particularly freedom of the information are basic and universally protected human rights that can only be restricted under very exceptional, necessary and proportionate circumstances. In the present case, the mentioned prohibitions will exclude and prevent certain individuals from exercising their right to freedom of expression through any type of media, which represents an extreme measure and the de facto complete silencing of these individuals (and corporations). In addition to this, these restrictions are to be adopted based on very broadly drafted and completely unjustified and unnecessary circumstances (see for example the very open to interpretation reference to serious crimes and crimes against public morality). Therefore, this article contains very broad and unnecessary restrictions that may seriously limit the possibility for a relevant number of individuals and legal

incorporations to have access to the public sphere through the creation of media entities. Such restrictions need to be repealed.

Finally, limitations included in article 26.4 regarding foreign ownership or funding of media organizations in Azerbaijan are unnecessary and disproportionate and therefore are recommended to be eliminated.

Audiovisual media

Chapter 3 of the Law is devoted to regulating the provision of audiovisual media services. Chapter 5 refers to the connected matter of licensing audiovisual media.

It is now important to reiterate and underscore once again the need to reformulate the classification of entities involved in the provision of these services, in line with what has already been presented in the previous epigraph on key concepts (article 1 of the Law).

In this context, it is also advised to reformulate and simplify the legal regime established in the mentioned Chapters, to adapt it to the following basic legal principles (in order to avoid the imposition of excessive burdens and restrictions that would seriously stifle the exercise of the right to freedom of expression in this area):

a) Terrestrial broadcasters are subjected to the obtention of a prior license. The Law must also establish clear and transparent licensing procedures that guarantee that the tender process is conducted in a fair and objective manner. Pluralism and diversity of voices and editorial views, as well as avoiding excessive media concentration, must be particularly protected and promoted by tender criteria and selection procedures.
b) Audiovisual service providers using distribution/transmission platforms other than terrestrial frequencies (satellite, cable, IP, online platforms) must not be subjected to any license/prior authorisation regime, but to the requirement to provide the regulator with some basic information (address, ownership, general information about content offer, and identification of editorial responsibility).
c) Distribution/transmission platforms and networks that do not adopt direct editorial decisions regarding content/channels are only subjected to licensing/authorisation telecommunications regime, based on technical (not content) aspects.
d) Multiplex operators of terrestrial broadcasting may be subjected to specific licensing regimes related to the use of limited frequencies, as well as specific obligations such as "must-carry" duties.

Article 41.3 establishes the termination of audiovisual licenses in cases of "open calls for a forcible change of the constitutional order of the Republic of Azerbaijan, disintegration of its territorial integrity, forcible seizure or retention of power, mass riots, incitement to ethnic, racial or religious hatred and enmity, and terrorism, and also information oriented at financing of terrorism and organisation or conduct of trainings for the purpose of terrorism". The termination of a license is an extreme and very restrictive measure, in terms of freedom of expression, that is only necessary and proportionate in cases clearly established by law and when the harm directly caused by the dissemination of content overrides the essential need to protect the exercise of freedom of expression (including cases of dissemination of shocking, disturbing or offensive content). The circumstances

mentioned by the Law are indeed very serious. However, they are still presented in a very broad and open to interpretation language (mass riots, enmity, calls for disintegration, purpose of terrorism) that may give competent authorities the discretionary power to silence contentious yet protected speech. It is therefore recommended to amend this provision in order to clearly identify specific situations of clear or direct danger of violent acts directly connected to the dissemination of certain messages that might justify the adoption of such exceptional measures, on the basis of a transparent and fair process.

The Council

Article 43 of the Law establishes the Council as the body that "regulates the field of audiovisual media in the Republic of Azerbaijan". International and regional standards, and particularly the Recommendation Rec(2000)23 of the Committee of Ministers of the Council of Europe to member states on the independence and functions of regulatory authorities for the broadcasting sector, establish a series of clear criteria and parameters applicable to these bodies, which must have the capacity to properly regulate and protect the public interest in the media sector on an independent basis, while also protecting the right to freedom of expression.

Based on these standards, the following observations must be made regarding Chapter 4 of the Law:

a) Article 43.2 establishes that the Council is financed "from the state budget and other sources not prohibited by law". A key element to protect the independence of regulatory bodies is financial independence. It is therefore advised to introduce additional provisions establishing mechanisms that would guarantee the autonomy of the Council (for example, via the collection of their own fees) or eliminate the discretion of political bodies in this field (for example, by establishing a fixed percentage of the annual budget).
b) Article 45.2 provides that the structure and staff of the Council "shall be determined by a body (institution) designated by a relevant executive authority". Another basic pre-condition for regulatory independence would also be to clearly leave to the Council itself the power to take all the relevant decisions regarding its internal structure and staff.
c) Article 48 refers to the membership of the Council and the election of its members. These provisions are clearly insufficient to safeguard the independence of the authority as well as to respect the regional standards in this field. The Law would need to be amended in order to guarantee an independent and transparent selection and nomination process, as well as to avoid an appointment system that basically leaves in the hands of the Government (and therefore to political guidance and interests) the decision on who finally becomes a member of this institution.

