



THE REPRESENTATIVE ON FREEDOM OF THE MEDIA

**21ST CENTURY CHALLENGES FOR THE
MEDIA IN THE SOUTH CAUCASUS:**

Dealing with Libel and Freedom of Information

FIRST SOUTH CAUCASUS MEDIA CONFERENCE
TBILISI, 25-26 OCTOBER 2004

Vienna 2005

The cover is a drawing by the German author and Nobel prize laureate (1999), Günter Grass, *Des Schreibers Hand (The Writer's Hand)*.

He gave his kind permission for its use as the logo of the publications of the OSCE Representative on Freedom of the Media.

The drawing was created in the context of his novel *Das Treffen in Telgte*, dealing with the literary authors of the time of the Thirty Years War.

This publication is dedicated to Elmar Huseynov, who was murdered in Baku on 2 March 2005. Elmar will always remain in our memories as a courageous journalist and a fighter for freedom of expression in his country, Azerbaijan.

The views expressed by the authors in this publication are their own and do not necessarily reflect the views of the OSCE Representative on Freedom of the Media.

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ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE
THE REPRESENTATIVE ON FREEDOM OF THE MEDIA
AND
THE OSCE MISSION TO GEORGIA

**FIRST SOUTH CAUCASUS MEDIA CONFERENCE
TBILISI**

*21st Century Challenges for the Media in South Caucasus:
Dealing with Libel and Freedom of Information
25-26 October 2004*

On 25 and 26 October 2004, the First South Caucasus Media Conference was held in Tbilisi, Georgia. The Conference was organised by the OSCE Representative on Freedom of the Media, **Miklos Haraszti**, in cooperation with the OSCE Mission to Georgia.

For the first time journalists and NGOs from Armenia, Azerbaijan and Georgia, as well as international experts, came together to discuss their common problems. The conference focused on **Libel and Legislation on Freedom of Information** as modern challenges for the media in the 21st century.

The conference heard that obsolete **defamation** laws are detrimental to democratic reforms when freedom of the press and uninhibited discussion of public issues are chilled by the use of these laws. There was also a discussion of the positive developments in three countries. Earlier this year Georgia became one of the six OSCE participating States decriminalising defamation. Armenia also took an important step forward by reducing criminal penalties for libel. The process of elaboration of the new Law regulating defamation, libel issues and protection of honour and dignity has started in Azerbaijan.

The conference participants also stated that **access to official information** remains a major problem area for the media in the three South Caucasus states. Among the major obstacles the journalists highlighted were: the poor implementation of existing laws on access to information;

excessive state secrets' laws and criminal penalties for their violations; lack of public awareness of legal rights to access to information; and lack of professionalism among the media.

Participants encouraged the OSCE Representative on Freedom of the Media to continue the South Caucasus Media Conferences in the future.

The Conference ended with a **Declaration** on libel and freedom of information, to which all participants subscribed.

The Tbilisi Declaration on Libel and Freedom of Information ***On Defamation:***

- Executive and legislative authorities at all levels should systematically review all legal norms including laws, regulations, decrees and other legal instruments, that impose criminal and civil sanctions for defamation. This review should be in consultation with the judiciary, media and civil society organisations. The changes should include:
 - In Armenia and Azerbaijan, criminal defamation laws should be eliminated and replaced with appropriate and narrowly defined civil defamation laws. As a first step, at least prison sentences should be abolished including suspended ones. If decriminalisation is not possible in the short term, all current cases should be stopped and a moratorium on further cases should be imposed. All persons imprisoned for these offences should be released and rehabilitated.
 - Public bodies should not be eligible to use defamation laws. Under the law, public officials and elected representatives should be prohibited from using defamation laws to suppress legitimate criticism of their activities or limit political debate.
 - Specific criminal and civil laws for insulting heads of state should be abolished.
 - Civil defamation laws should be revised based on established international standards and best practices. The burden of proving falsehood should always be placed on the person who is complaining. Even in cases of factual inaccuracies, there

should be a defence of ‘reasonable publication’ available.

- In parallel to decriminalisation, civil damages should be limited to what is clearly necessary only to repair the harm done by the defamatory statement and take into account the effect of the award on the ability of the defendant to continue to exercise their profession. Laws should define an upper limit for damages.
- Media should develop, promote and observe professional and ethical standards. Governments should not obstruct efforts by media to establish professional bodies and create self-regulatory mechanisms.
- Specialised non-governmental organisations should conduct ongoing monitoring and regularly report on the use of these laws. They should provide training to media on their legal rights and obligations.

On Freedom of Information:

- Executive and legislative authorities at all levels should systematically review all legal norms including laws, regulations, decrees and other legal instruments, that affect access to information held by public bodies. This review should be in consultation with the judiciary, media and civil society organisations. The changes should include:

Regarding Freedom of Information and Related Laws:

- The adoption of a comprehensive law on Free Access to Information based on international standards should be finalised in Azerbaijan.
- All three countries should develop a strategy jointly with the media and NGOs and a comprehensive strategy for the implementation of the laws.
- All public institutions and government departments should establish procedures and mechanisms (training, public hours, appointment of information officers, setting up information management systems, creating and maintaining official web sites) to effectively enable the media and the public to access information held by the institution.
- Official web sites should be established, maintained and regularly updated.

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- Oversight over the observation of these laws and standards should be ensured and carried out by parliaments, parliamentary commissions open to the public, commissions of public hearings and an independent information commission.
 - Laws should be developed to create an independent review mechanism to provide protection for ‘whistleblowers’.

Regarding State Secrets:

- The State Secrets Acts and regulations should be amended in order to limit their applicability only to that information whose disclosure would significantly threaten the national security or territorial integrity of a nation.
- Rules by which information is classified should be made public. Information should be classified within a short period of being created. Information classified as secret should be reviewed periodically and be declassified no later than 20 years after it was classified. Independent bodies which review classification decisions should be created, such as ombudsmen or information commissioners.
- Criminal liability connected with the disclosure of state secrets should be limited in cases of public interest. Journalists should not be required to disclose their sources.

The Judiciary

- The independence of the judiciary has to be strengthened in order to effectively enforce the right to freedom of information.

The Media and NGOs

- Should promote awareness of access to information laws and monitor their use.
- Investigate all illegal restrictions on freedom of information, attacks on journalists, cases of punishment of journalists for seeking and publishing information regarded to be of public interest.
- The media should know their rights to access information under existing legislation and use those rights. Unlawful denials should be challenged and publicized.

Tbilisi, 26 October 2004

GIORGI GOMIASHVILI

WELCOMING REMARKS

Mr. Chairman, Ladies and Gentlemen

It is both a pleasure and an honor to be in the midst of you today and to have the opportunity to warmly greet the participants of the First South Caucasus Media Conference. Allow me to express our deep gratitude to the organizers of this important event – the Office of the OSCE Representative on Freedom of the Media, and the OSCE Mission to Georgia – for their best efforts to make this Conference a success. It is a great honor for my country to host the Conference, for it attests to Georgia’s strong commitment to democratic principles, among which freedom of the media is one of the most important. As an advocate for and defender of freedoms of expression and media, Georgia wishes to thank the Representative on Freedom of the Media Mr. Miklos Haraszti for his work to protect these freedoms on the internet and in the traditional media. We also appreciate his efforts to promote personal safety for journalists, combat media laws criminalizing libel, and address intolerance in the media. Sadly however, restrictions on the media freedoms have continued to be a problem in the OSCE region. I believe that the honored participants will have the opportunity to address these problems during the Conference and return home with a better grasp of how best they can improve the situation in our respective countries. In extending to you my very best wishes for your success, let me tell you that all the freedoms we discuss at the meetings mean nothing unless we can communicate freely and openly about our hopes, ideas and aspirations for ourselves, and for each other. We all must seek to enshrine the freedoms of speech and press for future generations. Thank you.

MIKLOS HARASZTI

OPENING STATEMENT

Mr. Chairman, Ladies and Gentlemen, Dear Friends,

I am very pleased to welcome you all at our First South Caucasus Media Conference, which is organised by my Office in co-operation with the OSCE Mission to Georgia. I am extremely enthusiastic that we all came together in the beautiful Tbilisi where we enjoy the hospitality of the Georgian government.

The idea about the conference is not new. Journalists and representatives of media NGOs from Armenia, Azerbaijan and Georgia have often approached us expressing their desire to come together to discuss developments in the media field in their countries.

On the other hand, South Caucasus has long been in the focus of my Office. Apart from our regular monitoring activities, we try to contribute to a further development of a legal framework for free and independent media. We have commissioned a number of legal reviews in the past few years, many of them conducted together with Article 19 who are also present here today, and many of them related to the topics of this conference. We have had some training initiatives in the countries and we hope that this conference will conclude with concrete proposals for further initiatives.

Over the next two days we will mostly focus on two themes: Libel and Access to Information, so let me provide you with some of our thoughts on these two themes. Similar comments I made last week at the OSCE Permanent Council.

I am very pleased that Georgia is one the five OSCE participating States which have abolished *libel* as a criminal offence, and turned to its civil law based handling: the others are USA (although 17 states within this country still retain their criminal libel provisions), Moldova, Ukraine and Bosnia and Herzegovina. Also, I was very glad to hear that on 1 July, President Robert Kocharian signed amendments to the Criminal Code partially decriminalizing libel in Armenia.

The ancient libel laws are inadequate, even detrimental, to a modern democracy where freedom of the press and uninhibited discussion of public issues could be diminished by the effect of a criminal libel sentence used against journalists for their work.

In some of our participating States there is wide understanding of the need to provide journalists with a certain privilege when discussing issues of public importance. As with the protection of sources, journalists should also not be open to criminal prosecution or frivolous lawsuits even when the information that they disseminate might be false or derogatory. Weighed against the potential “chilling” effect, this privilege, if often questioned, should not be allowed to erode.

In general, I foresee for my Office several possible lobbying strategies regarding libel:

- Encourage parliamentarians to table proposals to repeal criminal libel legislation;
- Encourage government officials through public information campaigns to refrain from using existing criminal laws to sue the media and journalists;
- Encourage judicial bodies, where criminal libel does exist, to install a moratorium on issuing prison terms, even suspended ones, until the necessary reform;

My Office is currently in the process of developing a database matrix on libel legislation in the OSCE region. This matrix will also be accompanied by a legal analysis that will explain our findings, and help define the best ways to resolve the problem. I hope to present the matrix early next year.

On *access to information*, I plan to take a closer look how the relationship between the governments and the journalists actually works. One of the first steps is commissioning a report on the link between freedom of information and the media in South Caucasus, which has been distributed here and will be presented by Article 19 tomorrow.

We will discuss both libel and access to information with you and I very much look forward to your views, thoughts, steps forward.

Thank you.

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I.

**LATEST DEVELOPMENTS FOR THE MEDIA
IN THE SOUTH CAUCASUS**

Boris Navasardyan

RELATIONS BETWEEN POLITICS, SOCIETY
AND THE MEDIA IN ARMENIA

Chinqiz Sultansoy

MEDIA IN AZERBAIJAN: CURRENT STATUS, RECENT TRENDS
AND PROSPECTS FOR DEVELOPMENT

Levan Ramishvili

GEORGIAN MEDIA – PROBLEMS AND PROSPECTS

BORIS NAVASARDYAN**RELATIONS BETWEEN POLITICS,
SOCIETY AND THE MEDIA IN ARMENIA**

Ordinary people in Armenia treat the press and journalists the way people in any other normal country do. They are like well-bred children who would wince at cod-liver oil and yet take it moderately as a very wholesome thing. However, there are people – let us call them “bad guys” – who don’t like this “cod-liver oil” and try to change its substance in line with their own tastes to obtain cola, vodka or some other thing as a result. Regrettably, it is these people who eventually end up in possession of the main national resources, including those that are responsible for the state of the media.

Hardly had the Armenian press relaxed, in the early 1990s, after 70 years of Soviet experiments on itself, as new-generation politicians, or, more precisely, political parties of the independent Republic of Armenia, took to breeding the kind of “media variety” that would suit them. It was they who emerged as the decision-making elite in the first years of independence. By the mid-1990s, the **mass media** had practically been wiped out and their place taken by the **mass agitation and propaganda media – agitprop (MAPM)**. Each newspaper sought to prove that the party or political group that stood behind it was the sole champion of national interests, while all its opponents were leading the nation to the brink of an abyss. The state-owned MAPM were in the lead where the defence of narrowly partisan and group interests was concerned. Whenever the authorities failed to gain an overwhelming superiority in the purely ideological sense, they took controversy to a sphere where their arguments proved irrefutable. I mean bans and clampdowns on the opposition press, as well as the posing of insurmountable economic, bureaucratic and legal obstacles in its way. An unprecedented thing in this sense happened in 1995, when over a dozen opposition newspapers were shut down at a go.

This outrage upon freedom of speech couldn't but change the mass attitudes to the press. While people lined for hours before news stands in 1991 and 1992 and new editions were published in 50,000 to 70,000 copies, the subsequent years saw a steady decline in reader demand for printed periodicals. For some time, ordinary people, who were after their regular "cod-liver oil", were fed a variety of "cola" (or some other substance) instead. Seeing that they were deceived, they got what they wanted by mixing whatever was on offer. An objective picture was gleaned from several diverse editions that covered one and the same event or problem. However, it became increasingly hard to filter real information from the rising stream of propaganda "cola". Apart from the fact that the job required titanic intellectual efforts, few ordinary Armenians could afford buying the press.

Thus, newspapers increasingly adjusted to tastes of the "bad guys", turning into the elite media that only professionals capable of extracting "cod-liver oil" from any "liquid" could access. Ordinary readers drifted farther and farther away from the press and sought to replenish their store of information vitamins from other sources. A sociological poll taken in the late 1990s revealed that "conversations with friends" ranked third among information sources in Armenia. Semyon Narinyani, a popular composer of satirical articles in the Soviet period, would have called this source "A Grapevine News Agency" (GNA). We know well why the GNA was so popular in the Soviet era, but its persistence is a bad sign for society in the epoch of freedom of speech and pluralism.

Journalists have certainly tried to perform their professional mission of informing the public about all important events as promptly and objectively as possible. Yet, they succeed in doing so only occasionally to time and, as a rule, contrary to their masters' expectations. A characteristic situation took shape immediately in the wake of the shooting attack in Parliament five years ago, which left the nation almost without leaders. While overlords of the national press (and of much else) were all at sea, attempting to find their bearings in a radically changed political set-up, the media obeyed the dictates of journalistic conscience and gave the public, within the brief spell of one or two days, all that was required

of the **media**. But as soon as new political priorities took shape, the journalists and the press, both printed and electronic, were spirited away to opposing camps, and surrogate was again substituted for the natural media product.

Accusing the education system of supposedly being unable to provide the media with able young journalists is a rather widespread thing in post-Soviet Armenia. Some of my colleagues are seeking to explain all the problems besetting the national journalistic community precisely by this circumstance. In reality, the problem lies elsewhere, even though the system of training in journalism does need a major overhaul. Professional skill levels of journalists are in line with the demand shaped by the present-day Armenian press. It is far from always, regrettably, that its *modus operandi* can be an incentive on the way to the heights of professionalism or standards set by the leading world media.

Number one problem in this sense is associated with the sources for the media, and is summarized by this traditional question: Who calls the tune? A rough analysis of the market suggests the following picture: leading by a long shot in amounts of financial resources channelled to the media are different kinds of sponsor aid and investments by financial and business circles (the lion's share of inputs comes from several oligarchic groups); second place goes to the advertising business, with most of the money being consumed by television and other media subsisting on crumbs from its table; third place belongs to direct subsidies from the state budget, and Armenia's Public Television and Radio Company is without rival as their consumer, enjoying as it does much fatter budget benefits than the National Academy of Sciences; direct or indirect grants from political parties and blocs are in fourth place; earnings from media product sales are in fifth place; and aid from international organizations and funds is in sixth place. A rough breakdown of the sources of financing based on which of them shape the order for "good", quality journalism ("cod-liver oil", to use the earlier term) and those favouring "bad" journalism (all other substances) will clearly demonstrate that the resources available to the "bad guys", i.e. customers ordering "bad" journalism, are much more powerful: they rank first, third and fourth on the list of the main sources.

Certainly, this classification is quite conditional: now and then public television and radio would come up with quality productions, while, on the other hand, advertisement payments are often a cover for political sponsorship. But this does not change the overall situation: the media fulfilling the **order of definite political, oligarchic circles** make much more money than the media seeking to **meet broad consumer demand for topical and unbiased information**. One consequence of this is a broad discrepancy between the supply dictated by the main customer and mass consumer demand. Repeated surveys revealed that various home policy issues ranked first in press coverage. The public, meanwhile, was primarily interested in international and social problems that held the sixth and the eleventh place, respectively, in terms of press coverage. The chances to live up to the best standards in journalism and to public expectations were not all that frequent, much as media professionals might have wished it to be otherwise.

The alert listener must have realized by now that, by comparison with the period I described somewhat earlier, the image of the mass media in present-day Armenia is shaped by the oligarchic groups, rather than political parties. To a certain extent, this alters the nature of journalism, and whether it is for better or for worse is still a moot question. In the mid-1990s, we complained that the printed media (MAPM) were being polarized on the partisan principle. But for all their bias, the positions and approaches by the press to some problem or other were, on the whole, clear and explainable, at least for a portion of the audience. By contrast, the goals and interests of the oligarchic clans, whose clashes are reflected in the media and increasingly influence the media content, are not expounded in any charters, programmes or manifestos, and the public is informed about them to a much lesser extent than it is about party platforms. Thus, the reader is left with no choice other than skipping over the mysterious press exchanges between different groups of the oligarchic superelite and turning to pulp fiction and shows. Television, including Russian television, is what serves to quell the information hunger, whereas formerly the socio-political information press had a thankful reader in the person of the Armenian public. A lively public interest in current processes is due

to the stormy events of the last few years, a host of outstanding problems both on the national and regional plane, and traditionally high literacy levels. Yet, the information hunger remains unequalled, and this hits hard the printed media by virtue of slumping print-runs and the country as a whole as failing to use the nation's civic potential. What we have now is a vicious circle of sorts: the press needs a broad readership in order to become financially independent from political sponsors, while the public at large are prepared to pay only those press bodies that meet their interests rather than those of a narrow group of moneybags. Clearly, it is the media that should break the circle. To date, however, the few attempts made to date at getting off the gravy train and taking to the open sea of a civilized information market proved unsuccessful.

With the media market in this specific state, there are, regrettably, some members of our profession who have chosen to lie down and are trying to enjoy it. Those pleased with amounts of remuneration are managing to look quite respectable. On the contrary, those who believe that they have been done out of their fair share and deserve a bigger chunk of the oligarchic pie would resort to various forms of journalistic racket, working with perseverance and imagination on a solvent customer until the latter is ready to see the need for sharing. True enough, doing so is a delicate and high-risk thing. Far from all potential sponsors respect the Criminal Code: lacking the necessary skills, arguments and self-possession, a media racketeer risks getting a concussion of the brain instead of a chunk of the pie, along with a convincing advice to the effect that he or she should never again dabble in journalism (if the above has the right to be called that).

But an optimistic view of things is a reality, too. It is based on the postulate that there is no such thing as complete media independence, and therefore one should rather speak of the media's independence of the state. It already means that some progress is in evidence if the government share in media property and spending declines, and this is precisely what one currently observes in Armenia. In fact, 60 private broadcasting companies is an impressive sight, but obviously we must consider not only their legal status but also the interests behind them and how they affect the content of broadcasts. Television is of most importance in this context, because,

as I already said, it dominates the news market and therefore has a huge impact on the shaping of public views. The saying “whoever controls television is in power” is totally true of Armenia. The majority of private national and Yerevan-based television channels, at least those wielding some political influence, are owned by big businessmen who in some way or other are linked with the authorities. Add to this the Public Television and Radio Company, Armenia’s most powerful media body in terms of coverage, which is controlled by a Board whose members are appointed by the President himself. Also note that groups of businessmen loyal to the authorities prevail among the advertisers and advertising agencies. Keeping that in mind, you will see that “private” and “public” are by far not the same things as “independent” and “politically neutral”.

To be sure, the authorities do not rely just on the abstract loyalty of broadcasters – they need institutional guarantees. The chief supervisor is the National Commission for Television and Radio, whose members, like those of the Board of the Public Television and Radio Company, are appointed exclusively and personally by the President of the Republic of Armenia. This body is in charge of the tender-based allocation of radio frequencies, and has a duty to see to it that private television and radio companies comply with their license and Armenian legislation. Its main “achievement” is that one of the first and most popular Armenian TV channels, A1+, has lost eight frequency tenders and been off the air for 30 months already for the sole reason that its operation couldn’t have been controlled from on-high. The Commission can selectively punish or pardon, since it is practically impossible to comply with all the requirements of legislation. Thus, the authorities have built a system that enables them not only to influence the content of telecasts but also regulate the process of TV companies changing hands. This means that no TV company can be sold or purchased without an appropriate authorization.

Clearly, all of that occurs behind the scenes, and looks quite decent and in line with the civilized legal standards on the surface. But far from everyone believes it is true. Where A1+ is concerned, different local and international organizations appeal, for some unknown reason, to the President, and he has to explain that the National Commission for

Television and Radio (NCTR) he formed is an independent structure and that he, for all his liking for the television channel in question, is unable to reverse the NCTR decision that took it off the air. The presidential staff was even more bewildered by a recent address by the Radio Free Europe/Radio Liberty Director, Thomas Dine, who asked to put back on the air a suspended series of televised shows his own company had made by preliminary agreement with one of private TV companies. The RA President's press secretary explained to Mr. Dine in easy-to-understand terms that "the 2003 Law on the Mass Media rules out any possibility of governmental interference in the professional activities of the press..."

It could still be too early for the members of the Armenian media community, like their colleagues in Georgia and Azerbaijan, to report about any achievements in the area of freedom of speech. Our heads of state are doing that for us, with a vengeance. Moreover, these achievements are as yet fragile, while problems are fundamental. Armenia is finding itself somewhat ahead of its neighbours in the Southern Caucasus in reforming its media legislation on the basis of obligations to the Council of Europe (I mean the quantitative, not qualitative, aspect of reform, for we are likely to be inferior to Georgia in terms of real freedom of the press), and therefore I strongly recommend my colleagues to study closely not only the experience of advanced European countries but also our experience, in order to avoid at least some, if not all, "traps" capable of turning the most liberal procedures into mechanisms for restricting freedom of speech. This recommendation applies, perhaps, above all, to European experts aiding our countries to improve their legislations: it is even more difficult for them (than for us locally) to discern the said "traps" in draft laws submitted for review. Besides, they will find it particularly useful to watch practical effects of concrete legal provisions on the specific post-Soviet soil of the southern Caucasus.

This report would have been incomplete if it did not suggest some ways of dealing with the problems I mentioned. The above analysis of the situation shows that the state-oligarchic monopoly on the media is the main threat to freedom of speech in Armenia, a monopoly based not so much on force as on the pseudo-market and pseudo-legal mechanisms

which I attempted to describe. And it is on creating some alternatives to this monopoly that an independent media advancement strategy should be built.

First, measures designed to ease the economic burden lying on the press. The Armenian media are the sole sector that got nothing from the privatization of the news and publishing infrastructure. The state-owned premises rented by the editorial boards are the only thing which is yet to be sold. The private media should be granted easy terms so that they might become owners of at least those premises. (Claims that it is necessary to fill up the budget by facilities privatization are out of place in this case: the budget will somehow cope with the minor losses involved in granting benefits to the press if it did in a situation where facilities worth, in real terms, millions of dollars were privatized for several dozen thousand dollars. Real estate ownership is an important jumping-board for independent businesses. Besides, each year the state budget allocates certain funds for supporting the independent media, but it is not clear what yardstick is used to share these funds. Meanwhile, the media community has long suggested using these funds for pro rata compensation of the taxes paid by the press. That will encourage transparency in media finances and impel at least some of the media to renounce “shadow” deals.

Second, high-quality, objective journalism at the level of Radio Liberty standards should be encouraged. Radio Liberty will find it hard to change the information climate in my country single-handedly, but the situation will not look as hopeless as it does now if positive examples multiply. The 7.5 million dollars in USAID appropriations for independent media support over the next four to five years might go a long way in helping put this idea into practice. It is a lot of money for the Armenian media market, and it might form a worthy counterbalance to resources invested in “bad” journalism. Yet, Armenia’s media landscape is unlikely to change much if the project is implemented on USAID-formulated terms. There are, regrettably, too many examples of well-wishing waste of resources where an adequate understanding of what a concrete country needs is lacking. At the same time, this means that we have an unutilized resource which can be activated.

Third, international organizations with an undoubted influence on processes underway in our countries should be more consistent. I mean, in the first place, the Council of Europe and the OSCE. In 2000, several months before the accession to the CoE, Armenia's Parliament passed the Law on Television and Radio, which was most openly at variance with several fundamental standards recommended by the CoE Committee of Ministers. But Strasbourg's reaction was not particularly negative. During the next four years, Armenia's Parliament, far from upgrading the law, even though there were numerous documents urging it to do so, approved a series of amendments enabling the authorities to strengthen their grip on the broadcasting sphere. Nevertheless, judging by the latest PACE resolution on Armenia's compliance with its obligations, Strasbourg seems unperturbed by this sabotage. Tolerance of this sort is unlikely to help the real reforms.

Fourth, self-regulation principles should be introduced for use in Armenia's media. Leading Armenian journalists are increasingly conscious of their inability to oppose the dictates of oligarchic ethics single-handedly. They come to realize the need for self-defence against laws and judicial practices that restrict freedom of speech. To save their industry from total disrepute in the eyes of the public, they are ready to put forward their code of corporate ethics and their own system of settling media conflicts as an alternative. Bridging the political gap between journalists is a difficult task, but the industry's self-preservation instinct, given competent intervention and encouragement from non-governmental associations and international institutions, should do the trick.

As is evident from the above incomplete list of measures, joint efforts by governmental agencies, the media community itself and international organizations are needed if the situation in the Armenian media is to be improved. A group similar to the one created at the initiative of the OSCE mission to Yerevan might undertake to coordinate this work.

CHINQIZ SULTANSOY

MEDIA IN AZERBAIJAN: CURRENT STATUS, RECENT TRENDS AND PROSPECTS FOR DEVELOPMENT

This report attempts to describe briefly the state of affairs with respect to observance of journalist and media rights in Azerbaijan in 2004. Data from 2003 will be cited for comparison, as 2003 was the year of the presidential election.

The data of monitoring carried out by the Committee for the Protection of Journalist Rights, RUKH, have also been used.

According to the monitoring data, as of 25 October 2004, a total of 13 instances of journalist and media rights violation were recorded (of which 11 referred to newspapers, 1 to a magazine and 1 to a TV company). True, this list does not include cases of psychological pressure, threats, restricted access to information, etc.

For comparison: there were 350 instances of journalist and media rights violation in 2003; 218 in 2001; and 130 in 2002.

PHYSICAL VIOLENCE

Like elsewhere in the world, the facts of physical violence used against or psychological pressure brought upon journalists were largely registered in respect of the staff of the opposition or critically disposed media. As a rule, such excesses occur immediately after the publication of reports on illegal actions by officials or representatives of Big Business. In 2004, four media people were assaulted. Thus, in July 2004, a group of unidentified masked people hijacked, beat up and then let go Aidym Guliyev, editor-in-chief of the new opposition newspaper *Baky-habar*. (*Baky-habar* is issued by journalists who used to publish the *Hurriyet* newspaper.)

Two weeks later, Einulla Fatullayev, a reporter for the *Monitor* magazine, was assaulted in broad daylight in a busy square in downtown Baku. The man was hit on the head with a dull object, whereupon the assaulters disappeared virtually before the eyes of the police.

An operator and a driver of the ATV television company were beaten up by employees of the P.S.S. security firm during a concert. In this case, however, violence against these media people had nothing to do with vengeance for criticism.

For comparison: in 2003, 133 media people were physically assaulted while on duty (46 journalists in 2001, 37 in 2002). Significantly, the majority of such offences were committed during unauthorized protest actions held by various organizations. Media workers who arrived at the venue of events, being sent by the editorial boards to collect information, were offered resistance by uniformed police. As a result, journalists either were denied access to rally participants or removed from the venue forcibly.

2003 will be remembered in Azerbaijan as the year of the presidential election. It is the presidential election that accounted for a substantial increase in the number of offences compared with previous years. Thus, during the election campaign and the polling day, 91 journalists were assaulted.

On 15-16 October 2003 alone, the day of the presidential election and the following day, when mass actions were held in Baku, physical violence was used against 58 media workers. Most of them were beaten up by the police and “unidentified men”.