Print media, online media and news agencies

Chapter 6 of the Law contains a series of provisions applicable to media entities classified and defined as print media, online media and news agencies. These provisions include some elements that may create unnecessary and unjustified restrictions to the right to freedom of expression.

Before introducing these problematic provisions, it is important to reiterate the already presented recommendation regarding the need to reformulate and simplify the classification and separation between "traditional" media (including print) and online media. Considering that online is nowadays just another platform for media distribution (therefore to be used to provide all kinds of media services, either as "online versions" of what is already disseminated via other supports, or as online media outlets of their own), the separated category of online media is simply redundant. Regarding specifically the Chapter under analysis in this epigraph, it is therefore advised to establish a single category of written media (either printed, online or both), taking also into account the following considerations:

a) Provisions included in article 59 regarding print media are excessively detailed. There is no need to pre-determine and classify by law all the different types and modalities of publications based on periodicity, thematic focus or geographic reach, among other criteria. It is recommended to merely introduce a basic definition of publication (on paper and online) based on the notion of dissemination of information and opinions on matters of public interest.
b) Although, according to article 62.1, prior authorisation from State authorities is not required to establish print and online media organizations, the Law is still excessively interventionist regarding the possibility for such authorities to restrict, suspend or terminate the provision of print and online media services. Circumstances such as media governing bodies being occupied by stateless or foreign individuals, persons who received administrative penalties, violations of general content prohibitions established by the Law, or the use of foreign funds cannot justify the restriction of the exercise of the right to freedom of expression by means of banning a whole media organization from operating. From a general point of view, responsibilities for the violation of legitimate restrictions of the right to freedom of expression (i.e., those established respecting the three-part test) are to be imposed on an individual basis. Only when a media organization continuously and tenaciously engages in flagrant violations of fundamental rights and public interest values (for example, via the dissemination of hate speech) the suspension of the whole organization's operations would be acceptable.
c) Specific provisions included in article 66 regarding the specific banning of the import and dissemination of foreign print media products are not justifiable, as they are based on the mere grounds of geographic origin and must therefore be eliminated.

Journalists' activities

Chapter 7 is focused on the regulation of the activities of journalists. This Chapter contains a series of provisions that are not aligned with applicable international and regional standards.

Before that, it is necessary to underscore that the already mentioned General Comment No. 34 concerning Article 19 of the International Covenant on Civil and Political Rights adopted on 29 June 2011 by the UN Human Rights Committee establishes the following:

> "Journalism is a function shared by a wide range of actors, including professional full-time reporters and analysts, as well as bloggers and others who engage in forms of self-publication in print, on the internet or elsewhere, and general State

systems of registration or licensing of journalists are incompatible with paragraph 3. Limited accreditation schemes are permissible only where necessary to provide journalists with privileged access to certain places and, or events. Such schemes should be applied in a manner that is non-discriminatory and compatible with article 19 and other provisions of the Covenant, based on objective criteria and taking into account that journalism is a function shared by a wide range of actors."

Based on the above, the following considerations need to be presented:

a) The right to seek, receive and impart information is a human right protected and granted to "everyone". Even tough this does not mean that everyone becomes automatically a journalist, international law prohibits the prior intervention of any State authority as a pre-condition for the exercise of journalistic activities. Moreover, the exercise of this kind of activities cannot, in general, be subjected to any requisite such as residence, nationality, professional status or education. As the UN Special Rapporteur on Freedom of Opinion and Freedom of Expression has established, journalism needs to be connected to the function of collection and dissemination and not merely the specific profession of journalist[22]. Therefore, provisions regarding the need for an individual to obtain a card or any other authorisation from the Azerbaijani authorities in order to be considered and protected as journalists need to be repealed.
b) Article 74.2 in Chapter 8 (Media Register) establishes a series of requisites for journalists to be included in the Media Register. It is necessary once again to reiterate the incompatibility of registering mechanisms for journalists under international human rights law. In addition to this, establishing specific requisites in order to obtain the professional consideration as journalist (higher education, legal capacity, absence of criminal or administrative infractions record, continuous operation, labour contract, etc.) is, as already mentioned, also incompatible with applicable standards and must therefore be eliminated. Other requirements such as respect for ethical standards are acceptable as guiding principles for the activity but not as pre-requisites for its exercise.

[22] Report of 8 September 2015. A/70/361. Paragraph 17.