LEGAL PROSECUTION

In recent years, Azerbaijan saw a rise in the number of honour, dignity, and business reputation protection suits mounted against the media and journalists. The overwhelming majority of such suits were allowed by courts. Usually, it is not ordinary people but representatives of the executive, deputies of various legislatures, local self-government officials and senior officers of uniformed services who claim to have been “grieved by the press”. In 2004, however, the situation has also changed somewhat.

For example, in 2004, an investigation against the *Baky-habar* newspaper was conducted in response to an action for insulting the honour and dignity (Article 148 of the Azerbaijan Criminal Code) instituted by

Ramiz Mirzoyev, General Director of the Azneftiyag Oil Refinery and President of the Azerbaijan Federation of Football Associations (AFFA). The paper was found guilty and fined 80 million manats, or around US\$16,000.

This paper was also brought to book following a suit by Parliament deputy Jalal Aliyev, brother of the former President and uncle of the current President of Azerbaijan, under the same article: insult of honour and dignity. The paper lost the case again, and its editor-in-chief got a suspended sentence of 1 year imprisonment.

In 2004, the independent magazine *Monitor* was brought to legal liability twice: first, following an action instituted by Parliament Deputy Siyavush Novruzov, department chief of the Yeni Azerbaijan ruling party, and second, in response to a suit brought by deputy Zalimkhan Yagub, each time simultaneously under two articles 147 and 148 – libel and insult of honour and dignity. Under the former suit, the magazine was sentenced to pay 40 million manats. As for the latter suit, the court ruled in October 2004 that the magazine publish an official article refuting earlier charges and pay a penalty in the amount of 30 million manats.

The newspaper *Muhlifet* was brought to book by famous athlete Fizuli Musayev, World and European Karate Champion. It is worthy of note that in 2003, Muzayev won a civil suit against the paper and was awarded 20 million manats in compensation for a report about him published by the paper. Last year, the athlete filed a suit against the paper to bring it to criminal liability under the same two articles of the Criminal Code. The proceedings are not completed yet.

Another action under Article 148 (libel) was brought against the *Bizim yol* newspaper by former deputy and politician Jumshud Nuriyev. In this case, the plaintiff claimed that the entire Azerbaijan people, not he alone, were slandered.

In 2004 the court trial of Rauf Arifoglu, editor-in-chief of the newspaper *Yeni Musavat* came to an end. He was arrested and held in custody since the autumn 2003 presidential election, and given a 5-year prison term. The public prosecutor charged him with offences provided for under three articles of the Criminal Code: participation in mass

disturbances, organization of a criminal gang and offering resistance to representatives of the authorities. By way of accusation, the prosecutor read out extracts from Arifoglu's articles published in *Yeni Musavat*. In fact, Rauf Arifoglu was convicted for professional journalist activity. The appeals by numerous journalist organizations, such as the Reporters without Borders, the New York-based Committee for the Protection of Journalists, the International Federation of Journalists, Article XIX, the World Association of Newspapers, the Committee for the Protection of Rauf Arifoglu's Rights, Parliament deputies, Azerbaijani intellectuals, journalist organizations, newspaper editors, etc., failed to produce any impact on the authorities and the court.

In all, 7 suits were filed against the media and journalists in 2004.

For comparison: in 2003, 18 media bodies stood as defendants in 40 legal cases. (By and large, the plaintiffs demanded from them a compensation in the amount of 7,415,500,000 manats.) The same year, 27 legal cases were filed in which the courts fined the media a total of 1,590,500,000 manats.

Like in previous years, government officials filed the lion's share of suits against the media (19), and in 10 cases, claimants were representatives of political parties and deputies.

In the opinion of experts, legal proceedings against the media are conducted with bias and in defiance of procedural norms. For example, while a specific newspaper article, which is the subject-matter of a dispute, has a specific author, legal proceedings are instituted, apart from the author, against other employees of the editorial board, including the promoter who, in legal terms, has nothing to do with the matter under consideration.

DETENTION OF JOURNALISTS BY LAW-ENFORCEMENT AGENCIES

In 2004, the only journalist held in custody was the editor-in-chief of the newspaper *Yeni Musavat*, Rauf Arifoglu, arrested in autumn 2003 following the presidential election.

For comparison: 2003 was a record year, with 60 media workers

arrested while on duty. Nearly half of those cases (28 detentions) occurred when journalists were trying to gather information on the unauthorized mass actions held by public and political organizations of the country. The detainees were taken to police stations to be released, without any explanations or apologies, few hours later, usually after the interference of journalist organizations like Yeni Nesil and RUKH.

Let's have a look at some of the cases:

On 26 July 2003, Aflatun Avashov, Chairman of the Azerbaijan Press Council, Arif Aliyev, Chairman of the Organization of Azerbaijan Journalists Yeni Nesil, Gyundyuz Tairli, member of the Azerbaijan Press Council, Rauf Afiroglu, editor-in-chief of the newspaper *Yeni Musavat*, Mekhman Aliyev, director of the information agency Turan, and Asif Merzili, editor-in-chief of the newspaper *Tezadlar*, were detained by traffic police for no reason and taken to police station No. 37 of the Khatainsky District, where they were held for one hour. Later, the minister of the interior said their detention was the result of a provocation organized by "third forces", and ordered to investigate the fact with a view to finding and punishing those guilty. The guilty parties were never found, however.

During the presidential election and authorized actions of the opposition on 15-16 October 2003, 25 media persons were detained and taken to police stations. These detentions were made with flagrant procedural violations. Following the decisions of courts, whose sittings were held with revolting procedural irregularities, virtually in the absence of the "accused" and their attorneys, 9 journalists were arrested administratively for period of 7 to 15 days. Most outrageous was the fact of disappearance of Azer Garachenli, a journalist for the newspaper *Avropa*. For a whole week, there was no information about that person. The investigation bodies denied the fact of his having been arrested. It was only after the interference of international organizations and journalist associations that Garachenli was found and released from custody. According to the journalist, he spent all those days at the pretrial detention centre of the Binagadinsky District Police Department of Baku.

On the presidential election day, 15 October 2003, there were numerous cases of journalists being denied access to the polling stations, etc.

On 17 October and 4 November 2003, Boyukaga Agayev, a reporter for the newspaper *Azadlyg*, was not admitted to sessions of the country's supreme law-making body in defiance of his appropriate accreditation. At the parliamentary press centre, he was told orders to that effect had come "above". In real life, journalists often hear this phrase. The staff of many government institutions are not allowed to provide any information to journalists on request, either, unless there is a special authorization "above". More often than not the media face this problem at the bodies of law enforcement and at the agencies of the Ministry of Health. As a result of lengthy agreement procedures in the corridors of power, information gets stale, never reaching the consumer at the right time. Incidentally, this is one of the major reasons for the abundance of inaccurate, at best, distorted reports in the media. Due to the difficulty of obtaining direct access to information, journalists are forced to use unverified facts, resort to the services of "reliable sources" that in actual fact often prove to be not quite competent or outright dishonest.

Sometimes, government agencies not only bar journalists from particular events, but also deprive them of accreditation altogether for public criticisms addressed to them. Another offence in this sphere is constituted by variously obstructing the spread of, or confiscating altogether, media products. In consonance with the restated version of Article 27 of the law on the Mass Media, the run of the published and distributed for realization media products may only be confiscated under an appropriate court decision. In passing such a decision, the court of law must also prove that such products are harmful to the integrity and security of the state, or contain elements of pornography.

The 2003 monitoring revealed 60 cases of the authorities imposing a ban on the dissemination of part of the run of particular newspapers in specific administrative areas. As the authorities did so, they never met the requirements of Article 27 of the aforesaid law on the Mass Media.

As a result of arbitrary actions by officials, in 2003 the *Yeni Musavat* newspaper alone sustained losses in the amount of 12 million manats. The highest obstacles were set up to the dissemination of opposition publications that carried reports on the deteriorating state of health of the

country's former president, Heidar Aliyev. In this way, material damage was inflicted on the editorial board of the newspaper *Milli Yol* (18,500,000 manats) and others.

Quite a few instances, where a part of the newspaper was confiscated by the district or municipal authorities have been registered. Local officials find it hard to put up with criticism addressed to them and order withdrawal from sale of such publications in areas coming under their purview.

ECONOMIC AND OTHER PRESSURE ON THE MEDIA

Such forms of pressure include newsprint price raises and huge court fines, nonpayments of the money for the sold print by a state-run distribution company, its refusal to sell the newspaper print, bans on street sales and arrests of newspaper vendors. In 2003, it was hard to give any natural economic reasons for the rise of newsprint prices because, according to the State Customs Committee of Azerbaijan, around 3,000 tons of newsprint were imported by Azerbaijan, which amount more than covered the combined requirements of all periodicals in the country. However, the problem was that the import of this product in Azerbaijan, and its subsequent storage and sales were controlled by top officials of the executive, including the aforesaid Customs Committee. Therefore, journalists had all grounds to suppose that the newsprint shortage had been produced artificially. As a result of protests, government institutions picketing, journalist investigations, and critical publications, the situation began to change: the prices gradually went down. By that time, however, the election and post-election flap in the country died away.

Another method of bringing economic pressure to bear on the media is default by state organizations on their obligations under contracts concluded with editorial boards. This happens when publishing houses unilaterally refuse to print particular issues of newspapers using the pretext that they are lacking newsprint. An example: between 15 and 20 November 2003, the Azerbaijan Publishing House did not print the newspapers *Azadlyg*, *Yeni Musavat*, *Hurriyet*, *Baky-habar*, *Yeni Zaman* and *Novoye Vremya*: the lack of newsprint hit exactly the opposition publications.

CONCLUSION

The data presented in this report cannot be regarded complete as they only pertain to physical violence against and legal persecution of journalists and the media. It contains no data on psychological pressure and denied access to information. Nevertheless, the data reported here make it possible to draw conclusions and reveal certain trends. What meets the eye in the first place is a large number of freedom of speech and media rights violations committed in 2003 before, during and after the presidential election in the country, and a small number of such offences in 2004.

At the same time, there are many journalists who abuse the rules of professional ethics, law and their office, and this engenders further conflicts.

As I said earlier, the data in this report may only be regarded as the tip of an iceberg for there is a high percentage of unrecorded conflicts. There are many reasons for this, but the most important one is the apathy and tolerance of media people towards the increasingly numerous violations of their rights in 2004. It is not uncommon for journalists to ignore such facts, referring to them occasionally in their articles as examples of red tape or arbitrariness. Another reason is serious gaps in the knowledge of laws by many journalists. Sometimes, they even are not aware of such violations due to their ignorance of the existing legal rules. Lack of faith in the force of law and the efficacy of legal remedies, based on their opinion of the judges and of the legal procedure, is also a big problem. Like most other people, journalists prefer not to waste time on applying to the relevant agencies for reinstatement of their rights.

Thus, summing up the report, it is safe to state that the overwhelming majority of violations in the field of journalist and media rights in the country occur due to the following factors:

- failure to comply with the rules and provisions of current media legislation, the Council of Europe recommendations, and the requirements of the European Court of Human Rights;
- an atmosphere of impunity for those who violate the principles of freedom of expression, speech and the press reigning in the country;

- non-existence of an independent judiciary;
- inadequacy of the legislative framework on the mass media, especially as far as access to information and defamation are concerned;
- the poorly developed media economics and market; the strong leverage held by the authorities to bring economic pressure to bear on the media;
- intolerance by government officials and public and political figures of criticisms voiced by the media;
- a low level of journalists' professional skills and knowledge of laws;
- excessive political bias and fragmentation of the media, providing for weak professional solidarity among the journalist community.

To conclude: *in 2003, there were 133 registered cases of physical violence used against journalists and other media people, as against 13 cases in 2004* (even though the list is incomplete). The difference is more than ten-fold. Proceeding from the above figures and comparing the 2003 and 2004 situations, one can expect the number of violations of media and journalist rights to decline further. On the face of it, the trend is rather positive. However, this is true on the face of it only, because, in fact, the situation is not all that good: both the figures and the trend indicate that the authorities have resolved the problems of their relationships with the media. There are no independent TV companies, most newspapers are pro-government or have become pro-government for a variety of reasons. There are but a few independent and opposition newspapers left that are fighting for their own survival under an extremely heavy burden of skilfully created and seemingly objective pressures. The current situation poses the greatest threat to freedom of speech in the country.

LEVAN RAMISHVILI

GEORGIAN MEDIA – PROBLEMS AND PROSPECTS

The independent media played a crucial role in November 2003 Rose Revolution laying ground for independent journalism in Georgia. However, it failed to meet challenges it has been facing in the period following the revolution. Many of the weaknesses, which have characterised Georgian media for the last 10-15 years, have turned painful in the new reality.

According to various international assessments, Georgia is still considered among countries with partially free press. This is quite alarming with the country's democratic development moving ahead, and such progress not taking place in media. Moreover, it's not only that the Georgian media is lagging behind society, but we are also dealing with certain a retreat.

For the last decade Georgia was distinguished with quite dynamic and critical press, which emerged as one of the chief driving forces in the democratic changes. However, its sustainability and independence is very much subject to debate. The tradition of editorial independence and professional standards has not yet been formed. Professional journalism ethics are still on a very low level, and since there are no common values of journalism, professional associations based on such values are also absent. Solidarity of journalists towards each other is also quite low. All the above problems are most sharply encountered with the new realities in place.

The current condition of the media market creates additional difficulties. The tendency of the market's domination by a small elite is becoming increasingly apparent. Unfortunately, the press has yet to emerge as a sustainable business. A reason for this can be found in the economic shape of the country. The advertising market is scarce and does not exceed five million USD in total. However, there is also a shadow market with capital circulation amounting to around 15-20 million USD, while the annual budget of leading TV channels is under this figure. In such situation, different business groups subsidise the media. The

owners of the largest electronic media outlets are also the richest people in Georgia. They have their own political interests, which could pose a threat to the independence of the Media.

Despite developing trends, circulation of the print media is still limited. The circulation of main daily editions is varies from five to ten thousand copies. Thus, for the public, electronic media remains the chief source of information. Many observers conclude that the freedom of Georgian electronic media is regressing.

Although Georgia adopted one of the most liberal media legislations, it still had many problems related to press freedom. Defamation has been decriminalised. The Law on Freedom of Press and Speech established different standards for burden of proof for public and private persons, thereby shifting the burden of proof from defendant to the plaintiff. It also includes an absolute protection mechanism for journalistic sources with no exceptions. Now the media owners, and not the journalists, concerned will have to act as respondents in court. All those mechanisms have set up tangible tools of legal protection of the media.

Changes are being planned for the electronic media. The transformation of State Television into Public Broadcasting is a priority on the agenda. The legislation guarantees political-institutional and financial independence for public broadcaster. A nine member Board of Trustees will be set up. The selection of candidates will take place through open competition. The President will propose the best candidates to the Parliament, and he is in charge for their final appointment. First two, and later three, candidates will be proposed for each vacancy. The board will hire, through competition, an executive director. The state budget of Georgia will annually allocate 0.15% of GDP, i.e approximately 15 million GEL.

The presence of legal tools, without their proper use, does not guarantee freedom of the press. Journalists and media at large should possess the will to struggle for their freedom. This is where the serious problems related to the internal editorial atmosphere, absence of editorial independence, and the lack of journalistic solidarity are. However, the chief responsibility for this situation rests with the government. Not only because constitutionally it is the main guarantor of human rights, including freedom of press,

but also because the country is still not free from rampant corruption. Privatisation is an ongoing process in Georgia. The oligarchs—owners of media outlets who are also active businessmen—are driven by the desire to fulfil their business interests. They expect benefits from privatisation. Therefore they seek to find common ground with the government and establish a “good relationship” with it. This interest from the media owners and the responses from the government create fertile ground self-censorship in the Georgian media.

The key problem is that journalists themselves don’t speak out against the limitations on freedom of speech. Journalists tend to play to the government’s hand. Georgia needs reconsidering and re-thinking of journalism. It needs to rethink the professional values of journalists, the role of media owners, and its effect on the public.

The current condition of the Georgian media reminds one of the early 1990s, when conditions were ripe for Soviet media heritage and new demands of the public. Back then Soviet journalist and media organisations did not adapt and were replaced by new media. New electronic media outlets also gradually emerged. Today’s situation is somewhat similar: society is evolving while complete stagnation prevails in the media. Aggressive commercialisation of the media is also taking place. Media should be self-sufficient, but this is not its sole mission. By focusing on short-term goals, the media is eventually cutting its own branch.

The media has multiple functions. Entertainment is one of them. However providing information and education to the society is also important. Georgian media does, although it has persisting problems, manage to inform the public. However, its educational component is completely ignored. The Freedom of Information Act, giving firm legal guarantees for availability of information in public establishments, is in place in Georgia since 1999, but it is used very little by journalists. They also rarely go to court to seek protection of their rights. In addition, there is no state body to oversee the application of the freedom of information legislation. In this regard, it could be appropriate to grant the function of overseeing adherence to the Freedom of Information Law implementation to the Ombudsman of Georgia, who has started his new

job very enthusiastically, giving hopes for considerable progress in this field. In general, public bodies are accessible for journalists with the will to act persistently and not to give up at the first obstacle.

The failure in educating the public could be addressed by public broadcasting. However, new professional standards need to be established, and set a possible example for other media outlets.

Public broadcasting should also balance public and private interests. This problem is becoming more visible with the ongoing commercialisation of the media. New marketing methods allow advertisers to define their target groups more accurately. However, the interests of different public groups are ignored, since society is not only made up of active consumers. It is impossible to regulate this problem only through the market. We thus need an institution that will not only be guided by market rules.

Public broadcasting alone can not change anything if journalists themselves do not introduce the new values into their work. The *Media Professional Standards* were put forth in 2003. Almost all leading Media subscribed to them. Nonetheless, the declared values have yet to become guiding principles in the media's real work.

Another reason for the lack of public accountability of the media might also be that the institutionalisation of journalistic self-regulating mechanisms has not been successful so far. A Press Council could facilitate progress in this regard. The Formation of such an institution might raise public trust in the media, which did enjoy considerable public support in last few years. Along with the Orthodox Church, media enjoyed up to 80% social trust. Today's figures indicate around the same rating for the church, while that of the media has gone down to 75%. Its position has considerably eroded.

The government, primarily president Saakashvili, is on top of public trust. It is followed by the Church, and then by the media. This indicator reveals an apprehending trend.

Rustavi 2 TV is a good example when speaking of freedom of expression limitations. For years Rustavi 2 stood on the forefront of free speech. What is happening to this channel today is of great concern for the Georgian public. The channel, which was subject to numerous attacks,

played crucial role in Rose Revolution. It was rewarded in its aftermath with an opportunity to improve its financial situation.

It would be right to mention that the “oligarchisation” of the media started with the formation of Imedi TV. The channel is connected to the Russian tycoon Borys Berezovski’s partner, Badri Patarkatsishvili. This had some kind of virus effect in Georgian media space. For years, Rustavi 2 strived to survive in the new oligarchic environment created by Mr. Patarkatsishvili. However, it gradually became similar to what it was confronting. Shortly after the revolution, Rustavi 2 mysteriously found itself on the brink of bankruptcy. This was followed by the replacement of Erosi Kitsmarishvili, as the channels chief owner, by another businessman Kibar Khalvashi.

Electronic media is not yet self-sufficient. Its owners are still driven by different political and financial interests. This certainly reflects negatively on media independence.

Journalists’ critical views were protected when the owners of media outlets were also critical of the government. Today, Georgian journalists are encountering serious problems with regards to criticism.

The deficit of critical thought also has objective reasons. For years, Rustavi 2’s sharp pathos was grounded on public demand. Not only was public opinion pluralistic, but it also was radically polarised, and Rustavi 2 was reflecting this polarization. This cannot be said about today’s reality. Today public opinion is not polarised but shifted from one extreme to another. During the elections the ruling party received around 90% of voters’ support. One could say opposition virtually does not exist, and therefore criticism is reduced. A similar situation was also a characteristic to first years of Eduard Shevardnadze’s rule. Today’s political environment is less favourable for different political views and pluralism. At the same time, more space for different views is created at different channels still in search of establishing themselves. Therefore, what was lost on Rustavi 2 is being compensated through other channels.

This does not solve the problem of editorial independence. There are clearly taboo issues left untouched by journalists. Another important problem is that most news reports are extremely similar. The news starts

with reports on where the president cut the lent, which school and village he visited. This certainly is not in line with general views on professional journalism.

In Georgia, the history of the independent media is connected with the development of the political parties press. It traditionally played opposition role vis-à-vis the government. Political parties publications emerged as early as the Soviet period. Connection with politics developed into connections with politicians. Journalists were more concerned about the politicians than about their readers. As noted by 19th century Georgian thinker Ilia Chavchavadze, the Georgian history is more a royal history where people are not visible. The public is also not visible in today's newspapers and news reports. The main accent is still falling on politicians. One of the reasons for the current status of printed media in Georgia is that their primary target is not public in general, but specific political groups.

The solution should probably be sought in independent journalism. This means that the journalists should re-think their profession by journalists themselves. If the Georgian media restores its connection with society, and focuses more on public interest, it will be able to respond to the new challenges properly. Unfortunately, today's realities do not allow such optimism. Probably the golden cages created by media owners are very hard to be given up for some journalists.

This rethinking has been done for years at the journalism department of Tbilisi State University, headed by former communist party secretary Nugzar Popkhadze. However, this department is not being the best place for absorbing independent journalistic values. New journalism schools, like the Caucasus Media and Management School in Georgian Institute of Public Affairs, already train a limited number but a new type of journalists. In this regard the ongoing education reforms will most probably result in increasing professional journalism.

II.

**LIBEL AND INSULT LAWS AS A CHALLENGE TO
FREEDOM OF THE MEDIA**

Peter Noorlander

THE EUROPEAN COURT OF HUMAN RIGHTS ON DEFAMATION

Irakli Kotetishvili

DEFAMATION IN THE GEORGIAN LEGISLATION

Olga Safarayan

LIBEL AND INSULT PROVISIONS IN THE LEGISLATION
OF ARMENIA

Ramil Hasanov

LIBEL AND INSULT LAWS AS PUNITIVE FORMS
OF THE MEDIA REGULATION: RECENT DEVELOPMENTS
IN THE AZERBAIJANI DEFAMATION LAW

PETER NOORLANDERTHE EUROPEAN COURT OF HUMAN RIGHTS ON DEFAMATION¹**I. Introduction**

In the 18 years since the European Court of Human Rights (the Court) delivered its first judgment in a defamation case,² it has built up a rich and impressive body of case-law on this crucial topic. The cases have often been brought by journalists complaining of defamation actions initiated by politicians or other public figures attempting to muffle criticism voiced in the press and it is clear that the proceedings often concerned matters of important public interest. In the overwhelming majority of cases, the judgments delivered by the Court have clarified the important status of freedom of expression, particularly with regard to debate on matters of public interest, and have helped bolster democratic values in all Council of Europe Member States. As such, it is fair to say that the body of law developed by the Court in defamation cases provides an important underpinning for democracy.

The European Convention on Human Rights (the Convention) has been ratified by all Member States of the Council of Europe, and is binding on these States as a matter of international law. Judgments of the European Court of Human Rights are binding on the State(s) directly involved in the cases before it and constitute an extremely authoritative interpretation of the requirements of the Convention for other Member States. As such, their spirit if not their letter ought to be followed in all Member States, including in the Caucasus. I also note that in some countries, national law requires courts to take into account the judgments of the European Court of Human Rights in cases before them.³

1 This paper draws on previous ARTICLE 19 publications by the author, in particular *The Price of Honour: A Guide to Defamation Law and Practice in Russia*, ARTICLE 19, London: 2003.

2 *Lingens v. Austria*, 8 July 1986, Application No. 9815/82.

3 E.g. the 2004 Law of Georgia on the Freedom of Speech and Expression (Article 2).

II. The Fundamental Status of Freedom of Expression in the ECHR

In virtually every defamation case before it, the Court has begun by stressing the overriding importance of freedom of expression in a democratic society. The following statement features in most of its defamation judgments:

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.⁴

The Court also habitually makes clear at the outset that the right to freedom of expression protects offensive and insulting speech. It has become a fundamental tenet of its jurisprudence that the right to freedom of expression “is applicable not only to ‘information’ or ‘ideas’ that are favourably 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 pluralism, tolerance and broadmindedness without which there is no ‘democratic society’.”⁵

It has similarly emphasised that “[j]ournalistic freedom ... covers possible recourse to a degree of exaggeration, or even provocation.”⁶ This means, for example, that the media are free to use hyperbole, satire or colourful imagery to convey a particular message.⁷ The choice as to the form of expression is up to the media. For example, the Court will not criticise a newspaper for choosing to voice its criticism in the form of a satirical cartoon and – it has urged – neither should national courts.⁸ The context within which statements are made is relevant as well. For example, in the second *Oberschlick* case, the Court considered that calling a politician an idiot was a legitimate response to earlier, provocative statements by that same politician while in the *Lingens* case, the Court

⁴ *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72, para. 49.

⁵ *Ibid.* Statements of this nature abound in the jurisprudence of courts and other judicial bodies around the world.

⁶ *Dichand and others v. Austria*, 26 February 2002, Application No. 29271/95, para. 39.

⁷ See *Karatas v. Turkey*, 8 July 1999, Application No. 23168/94, paras 50-54.

⁸ See, for example, *Bladet Tromsø and Stensaas v. Norway*, 20 May 1999, Application No. 21980/93, para. 63 and *Bergens Tidende and Others v. Norway*, 2 May 2000, Application No. 26131/95, para. 57.

stressed that the circumstances in which the impugned statements had been made “must not be overlooked.”⁹

The Court attaches particular value to political debate and debate on other matters of public importance. Any statements made in the conduct of such debate can be restricted only when this is absolutely necessary: “There is little scope ... for restrictions on political speech or debates on questions of public interest.”¹⁰ The Court has rejected any distinction between political debate and other matters of public interest, stating that there is “no warrant” for such distinction.¹¹ The Court has also clarified that this enhanced protection applies even where the person who is attacked is not a ‘public figure;’ it is sufficient if the statement is made on a matter of public interest.¹² The flow of information on such matters is so important that, in a case involving newspaper articles making allegations against seal hunters, a matter of intense public debate at the time, the journalists’ behaviour was deemed reasonable, and hence not liable, even though they did not seek the comments of the seal hunters to the allegations.¹³

The guarantee of freedom of expression applies with particular force to the media. In nearly every case before it concerning the media, the Court has stressed the “essential role [of the press] in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest. Not only does it have the task of imparting such information and ideas, the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of ‘public watchdog’.”^{14,15}

While the right to freedom of expression is not absolute, any limitations must remain within strictly defined parameters. It is well-established that

9 *Oberschlick v. Austria* (No. 2), 1 July 1997, Application No. 20834/92, para. 34 and *Lingens v. Austria*, note 2, para. 43.

10 See, for example, *Dichand and others v. Austria*, note 6, para. 38.

11 *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 64.

12 See, for example, *Bladet Tromsø and Stensaas v. Norway*, note 8.

13 *Ibid.*

14 See, for example, *Dichand and others v. Austria*, note 6, para. 40.

15 *The Sunday Times v. The United Kingdom*, 26 April 1979, Application No. 6538/74, para. 65.

defamation cases constitute an interference with freedom of expression, even when no award for damages is made,¹⁶ and so they must remain within the parameters set by Article 10(2) of the Convention. This means that they must meet a strict three-part test. First, the interference must be provided for by a democratically adopted law, which is accessible and “formulated with sufficient precision to enable the citizen to regulate his conduct.”¹⁷ Second, the interference must pursue one of the legitimate aims listed in Article 10(2). This list includes the aim of protecting the rights of others, which provides an adequate justification for civil defamation cases. Third, the restriction must be necessary to secure one of those aims. The word “necessary” means that there must be a “pressing social need” for the restriction. The reasons given by the State to justify the restriction must be “relevant and sufficient” and the restriction must be proportionate to the aim pursued.¹⁸

III. Freedom of Expression and Defamation under the ECHR

In considering defamation cases, the Court strictly follows the structure of Article 10(2) of the Convention. The requirement that the defamation restriction be prescribed by law is usually found by the Court to be easily met. This section considers the application by the Court of the remaining two conditions of Article 10(2), namely that the defamation action pursues a ‘legitimate aim’ and that it be ‘necessary in a democratic society’.

III.1. The Legitimate Aim of Defamation Laws

As stated above, Article 10(2) of the Convention provides an exclusive list of aims in pursuit of which the exercise of the right to freedom of expression may be restricted. In virtually all cases before the Court, the “protection of the reputation or rights of others” has been invoked to justify defamation laws,¹⁹ although in one case, the Court considered that the speech complained of was potentially inflammatory and could lead

¹⁶ See, for example, *McVicar v. the United Kingdom*, 7 May 2002, Application No. 46311/99.

¹⁷ *The Sunday Times v. United Kingdom*, note 15, para. 49.

¹⁸ *Lingens v. Austria*, note 2, paras. 39-40.

¹⁹ *Ibid.*, para. 59 and *Schwabe v. Austria*, 28 August 1992, Application No. 13704/88, para. 25.

to large-scale public unrest. In those circumstances, the Court found that the respondent Government could invoke the “prevention of disorder” as a legitimate aim.²⁰

While most defamation laws in the Council of Europe are uncontroversial insofar as they aim to protect honour and dignity, it should be borne in mind that any laws that penalise ‘insult’ or ‘giving offence’ without linking this to the honour and dignity of the offended party will fail the ‘legitimate aim’ test.

III.2. Criminal Defamation

In many countries, defamation law²¹ represents one of the most serious threats to the open discussion which underpins democracy. The key problem with these laws is that a breach may lead to a custodial sentence or another form of harsh sanction, such as a suspension of the right to practise journalism. Even where these are rarely applied, the problem remains, since the severe nature of these sanctions means they cast a long shadow. Suspended sentences also exert a significant chilling effect as subsequent breach within the prescribed period means that the sentence will be imposed. It is now well-established that unduly harsh penalties, of themselves, represent a breach of the right to freedom of expression even if circumstances justify some sanction for abuse of this right.

International bodies such as the UN and the OSCE have long recognised the threat posed by criminal defamation laws and have recommended that they should be abolished. For example, the OSCE Parliamentary Assembly has called for the abolition of all laws that provide criminal penalties for the defamation of public figures or which penalize the defamation of the State, State organs, or public officials as such.²² The UN Special Rapporteur together with his OSCE and OAS²³ counterparts has gone even further, and said that “[c]riminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation

20 *Castells v. Spain*, 23 April 1992, Application No. 11798/85, paras. 38-39.

21 I use the generic term of defamation, which covers libel and insult as well as slander.

22 Warsaw Declaration of the OSCE Parliamentary Assembly, 8 July 1997, par. 140.

23 Organisation of American States.

laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.”²⁴

The UN Human Rights Committee has several times expressed its concern over the misuse of criminal defamation laws, recommending a thorough reform in many countries, including, in the Caucasus region, in Azerbaijan.²⁵ In a case before it from Sri Lanka, the Committee held that a situation where a newspaper editor had a criminal defamation case pending against him for several years violated the right to freedom of expression. It stated that “to keep pending ... the indictments for the criminal offence of defamation for a period of several years after the entry into force of the Optional Protocol for the State party left the author in a situation of uncertainty and intimidation, despite the author’s efforts to have them terminated, and thus had a chilling effect which unduly restricted the author’s exercise of his right to freedom of expression”.²⁶

The Court has never directly ruled on the legitimacy of criminal defamation laws; the nature of its jurisdiction means that its judgments are usually restricted to the facts of the individual case before it. But it should be noted that it has never upheld a prison sentence or other serious sanction in a criminal defamation case.²⁷ In *Castells v. Spain*, the Court noted:

[T]he dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media.²⁸

In the same case, the Court stated that criminal measures should only be adopted where States act “in their capacity as guarantors of public

24 Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 10 December 2002.

25 Concluding observations of the Human Rights Committee: Azerbaijan, UN Doc. CCPR/CO/73/AZE, 12 November 2001.

26 Communication No. 909/2000: Sri Lanka, 26 August 2004, UN Doc. CCPR/C/81/D/909/2000, at par. 9.4.

27 In the above-mentioned *Lingens* case, the Court found a violation of the right to freedom of expression.

28 Note 20, at para. 46.

order” and where such measures are, “[i]ntended to react appropriately and without excess to defamatory accusations devoid of foundation or formulated in bad faith.”²⁹ It is significant that in that case, which involved a conviction for defamation, the Court referred to the application of criminal measures only as a means of maintaining public order, and not as a means of protecting reputations, the purpose of defamation laws.

III.3. Public Bodies and Officials

Criticism of government is vital to the success of a democracy and defamation suits inhibit free debate about vital matters of public concern. In consequence, public bodies as such should not be allowed to sue in defamation and governments should tolerate a virtually limitless degree of criticism. The European Court of Human Rights has said that, “[t]he limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician.”³⁰ Both the UN Human Rights Committee and the OSCE Parliamentary Assembly have recommended the abolition of laws criminalising defamation of the state.³¹

The European Court of Human Rights has also held that public officials, while they can sue if they are defamed in their private capacity, should tolerate significantly more criticism than ordinary individuals. This is based on two key factors. First, it is of the greatest importance that public officials, like public bodies, are subjected to open debate and criticism. Second, public officials have knowingly opened themselves up to criticism by their choice of profession. Thus, in its very first defamation judgment, the Court emphasised that:

The limits of acceptable criticism are ... wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every

²⁹ *Ibid.*

³⁰ See, for example, *Incal v. Turkey*, 9 June 1998, Application No. 22678/93, at para 54.

³¹ E.g. Concluding observations of the Human Rights Committee: Mexico, 27 July 1999, UN Doc. No. CCPR/C/79/Add.109, par. 14; Warsaw Declaration of the OSCE Parliamentary Assembly, 8 July 1997, par. 140.

word and deed by both journalists and the public at large, and must consequently display a greater degree of tolerance.³²

The Court has affirmed this principle in several cases since and it has become a fundamental tenet of its case law.³³ The principle is not limited to criticism of politicians acting in their public capacity. Matters relating to private or business interests can be equally relevant. For example, the Court has said that the “fact that a politician is in a situation where his business and political activities overlap may give rise to public discussion, even where, strictly speaking, no problem of incompatibility of office under domestic law arises.”³⁴

In statements on matters of public interest, the principle applies to public officials and to public servants as well as to politicians.³⁵

III.4. Facts vs. Opinions

Where applicants have been required by national courts to establish the truth of allegations, the Court has made it clear that a distinction must be made between statements of fact and value judgments. This is because the existence of facts can be demonstrated, whereas the truth of a value judgment is not susceptible of proof. It follows that: “The requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right to [freedom of expression].”³⁶

In a number of cases before the Court, domestic courts had wrongly treated allegedly defamatory publications as statements of fact. For example, in *Feldek v. Slovakia*, the Court disagreed that the use by the applicant of the phrase “fascist past” should be understood as stating the fact that a person had participated in activities propagating particular fascist

32 *Lingens v. Austria*, note 2, para. 42.

33 See, for example, *Lopes Gomez da Silva v. Portugal*, 28 September 2000, Application No. 37698/97, para. 30; *Wabl v. Austria*, 21 March 2000, Application No. 24773/94, para. 42; and *Oberschlick v. Austria*, 23 May 1991, Application No. 11662/85, para. 59.

34 *Dichand and others v. Austria*, note 6, para. 51.

35 See *Janowski v. Poland*, 21 January 1999, Application No. 25716/94, para. 33; *Thoma v. Luxembourg*, 29 March 2001, Application No. 38432/97, para. 47.

36 *Dichand and others v. Austria*, note 6, para. 42.

ideals. It explained that the term was a wide one, capable of encompassing different notions as to its content and significance. One of them could be that a person participated as a member in a fascist organisation; on this basis, the value-judgment that that person had a ‘fascist past’ could fairly be made.³⁷

The freedom to express value judgements is not entirely unfettered. The Court has noted that “[e]ven where the statement amounts to a value judgment, the proportionality of an interference may depend on whether there exists a sufficient factual basis for the impugned statement, since even a value judgment without any factual basis to support it may be excessive.”³⁸ But in practice, the Court allows a considerable degree of leeway to statements of opinion. For example, in the case of *Unabhängige Initiative Informationsvielfalt v. Austria*, the Court expressed its concern that domestic courts had required journalists to supply factual proof beyond a reasonable doubt to support value judgements expressed by them, stating: “The degree of precision for establishing the well-foundedness of a criminal charge by a competent court can hardly be compared to that which ought to be observed by a journalist when expressing his opinion on a matter of public concern, in particular when expressing his opinion in the form of any value judgment.”³⁹

In a recent decision, the Court explained that value judgments need not be accompanied by the facts upon which the judgement is based, holding: “The necessity of a link between a value judgment and its supporting facts may vary from case to case in accordance with the specific circumstances.”⁴⁰ For example, where certain facts were widely known among the general public there was no need for a journalist basing an opinion on those facts to refer to them explicitly. Furthermore, value judgements may be based on rumours or stories circulating among the general public; they need not be supported by hard, scientific facts.⁴¹

37 12 July 2001, Application No. 29032/95.

38 *Dichand and others v. Austria*, note 6, para. 43.

39 26 February 2002, Application No. 28525/95, para. 46.

40 *Feldek v. Slovakia*, note 37, para. 86.

41 *Thorgeir Thorgeirson v. Iceland*, note 11.

III.5. Defences

A strong system of defences is essential if defamation laws are not unreasonably to restrict the free flow of information and ideas. While the precise nature and designation of these defences will differ from country to country, the Court has laid down some minimum criteria that should apply to all.

First, the Court has made it clear that no-one should be convicted of defamation for a statement shown to be true. This was at issue in the case of *Castells v. Spain*, where the domestic courts had refused to permit the applicant to try to establish the truth of his claim that the government had intentionally failed to investigate the murders of people accused of belonging to a separatist movement. While the Court recognized that the article included statements of opinion as well as fact, and that some of the accusations were serious, it attached decisive importance to the fact that the domestic courts had precluded him from offering any evidence as to the truth of his assertions. The Court ruled that the article had to be considered as a whole, and that the applicant should have been allowed to try to establish the truth of his factual assertions as well as his good faith.⁴²

Second, the Court has insisted on what may be termed a defence of 'reasonable publication'. It has recognised that in certain circumstances even false, defamatory statements of fact should be protected against liability. A rule of strict liability for all false statements is particularly unfair for the media, which are under a duty to satisfy the public's right to know where matters of public concern are involved and often cannot wait until they are sure that every fact alleged is true before they publish or broadcast a story. Even the best journalists make honest mistakes and to leave them open to punishment for every false allegation would be to undermine the public interest in receiving timely information. The nature of the news media is such that stories have to be published when they are topical, particularly when they concern matters of public interest. Thus, the Court has stated that the press should be allowed to publish stories that are

⁴² *Ibid.*

in the public interest subject to the proviso that “they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism.”⁴³

Third, the Court has held that certain statements should never attract liability for defamation. This applies, for example, to statements made in legislative assemblies⁴⁴ or in the course of judicial proceedings,⁴⁵ or reports of official statements or reports quoting from the findings of official reports.⁴⁶ This is based on the public interest in ensuring wide dissemination of these matters. In the recent case of *Colombani and others v. France*, the European Court of Human Rights extended this principle, holding that the applicants were entitled to rely on the contents of a confidential report which had been leaked to them by sources inside a European Union agency, even though they themselves had not investigated the facts.⁴⁷

In a related development, the Court has held that journalists should not automatically be held liable for repeating a potentially libellous allegation published by others. In the case of *Thoma v. Luxembourg*, a radio journalist had quoted from a newspaper article which alleged that of all eighty forestry officials in Luxembourg only one was not corrupt. The journalist was convicted for libel but the European Court held that the conviction constituted a violation of his right to freedom of expression: “[P]unishment of a journalist for assisting in the dissemination of statements made by another person ... would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so.”⁴⁸ The Court also dismissed the contention that the journalist should have formally distanced himself from the allegation, warning the public that he was quoting from a newspaper report:

43 *Bladet Tromsø and Stensaas v. Norway*, note 8, para 65.

44 *A. v. the United Kingdom*, 17 December 2002, Application No. 35373/97. See also *Jerusalem v. Austria*, 27 February 2001, Application No. 26958/95, para. 36.

45 *Nikula v. Finland*, 21 March 2002, Application No. 31611/96, para. 55.

46 *Bladet Tromsø and Stensaas v. Norway*, note 8, para. 72.

47 *Colombani v. France*, 25 June 2002, Application No. 51279/99.

48 *Thoma v. Luxembourg*, 29 March 2001, Application No. 38432/97, para. 62.

A general requirement for journalists systematically and formally to distance themselves from the content of a quotation that might insult or provoke others or damage their reputation is not reconcilable with the press's role of providing information on current events, opinions and ideas.⁴⁹

Finally, in relation to defences, the burden of proof can be a crucial issue. ARTICLE 19 has long argued that in cases involving statements on matters of public concern, the plaintiff should bear the burden of proving the falsity of any statements or imputations of fact alleged to be defamatory. This position, which has been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression,⁵⁰ reflects the general principle developed by constitutional courts, including the US Supreme Court, that placing the burden of proof with the defendant will have a significant chilling effect on the right to freedom of expression.

The European Court has stated that, particularly where a journalist is reporting from reliable sources in accordance with professional standards, it will be unfair to require them to prove the truth of their statements.⁵¹ Similarly, in the case of *Dalban v. Romania*, the Court stated: "It would be unacceptable for a journalist to be debarred from expressing critical value judgments unless he or she could prove their truth."⁵² However, the Court has required that when they make serious allegations, journalists should make a real effort to verify their truth, in accordance with general professional standards.⁵³ The Court currently has another case pending before it, *Steel and Morris v. the United Kingdom*,⁵⁴ in which the defendants were required to prove the truth of allegedly defamatory statements made by them.

49 *Ibid.*, para. 64.

50 Joint Declaration of 30 November 2000. See also, UN Doc. E/CN.4/2001/64, 13 February 2001, para. 48.

51 See, for example, *Colombani v. France*, note 47, para. 65.

52 *Dalban v. Romania*, 28 September 1999, Application No. 28114/95, para. 49.

53 *McVicar v. the United Kingdom*, 7 May 2002, 46311/99, paras. 84-86 and *Bladet Tromsø and Stensaas v. Norway*, note 8, para 66.

54 Application no. 68416/01, Decision (admissibility) of 6 April 2004.

III.6. Sanctions

It is clear that unduly harsh sanctions, even for statements found to be defamatory, breach the guarantee of freedom of expression. The Court has clearly stated that “the award of damages and the injunction clearly constitute an interference with the exercise [of the] right to freedom of expression.”⁵⁵ Therefore, any sanction imposed for defamation must bear a “reasonable relationship of proportionality to the injury to reputation suffered” and this should be specified in national defamation laws.⁵⁶

One aspect of this requirement is that less intrusive remedies, and in particular non-pecuniary remedies such as appropriate rules on the right to reply, should be prioritised over pecuniary remedies.⁵⁷ Another aspect is that any remedies already provided, for example on a voluntary or self-regulatory basis, should be taken into account in assessing court-awarded damages. To the extent that remedies already provided have mitigated the harm done, this should result in a corresponding lessening of any pecuniary damages.

As noted above, imprisonment can never be regarded as an appropriate response to defamation. The European Court of Human Rights has never upheld a sentence of actual imprisonment and international bodies have frequently emphasised the illegitimacy of defamation laws providing for imprisonment as a sanction.⁵⁸

III.7. Proceedings

The conduct of defamation proceedings can raise serious questions under Article 6 of the Convention, which guarantees fairness in both civil and in criminal proceedings. This means that journalists will need to be given adequate time to prepare their defence, that proceedings should

55 *Tolstoy Miloslavsky v. the United Kingdom*, 13 July 1995, Application No. 18139/91, para. 35.

56 *Ibid.*, para. 49.

57 See, for example, *Ediciones Tiempo S.A. v. Spain*, 12 July 1989, Application No. 13010/87 (European Commission of Human Rights).

58 See, e.g. Annual General Assembly Report of the Human Rights Committee, 21/9/94, Volume I, No.A/49/40, paras. 78, 91 and 236; Annual General Assembly Report of the Human Rights Committee, 3/10/95, No. A/50/40, paras. 89 and 113; Concluding observations of the Human Rights Committee: Kyrgyzstan. 24 July 2000, UN Doc. CCPR/CO/69/KGZ.

be open to the public and that, in criminal cases, a defendant must be presumed innocent until proven guilty, for example. One particular issue that has arisen before the Court in relation to civil defamation proceedings is the availability – or lack thereof – of legal aid. Another important issue is protection during proceedings of a journalist’s confidential sources.

III.9.1 Legal aid

In the case of *McVicar v. the UK*,⁵⁹ the applicant complained that the limited legal assistance he had received in defending himself in a defamation case had effectively denied him a fair trial. In its assessment of the complaint, the Court held that despite the absence of an explicit guarantee in Article 6 for legal aid in civil cases,

Article 6 § 1 may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for effective access to court, either because legal representation is rendered compulsory, or by reason of the complexity of the procedure or of the case.⁶⁰

However,

Article 6 § 1 leaves to the State a free choice of the means to be used in guaranteeing litigants a right of effective access to court. The question whether or not that Article requires the provision of legal representation to an individual litigant will depend upon the specific circumstances of the case and, in particular, upon whether the individual would be able to present his case properly and satisfactorily without the assistance of a lawyer.⁶¹

In that case, the Court considered that the defendant was a well educated journalist, that the issues at trial had not been particularly complex and that, up to the commencement of the actual proceedings, the applicant did have legal representation.⁶² Therefore, it did not find a violation of the right to a fair trial. However, it is implicit in the Court’s findings

⁵⁹ *McVicar v. the United Kingdom*, note 16.

⁶⁰ *Ibid.*, para. 47.

⁶¹ *Ibid.*, para. 48.

⁶² *Ibid.*, para. 60.

that had the trial been more complex or had the applicant not enjoyed legal assistance before the trial, it may have found a violation. The Court currently has another case before it in which the applicants complain of the lack of legal aid.⁶³

III.9.2 Confidentiality of sources

The Court has recognised, as a matter of fundamental principle, that defendants in defamation cases should not suffer any detriment simply for failing to reveal confidential sources of information.⁶⁴ In the standard-setting of case of *Goodwin v. the United Kingdom*, it stated:

Protection of journalistic sources is one of the basic conditions for press freedom as is reflected in the laws and professional codes of conduct in a number of Contracting States and is affirmed in several international instruments on journalistic freedoms. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result, the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potential chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 unless it is justified by an overriding requirement in the public interest.⁶⁵

The importance of this principle in defamation cases has been confirmed in a recent Recommendation by the Committee of Ministers of the Council of Europe, which specifies: “In legal proceedings against a journalist on grounds of an alleged infringement of the honour or reputation of a person, authorities ... may not require for that purpose the disclosure of information identifying a source by the journalist.”⁶⁶

63 *Steel and Morris v. the United Kingdom*, note 54.

64 *De Haes and Gijssels v. Belgium*, 24 February 1997, Application No. 19983/92, paras. 55 and 58.

65 *Goodwin v. the United Kingdom*, 27 March 1996, Application No. 17488/90, para. 39.

66 Recommendation No. R (2000) 7 of the Committee of Ministers to Member States on the right of journalists not to disclose their sources of information, adopted on 8 March 2000, Principle 4.

Thus, while there may be cases where mandatory disclosure of confidential sources is justified, for example for the defence of a person accused of a criminal offence, this can never be justified in the context of a defamation case.

IRAKLI KOTETISHVILI

DEFAMATION IN GEORGIAN LEGISLATION

Before June, 2004 it was possible in Georgia to punish a person for dissemination of defamatory statements according to the Criminal Code, which contained a relevant article on defamation. On 24 June 2004 the Parliament of Georgia has adopted a new Law on Freedom of Speech and Expression. Simultaneously, the Parliament made changes in the Criminal Code of Georgia and abolished the above mentioned article on Defamation.

This means that defamation can be appealed only according to civil procedures.

Civil Liability for the Defamation

How the defamation is defined in Georgian law?

A person shall be imposed civil responsibility for slander against a private person if the claimant proves in court that the statement of the respondent contains essentially wrong facts related directly to the claimant, and this statement caused damage to the latter.

Burden of proof

The burden of proof has been reversed and now it is on the side of plaintiff.

According to the new law there are two types of standard proving:

1) If the plaintiff is a private citizen, than he or she should prove that a) the statement of the respondent contains essentially wrong facts; b) the statement was related directly to the claimant; c) and this statement caused damage to the latter.

If the plaintiff is a *public figure* than he or she should prove that: a) the statement of the respondent contains essentially wrong facts related directly to the claimant; b) this statement caused damage to the latter; c) and the person knew the incorrectness of the declared fact beforehand, or the respondent revealed evident and material negligence that caused dissemination of the information containing essentially wrong fact.

Who is a respondent in the court in case of dissemination of the defamatory statements made through Mass Media?

According to the new law in case of a court dispute related to the slander published by a journalist in the media, the respondent will be the *owner of the media*.

According to the new law, the subject of a court dispute on slander cannot be a statement, which is related to an indefinite group of persons and/or in which the claimant is not unambiguously identified.

Privileged statements

The law introduces two types of privilege: a) absolute privilege and b) qualified privilege.

The freedom of *thought* is protected as an *absolute* privilege.

Appeal is protected by a *qualified* privilege. An appeal can cause responsibility prescribed by law only when a person commits an intentional action that creates direct and substantial danger of an illegal consequence.

According to the new law a person can not be found responsible for a statement containing essentially wrong fact if:

- a) He has taken reasonable steps to verify the accuracy of the fact, but failed to avoid a mistake and took efficient measures for the restoration of the reputation damaged due to slander;
- b) The purpose of his action was protecting of the legitimate interests of the society, and the protected values exceeded the caused damage;
- c) He made a statement with the claimant's consent;
- d) His statement was a corresponding reply to a statement made by the respondent against him;
- e) His statement was a fair and accurate reporting related to an event of public interest.

Guarantees related to the Freedom of Expression

The law introduces important guarantees for those statements expressed during political debates as well as with respect to performance of the official duties by a member of the Parliament or an assembly, at a pre-trial or court hearing, before a public defender, at a meeting of the Parliament or an assembly as well as their committees within the limits

of the performance of the authority of a person, upon the request of an authorized body.

What are the remedies for the plaintiff in case of publication of a defamatory statement?

If a person (who disseminated wrong facts) makes a correction or denial within the term established by law (although the law doesn't specify that time limit), however, correction and denial is not sufficient for the proper compensation of the damage caused to the claimant, the respondent may be imposed compensation of pecuniary or/and non-pecuniary (moral) damage.

A new law abolished the possibility to impose retraction or right of reply.

What happens if the journalist by negligence disseminates essentially wrong facts?

According to the new law a person can not be imposed a responsibility if he did *not and could not know* that he disseminated slander.

What happens if a person fills apparently ungrounded claim on slander for the purpose of unlawful restriction of freedom of speech and expression?

In that case the respondent is entitled to claim from the claimant pecuniary compensation within the reasonable limits.

What is the time limit for filing a claim?

A claim on slander shall be filed to the court within 100 days after the person got acquainted or could get acquainted with the statement.

It could be concluded that despite the fact that the new Georgian law on freedom of speech and expression is very close to the European one, and in general to the western standards of freedom of expression, we can not say that it will be implemented in reality by itself. For that reason, we consider it extremely important that Georgian courts define relevant provisions of that law in a proper manner and elaborate its jurisprudence in accordance to the case law of the European Court of Human Rights.

OLGA SAFARYANLIBEL AND INSULT PROVISIONS IN
THE LEGISLATION OF ARMENIA

Freedom of speech and freedom of expression are fundamental human rights and liberties in any democratic, rule-of-law state. They are a *sine qua non* for the existence of democratic institutions in modern society.

This right is guaranteed by Article 24 of the Constitution of the Republic of Armenia [RA], which says in part: “Everyone is entitled to freedom of speech, including freedom to seek, receive and disseminate information”. However, this freedom cannot be absolute. Freedom of speech is subject to restriction for the purpose of protecting the rights and liberties of others. Freedom of speech should not trample upon human honour and dignity, which are some of the most important values. For instance, Article 20 of the RA Constitution proclaims: “Everyone is entitled to defend his or her private and family life from unlawful interference and defend his or her honour and reputation from attack”. Paras 1 and 2 of this article say that interference in one’s private and family life shall be banned, and that the confidentiality in correspondence and telephone conversations may only be restricted by court order. According to Article 45 of the Constitution, a person’s right to protect his or her private life shall not be subject even to temporary restriction “in the event of martial law”. Meanwhile, the right to freedom of speech, including freedom to seek, receive and disseminate information, may be restricted by law under Article 44 of the Constitution, if this is “necessary for the protection of state and public security, public law and order, public health and morality, and the rights, freedoms, honour and reputation of others”.

International law also provides for certain restrictions of the right to freedom of speech, if this is necessary for the protection of personal or state interests. Specifically, para 2 of Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms says this: “The exercise of these freedoms, since it carries with it duties and re-

sponsibilities, 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 reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

Article 29 of the Universal Declaration of Human Rights (1948) also says that freedom of speech may, if necessary, be limited by law.

Following the collapse of the Soviet Union and the start of reforms, Armenia, perhaps like all the other ex-USSR republics, savoured the taste of freedom of speech. People read avidly newspaper publications focusing on ups and downs in our recent history. Freedom of speech and freedom of information are certainly some of the basic gains of modern society. All of us would find it extremely hard, if possible at all, to give up freedom of thought and freedom of speech we have grown so accustomed to. And yet, it is safe to say that we often are tired of the license with which freedom of speech is interpreted by certain dishonest journalists. Increasingly often one can hear the press being run down as “yellow”. The number of grievances against the press has been growing lately. Regrettably, journalists themselves are often to blame for many of these grievances, their legal competence and professional ethics leaving much to be desired. At the same time, the number of unfounded complaints is considerable as well, and the majority of these are lawsuits for the protection of honour, dignity, and business reputation. It is this category that is of particular interest, being a classical example of “inversion of responsibility”.

Under Armenian legislation, the insult of honour and dignity is a civil and criminal offence *punishable, inter alia, by a prison term of up to one year (Article 135 (2), the RA Criminal Code) or up to two years if the victim is a government/state official (Article 318 (2))*. In 2003, when the new RA Criminal Code was being approved, many press and public organizations attempted to use a chance to decriminalize libel and insult offences. I would like to draw your attention to an open letter to RA National Assembly Speaker Artur Bagdasaryan, with copies sent to the RA President,

Prime Minister, Minister of Justice, National Assembly deputies, and the media. The letter was signed by the head of the OSCE mission to Yerevan, heads of a number of embassies, representatives of the Eurasia Foundation, the Open Society Institute Assistance Foundation – Armenia, Article 19, the Yerevan Press Club, Internews Armenia, and others. However, their effort to have libel and insult decriminalized came to nothing, with the new RA Criminal Code coming into force as of 1 August 2003. Articles 135 and 136 in the new Code impose criminal liability, including imprisonment, for libel and insult. Moreover, Article 318 of the Code envisages additional protection for government/state officials and stricter liability for insulting the latter.

But all is not as sad as it often appears. Though the demand to decriminalize libel and insult came to nothing, it is my view that first steps have been taken in that direction. Those articles (135, 136 and 318) were considerably modified by the Law on Changes and Amendments to the RA Criminal Code of 9 June 2004, which came into force on 24 July 2004. For example, paragraphs 2 (qualifying elements) were removed from the descriptions of these articles. These paragraphs established punishment *for libel or insult contained in a public address, publicly demonstrated work, or in the mass media*.

Article 135 of the RA Criminal Code envisages punishment for *libel*, i.e., *the dissemination of information known to be false that defiles the honour and dignity of another person or damages that person's business reputation*.

The strictest punishment is provided for under para 2 of the article: a prison term of up to one year (up to three years in the previous version). Under para 1 of the article, this offence is punished by a fine of *100 to 500 minimal wages* (the old version: *50 to 100 minimal wages, respectively*). The former article also envisaged punishment by corrective labour for a period of *up to one year*. The new article establishes no such punishment. *For libel contained in a public address, publicly demonstrated work, or in the mass media*, the former article envisaged a fine of 100 to 200 minimal wages, corrective labour from one to two years, or up to two months in

custody. As I already mentioned, this paragraph was deleted in full from Article 135 of the RA Criminal Code.

Previously effective **para 3 of Article 135** of the Criminal Code envisaged punishment for acts indicated in the first two paragraphs of the article, if those acts were expressed in accusing a person of grave or particularly grave offence. These acts were punished by corrective labour for a period of not more than two years, a term in custody from one to two months, or a prison term of up to three years.

Thus, one can say that the previously effective article had two qualifying elements of the offence, which were fully deleted from the article and replaced with one qualifying element, to wit, recurrence of the offence, an act punishable by a fine of 300 to 1,000 minimal wages or a prison term of up to one year.

Article 136 of the RA Criminal Code establishes punishment *for insult, i.e., denigration of the honour and dignity of another person, as expressed in an indecent form.*

The former version of para 1 of the article punished this offence by a fine of up to 100 minimal wages, or corrective labour for a period of up to six months. Para 1 of the effective article envisages only a fine of 100 to 400 minimal wages.

For an insult contained in a public address, publicly demonstrated work, or in the mass media, the former version of the article envisaged punishment by a fine of 50 to 200 minimal wages, or corrective labour for a period of up to one year.

Like Article 135, the effective article establishes but one qualifying element, to wit, recurrence of the offence, and punishment by *a fine of 100 to 800 minimal wages.*

As we can see, Article 136 of the Criminal Code envisages neither corrective labour nor imprisonment, and the offender is liable to punishment by a fine alone.

I would like to draw your attention to the fact that those wrongful acts are seen as intentional because they imply a conscious attitude to:

- dissemination of information known to be false with regard to a person – **LIBEL**,
- intentional denigration of a person's honour and dignity, as expressed in an indecent form; characterization of a person performed in an indecent form – **INSULT**.

These wrongful acts differ in the burden of proving. The presence or otherwise of libel in information reports can be established with considerable accuracy, because the *falsity* of information can be established from concrete facts (documents, eyewitness evidence, etc.). It is obvious that a professional journalist can always argue that the statements made were not false even if their truth cannot be proved, just because he/she believes them to be true based on a plethora of indirect facts.

On the contrary, a considerable amount of proof is normally needed to demonstrate the presence of insulting information in publications and public addresses. As distinct from libel, where an analysis of the essence of information is needed, formal elements of insult do not call for analyzing the essence of viewpoints in a publication to prove their falsity. To punish this offence, it is enough to prove that a certain report has smeared the claimant's honour and dignity in an indecent form. It is natural that the key argument for applying the relevant Criminal Code article is that reference to the claimant was made in an indecent form, but the valuational concept of "indecent form" has been left totally unexplained by the legislator. In practice, as a rule, indecent form is seen as cynical treatment of a person, one that denigrates his/her honour, belittles his/her dignity, and is utterly at odds with the moral norms and rules of social behaviour. Normally, the indecent form of characterization of a person consists in utterances of indecent or obscene nature, which is at variance with the rules of communal living and relationships accepted in society. For example, if someone is referred to as a "cretin", even if the person's mental capacities are inadequate, it is nevertheless an insult punishable under the Criminal Code. It will also be an insult to comment on a person's physical defects in an indecent manner. In any case, a *sine qua non* element of insult is a negative characterization of a person and the intentional nature of this characterization.

Notice that Articles 135 and 136 of the RA Criminal Code are directed at protecting such intangible values as honour, dignity, and goodwill, i.e., the rights that are directly associated with and inseparable from the person. As of July 2004, these articles have no special subject of liability, the journalist. Accordingly, they are applied not only as per professional criteria and media people are not the only ones to be charged under these articles.

I agree that these articles may potentially be used to infringe upon citizens' freedom of expression, but at the same time, the articles themselves protect an important personal right to honour and dignity. Honour and dignity rank first on the list of intangible human rights. It is pertinent to say, therefore, that these objects of law per se certainly need protection as socially significant ones.

Currently one can often hear reasoning to the effect that anti-media criminal proceedings are on the rise in connection with critical attacks in the media, or that it is a shame to let journalists go on defaming people without fear of liability. Occasionally it takes on the form of appeals to tighten or ease liability for certain actions. These opposites are often based on fundamentally different understanding of the hierarchy of and relationship between human rights and principles of law, and thus shape views on consolidating the prevalence of some rights over others. What should we do about the right to freedom of expression and the right to uphold the intangible rights which occasionally suffer from certain forms of such expression?

So, if we are to look into the advisability of dropping those articles from the RA Criminal Code, we ought to study certain aspects, such as:

- whether the existence of these articles accords with the interests of the person and society;
- whether the rights these articles protect can be protected in any other way;
- whether these articles conform to the RA Constitution and international law;
- whether similar norms exist in other national legal systems;

- whether the articles' disposition is correct and whether it contains discriminatory implications relative to the subject of liability.

Now I will attempt to offer several arguments in connection with the above questions.

Given the currently growing need to protect the intangible human values, I think the first question ought to be answered in the affirmative. It is quite obvious that those rights should be protected against infringement. Rather, the problem is how correct and efficient it is to protect them in the exercise of criminal justice. Possibly, civil law or administrative methods of dealing with offenders would be quite enough.

As regards honour and dignity, it is safe to say that they, as per Article 162 of the RA Civil Code, are in the *category of intangible values* along with other objects of law (such as life and health, inviolability of the person, privacy of personal and family life, etc.) and, accordingly, can be protected by civil proceedings under Article 19 of the RA Civil Code (Protection of Honour, Dignity and Business Reputation). The article encompasses actions falling under Article 135 of the RA Criminal Code. Though one and the same object suffers (honour and dignity), the acts covered by the RA Criminal Code are graver for their qualifying elements and the presence of guilt. While it is totally immaterial in civil action whether or not the media body was aware of the falsity of the information disseminated, it is absolutely necessary in a criminal case. The victim can choose a method to defend his/her rights on his/her own. The person should decide which option is of more importance for him/her: having a renunciation of the previous report published by the same media body that disseminated false information, or having the author of the published report punished under criminal law. Also notice that in civil proceedings, the main burden of proving is borne by the respondent in this category of cases, and by the investigators in a criminal case.

Thus, a person whose honour and dignity suffered in consequence of the dissemination of false and defaming information has an alternative, and therefore one can state with assurance that the revocation of criminal proceedings will not deprive the victim of the remedies to protect his/her rights or restore good reputation.

It is a totally different matter where the infringement of honour and dignity results from an insulting form of the report itself rather than the dissemination of certain information. Here one will have to admit that civil remedies are not enough, for there is no special article in civil legislation that might be applicable in this instance. Article 19 of the RA Civil Code is absolutely of no use, because the remedies it envisages are aimed at disproving information, rather than rectifying the form of the report. Renunciation of an insulting report is impossible in view of the total absurdity of this method. Court trials of that kind will be farcical (examples). Consequently, dropping the formal elements of the crime of insult from the RA Criminal Code, unlike libel, will be an unwise and unjustified thing to do, inasmuch as no one now has any real remedy against the infringement of rights under civil procedures. Or we must bridge the gap by adding a legal provision on the defence against the act of insult, by analogy with provisions in Article 19 of the RA Civil Code.

One can see from the proceedings in the European Court of Human Rights that it has created no precedents recognizing national legal provisions on liability for libel or insult as being at variance with the European Convention, or precedents that groundlessly restrict the rights guaranteed by Article 10 of the Convention. And this approach is quite justified because the Convention cannot allow the preeminence of some rights to the detriment of others. Freedom of expression, as I mentioned earlier, is not in the category of the absolute rights that may not be restricted. Introduced for the purpose of protecting the rights of others, the lawful restrictions of freedom of expression (Articles 135 and 136 of the RA Criminal Code) conform to the freedom-restricting rules imposed by the European Convention and the RA Constitution. Moreover, the existing restrictions apply to the intentional infringement of the rights of others, where a person was aware that he or she was impinging on the rights of others and sought to achieve precisely that effect.

Proceeding from the foregoing, one may infer that Articles 135 and 136 of the RA Criminal Code neither restrict freedom of expression nor are at variance with the import of either the RA Constitution or international law, and that their revocation will cause greater damage to the

person than their existence. It is high time we recognized the priority of the person's basic right to dignity by comparison with the right to self-expression, let alone the self-expression of professional journalists, whose mission it is precisely to serve the person's interests by providing reliable information.

That these articles of the RA Criminal Code can be used to tamper with journalists' freedom of expression is not yet evidence that the institution designed to protect these rights is harmful per se. Rather, it is a pretext to give thought to the rationale behind this kind of policy as practiced by the authorities. After all, it is axiomatic that government pressure mounts where there is no professional self-regulation, as is evident from the practice of other states, where the institutions of criminal and civil persecution scaled down precisely owing to the existence of media self-regulation as expressed in professional ethics and media quality control.

To conclude, a quote by the former OSCE Representative on Freedom of the Media, Freimut Duve, on how he personally defines the limits of freedom of expression. Asked that question, he replied thus: "A journalist's professionalism is what draws the limits of his/her freedom of expression in the first place, while freedom and responsibility are its components".

RAMIL HASANOVLIBEL AND INSULT LAWS AS PUNITIVE FORMS
OF THE MEDIA REGULATION:
RECENT DEVELOPMENTS IN AZERBAIJANI DEFAMATION LAW

The arraignment of mass media in Azerbaijan is connected mainly with defamation – the necessity to protect honour, dignity and business reputation. First of all, it should be mentioned that there are very few legal acts in the country, regulating relations between subjects of law concerning defamation. The existing legal provisions are inconsistent and contain a lot of legal gaps. Legal provisions relating to defamation are reflected mostly in Article 46 of the Constitution, Articles 21, 23, and 1097 of the Civil Code, Articles 147, 148, and 323 of the Criminal Code, Articles 10, 10 (1), 44, and 45 of the Law on Mass Media, the resolution of the Plenary Meeting of the Supreme Court of Azerbaijan on the Practice of Applying Legislation on Protection of Honour and Dignity by the Courts, adopted in 1999, and in the decision of the Azerbaijan Republic Constitutional Court on Comments to Articles 21 and 23 of the CC of 31 May 2002. Some of the aforementioned articles need to be harmonized with the international standards.

Civil liability for defamation

Azerbaijani practice shows that most cases between mass media and plaintiffs are initiated on the basis of claims for protection of honour and dignity. On the whole, Azerbaijani courts strictly abide by legal provisions during the consideration of such cases, which leads to numerous rulings issued against the media, mainly due to the content of the laws.

It should be mentioned, however, that considerations of freedom of expression (freedom of speech, thought, and information) are usually disregarded during the hearings of cases of libel in spite of their constitutional guarantees. This is partially explained by the widely held opinion that statements providing grounds for using the constitutional right to protec-

tion of “honour and dignity”, “good name”, or “reputation” (e.g. as is the case in Azerbaijan) are automatically excluded from the protected forms of expression. A thorough examination of the texts of the Constitution does not suggest such interpretation. Under the national Constitution only war propaganda, instigation of strife on the grounds of race, ethnic origin, sex, etc. are referred to statements not guaranteed constitutional protection. However, the Constitution also stipulates that under the law, restrictions may be imposed on freedom of expression, if there is a need to protect honour and dignity. Consequently, the law on defamation should strike a balance between opposing constitutional requirements with respect to the protection of reputation and the freedom of speech and information.

The Decisions of the European Court in respect of freedom of expression always say that freedom of the press is one of the main components of freedom of expression. The press plays a leading role in informing the public opinion of problems involving public interests, and it should enjoy freedom of expression while commenting on certain issues of political or public interest. The limits of admissible criticism of political figures or government institutions are wider than for private individuals, and on the whole they are wider when concrete persons are not criticized.

Such categorical position of the judiciary with respect to the defamation law in Azerbaijan differs from the approach adopted in the legal practice of the European Court of Human Rights, which passed many of its decision, starting with the *Lingens vs. Austria* case (1986), based on the methodology aimed at harmonizing the opposing interests of reputation protection and guaranteeing the freedom of expression. This approach is based on the fact that the threat to impose sanctions in accordance with the defamation law constrains public debate, which is of paramount importance in a democratic society, and therefore under certain circumstances society’s interest in dissemination of information and opinions should prevail over the protection of reputation. Such circumstances include cases where an official is a plaintiff and the applications considered are evaluative judgments or personal opinions rather than statements of facts. Such reasoning is not common for the country’s legal practice. An exception could only be made for decisions, if any, stating that “the court shall

consider cases taking into account the notion of “evaluative judgement”, which means that a person shall not be liable for an opinion or judgment (evaluation) expressed in respect of events, circumstances, etc., the truthfulness of which cannot be proved. It is necessary to draw a distinctive line between facts and evaluative judgments. Facts can be proved, while the truthfulness of evaluative judgments is unprovable. The requirement to prove the truthfulness of evaluative judgments is impossible and violates the freedom of expression”.

Hence, decisions passed on the claims for the protection of honour and dignity in Azerbaijan, which is a participant in the European Convention on Human Rights, should at long last become a subject of close examination by the European Court.

Under the present-day circumstances, the probability that a concrete decision passed on a case of abasement of honour and dignity, slander, insult, compensation for moral damage will be subjective, disputable, and legally assailable, is extremely high in Azerbaijan.

This is caused by the fact that all, or nearly all basic notions of law connected with this category of cases have no objective and operational definition or interpretation. On the one hand, it is not quite clear what their meaning is (should be). On the other hand, they shut out direct practical enforcement (or such enforcement turns out to be contradictive). This opens vast opportunities for “politicization” of civil and criminal cases involving mass media, exerting pressure on the media by the authorities, manipulating public opinion, intentional discrediting of “unfriendly” printed publications and individual journalists. At the same time, it seriously complicates the consideration of cases of real abasement of honour and dignity of representatives of public officials, specifically, by oppositional publications.

Under Article 44 of the Law on the Mass Media, citizens of Azerbaijan and legal entities are entitled to respond to information published in or broadcast by the media, which contradicts reality and discredits their honour, dignity or business reputation. Article 45 envisages that the response should receive the same coverage as the initial article or programme broadcast by a mass medium. The grounds for refusal from publishing or

broadcasting a response by the media are provided by the same article.

The obligatory right to response is a highly disputable issue in the legislation on the mass media. In the United States, it is considered unconstitutional on the grounds that it constitutes interference in editorial independence. In Europe, on the other hand, the right to response is subject to a resolution of the Committee of Ministers of the Council of Europe. The right to response is prescribed by laws of many West European democracies, and these laws vary in efficiency. The purpose of the right to response is to provide a person with an opportunity to correct inaccurate facts hindering his (her) personal right to privacy and reputation. The advocates of freedom of the mass media, including ARTICLE 19, usually submit proposals to make the right to response voluntary, instead of obligatory as prescribed by law.

However, inaccurate and indefinite interpretation of such basic notions as “honour”, “dignity”, “slander”, “insult”, “honour and dignity abasement”, etc., both in the laws and in legal literature contribute to subjectivity and inexplicitness of their interpretation in law enforcement practice.

In other words, all the aforementioned notions are not defined by the legislators and so far contribute nothing substantial or new from the point of view of proceedings.

Let us consider the definition of these notions in legal literature in greater detail.

The Constitution of the Azerbaijani Republic interprets *dignity* as an absolute value of any individual, protected by the state. In other words, no matter how society may evaluate a given individual and no matter what his (her) personal opinion of himself (herself) might be, he (she) already has value for the state and society. However, legal literature often interprets dignity as (positive) self-evaluation of an individual. In that case, the formulation “abasement of dignity” is senseless, because it is impossible to abase an individual in his (her) own eyes. Moreover, “honour” and “dignity” are not strictly delineated. The Civil Code of the Azerbaijani Republic qualifies both honour and dignity as non-material, inalienable rights of an individual (benefits). But in legal literature it is

mostly interpreted as positive social assessment of a person, or “a reflection of qualities of an individual in public consciousness accompanied by a favourable social appraisal”. It is absolutely unclear what “outward honour” and “civil honour” mean: in expert opinion, the latter stems from the state and ... disappears in the event of criminal punishment!

In expert opinion, *dignity* means “self-evaluation of an individual based on his (her) evaluation by society”. But this social evaluation of a person is not related to the notion of dignity. Dignity means the acknowledgment by a person of his (her) value as a human being, a concrete individual, a professional, etc. Hence, the notions of personal, professional, national dignity. The Azerbaijani Constitution (Para 2 of Article 46) says: “Personal dignity shall be protected by the State. Nothing can serve as grounds for its abasement”. The legislation includes dignity, as well as honour, among non-material rights of an individual.

Therefore, the notion of dignity incorporates a person’s acknowledgement of his (her) abstract and specific social value, as well as the value (significance) of social groups to which he (she) belongs. It is another question on what grounds these groups have been formed: as a rule, they are professional, ethnic, or confessional (religious). It can only be favourable by definition – it is insignificant whether a given person has some or other positive traits or what the public thinks of this person.

From the point of view of law, *honour* is a reflection of the qualities of a person (both natural and legal) in public consciousness, involving a favourable appraisal. However, in this case the definition of honour comes into some contradiction with its interpretation by the Azerbaijani Criminal Code as a non-material and inalienable personal right, if only this right is not understood as some sort of “presumed presence of honour” – a presumption that a person has honour provided he (she) has not committed any deeds or made statements incompatible with his (her) positive evaluation in the public opinion (public consciousness). A comment to the Azerbaijani Criminal Code says: “The protection of honour and dignity involves a presumption according to which disseminated discrediting information is considered as inconsistent with reality. This means that the truthfulness of such information shall be proved by the person who spread it.”

Abasement of honour presumes that the plaintiff experiences a change (or considers such change potentially possible) of public opinion of himself (herself). It is a conscious discrediting of a person in the eyes of the public. However, according to the Comment to the Azerbaijani Criminal Code, “the fact of abasement and its degree and extent shall be estimated first of all by the victim himself (herself)”. There are no objective, and particularly operational criteria for proving the fact of “honour abasement” in the laws or legal texts in general.

Obviously, the Azerbaijani Constitution implies abasement, rather than impairment of dignity. Apparently, a clear line is drawn between abasement as a form of discrediting a person in the public opinion and impairment as a form of influence on the public opinion, which contradicts a person’s dignity as his (her) inalienable right. A person cannot be debased in his (her) own eyes. Therefore it would be more appropriate to speak of “honour abasement and impairment of dignity”, rather than of “abasement of honour and dignity”.

The notion of *reputation* (in general) is missing from the texts of the legislation: there is only the notion of business reputation as a non-material right of a person (including legal entities), in no way defined in the Azerbaijani Criminal Code. (However, the term “reputation” is used in the Azerbaijani Criminal Code, in the article dealing with slander, but it is obvious from the context that precisely, and only the business reputation is implied.) Apparently, the notion of reputation defined in the Comment to the Azerbaijani Criminal Code as “a formed opinion about a person based on the evaluation of his (her) socially significant qualities” is only one aspect of the notion of honour, which is wider than the notion of reputation.

As far as the notion of business reputation is concerned, legal texts link it primarily to entrepreneurial activity, defining it as a “reflection of a person’s business qualities in the public opinion accompanied by its positive appraisal by society”. Strictly speaking, business reputation may be negative as well, but generally this combination is used in the positive sense, e.g. “protection of business reputation”.

Legal texts do not contain a definition of “indecent form” either, although this notion underlies the concept of “insult”. The concepts of “defamatory” and “dishonourable” statements are confused, too, and so on.

The Comment to the Azerbaijani Criminal Code says: “Indecent form of discrediting a victim means that negative assessment of his (her) personality is presented in an overtly cynical manner, strongly opposed to the socially acceptable manner of human relations. This includes, first of all, unquotable expressions, and comparisons with odious historical and literary characters.”

The word “cynical” is synonymous to the word “indecent” or “obscene”, with the only difference that indecency does not involve intent, whereas cynicism does. It is totally unclear what “an overtly cynical manner” means, as well as “the socially acceptable manner of human relations”.

Unquotable expressions are synonymous to indecent form, as they present a negative appraisal of the victim’s personality by using words and expressions with a certain meaning, considered unsuitable in most situations of interpersonal communication. Incidentally, if such words and expressions were actually used, but without any negative appraisal of a person – they would be some sort of friendly obscenities.

None of the expressions mentioned here can be defined – or, at least, is not defined – with any degree of objectiveness, starting with the concept of discrediting, which, in all probability, is totally synonymous to abasement of honour and dignity.

Therefore, as we have already mentioned above, there is no clear definition of the notion of “honour and dignity abasement”, which is very unfortunate, as many other basic notions are connected with this concept, e.g. “insult” and “slander”.

Criminally punishable defamation

Criminal law defines “*libel*” as “dissemination of knowingly false information defaming another person’s honour and dignity or undermining his (her) reputation in a public statement, publicly demonstrated work or mass media”.

The difference between civil and criminal offence consists in intent (“knowingly”).

The law divides this article in two parts, according to its qualifying elements, and imposes a much more severe punishment for the latter. Thus, Article 147 (Part 2) of the Azerbaijani Criminal Code envisages punishment regardless of the method of dissemination: “libel combined with accusation of a person of committing a grave or especially grave crime” is punishable with corrective labour for a term up to two years, or restriction of freedom for a term up to two years, or imprisonment for a term up to three years.

Therefore, libel is a form of honour and dignity abasement (or honour abasement and impairment of dignity) involving intentional falsehood, but not necessarily expressed in an indecent form (unlike insult).

Let us try to take a closer look at the definition of libel provided by the Azerbaijani Criminal Code. There are two ambiguities.

First, what does “knowingly false” information mean (this wording was adopted in the new Criminal Code from the old one)? Apparently (as the Comment to the Azerbaijani Criminal Code interprets this expression) it means the awareness of the person disseminating slanderous information of its falsehood. But the law does not provide a clear definition.

Second, what does “defamatory information” mean and in what way is it related to the abasement of honour and dignity? A bylaw – Resolution of the Azerbaijani SC Plenary Meeting of 14 May 1999 – provides a definition of defamatory information: “information inconsistent with reality, containing statements about violations of effective law or moral principles by an individual or a legal entity, impairing the honour and dignity of an individual or business reputation of an individual or a legal entity”. Hence, there are three evident elements of defamatory information: (a) aiming at abasement (impairment) of honour and dignity or business reputation; (b) nature of the information (violation of the law or commonly accepted moral principles); (c) falsehood of this information. While it is easy to qualify information as defamatory on the basis of elements (b) and (c), the main element – (a) – takes us back to the still undefined notion of honour and dignity abasement.

In addition to libel, the Azerbaijani legislation envisages punishment for an “*insult*”, which is defined as “abasement of honour and dignity of another person expressed in indecent form in a public statement, publicly demonstrated work or mass media” (Para 1 of Article 148 of the Criminal Code). Verbal insult entails initially the imposition of “community sanctions”, whereas “insult made in the media or using another method” entails a fine in the amount from 300 to 1,000 minimal salaries, or social jobs for a term up to 240 hours, or corrective labour for a term of one year, or imprisonment for a term up to six months.

According to this article, insult means “abasement of another person’s honour and dignity expressed in indecent form”. This definition contains two elements: (a) aiming at abasement of honour and dignity, and (b) indecent form. Strictly speaking, another element, not directly indicated in the text of the article, is implied – it is (c) intentional nature of the deed. Truthfulness (reliability) or falsehood of the information disseminated during an insult does not make any difference.

The criminal legislation envisages a separate form of criminal liability for publicly insulting or libelling the President of the Azerbaijani Republic (Article 323 of the Azerbaijani Criminal Code).

Criminal liability for insulting or discrediting government agencies and public organizations was abolished in the old Criminal Code of Azerbaijan (Para 1 of Article 67) way back on 11 August 1989.

Since then, the only official whose slandering and discrediting entails special punishment is the President of the Azerbaijan. Liability for this offence was introduced on 26 June 1990, soon after the introduction of the presidential post.

The aforementioned article of the Criminal Code contradicts the Constitution of Azerbaijan, violates Azerbaijan’s international commitments, and does not comply with the accepted norms of international law.

While measuring the level of anti-constitutional action, it is useful to start with considering international laws which Azerbaijan openly agrees to support. For example, Azerbaijan is a participating State to the Organization for Security and Co-operation in Europe (OSCE). Some OSCE commitments are connected with guarantees of the freedom of speech,

including the provision on member countries' guarantees of the absence of any legal and administrative restrictions of free access to the mass media on non-discriminate principles. Azerbaijan is also a participant of the International Covenant on Civil and Political Rights (ICCPR) and its Optional Protocol. The aforementioned Article 323 of the Azerbaijani Criminal Code contradicts both documents. Thus, Article 25 of the Covenant says that freedom of conviction is an important element of the right to free expression of will during elections. Article 19 guarantees freedom of conviction even more explicitly:

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.

The use of the rights envisaged by Para 2 of this article carries with it special duties and responsibility. Therefore, it may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order, or of public health or morals.

Having joined the Optional Protocol to the International Covenant on Civil and Political Rights, Azerbaijan not only agreed to guarantee the aforementioned freedoms, but also agreed to recognize the competence of the Committee to "receive and consider ... communications from individuals claiming to be victims of violations (by Azerbaijan) of any of the rights set forth in the Covenant". Supporters of this article may argue that the prohibition of insults addressed to the President is an exception stipulated by Para 3 for such restrictions, necessary "for respect of the rights or reputations of others". However, this argument does not work, because this restriction cannot be proved "necessary" within the framework of commonly accepted principles of international law.

Presently, according to Para 1 of Article 323 of the new Criminal Code of Azerbaijan *Abasement or impairment of honour and dignity of the Azerbaijani head of state – the President of the Azerbaijani Republic – in a public statement, publicly demonstrated work or mass media shall be penalized with a fine in the amount from 500 to 1,000 minimal salaries, or corrective labour for a term up to two years, or imprisonment for the same term.*

According to Para 2 of the same article, *the same deeds connected with accusation of committing a grave or especially grave crime shall be penalized with imprisonment for a term from two to five years.*

At the same time the article contains notes stipulating that “public appearances containing critical statements about the activity of the Azerbaijani head of state, the President of Azerbaijan, as well as the policy conducted under his guidance shall not be regulated by this article”.

Article 323 of the Criminal Code (“Abasement or impairment of honour and dignity of the Azerbaijani head of state – the President of Azerbaijan”) constitutes, first and foremost, a gross violation of Article 25 of the Constitution of Azerbaijan (“Right to equality”), as it legalizes inequality of the republic’s president and the other citizens.

Moreover, according to Article 109 of the Constitution, the President shall submit proposals to Milli Mejlis of the Azerbaijani Republic on appointment of judges of the Supreme Court of Azerbaijan and appoint judges of other courts of the Azerbaijani Republic. The consideration by these judges of cases of insulting the President would initially violate Article 127 of the Constitution (“Independence of judges, main principles and terms of administration of justice”). It should be mentioned that the claims based on Article 323 of the Criminal Code are submitted by the Ministry of Justice, whose head is also appointed by the President.

Para 2 of Article 10 of the European Convention on Human Rights (ECHR) says: “The exercise of these freedoms [freedom of expression], since it carries with it duties and responsibilities, may be subject to such formalities ... 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 the rights of others...”

This provision was explicitly clarified in a number of cases considered by the European Court of Human Rights. The Court has repeatedly stated that the right to freedom of expression requires that any restrictions of statements should be well reasoned and justified by exclusive circumstances threatening vital social or human interests. Protection envisaged by Article 10 is very capacious and applicable not only to information and ideas which are considered as harmless, but also to those that insult, shock or cause concern of the state or other sectors of society. For this reason, interpretation of exceptions to restriction of freedom of expression should be very narrow.

In fact, in order to permit restrictions envisaged by Para 2 of Article 10, the Court insisted that they should:

- (a) be prescribed by law;
- (b) pursue a legal objective;
- (c) be necessary in a democratic society.

It is unclear whether Article 323 of the Azerbaijani Criminal Code meets the first and second criteria, but it is obvious that it does not comply with the third criterion.

As far as the first criterion is concerned, in order to be “prescribed by law”, restriction of the freedom of expression “should be formulated with sufficient precision, enabling those concerned to seek legal advice when necessary, so as to reasonably foresee the implications of the case, depending on the circumstances”. Although the Court usually finds that duly adopted laws infringing freedom of expression meet this condition, such conclusion could hardly be applied to this article, as it is formulated without due precision.

As for the second criterion, it is unclear whether protection of the President’s honour with the help of criminal law is a lawful objective as compared to public interest in freedom of speech. The goals considered legal by the Court for restricting freedom of expression include protection of public morals by censoring unquotable expressions, maintaining the power of the judicial system by bringing to responsibility liability for

contempt of court, and ensuring order in the telecommunication system. The Court also recognizes protection of reputation as a lawful objective. However, this is usually done after review of the defamation law, envisaging responsibility only in cases where the considered statements are untrue. Even those cases often demonstrated that the defamation laws applied to political statements often violate Article 10.

As for the third criterion, i.e. inalienability of restriction of the freedom of expression in a democratic society, the court defined the term “inalienable” restriction very narrowly: the adjective “inalienable” in the sense of Para 2 of Article 10 implicates the presence of acute public necessity. Although the imposition of restrictions on false statements by the government could be justified, the Court usually assumes that private opinions cannot be recognized as “false” and therefore any censorship of private opinion is inadmissible as per Article 10. Moreover, the Court stated that journalistic freedom requires the possibility to resort to exaggeration or even provocation.

There is no need to reflect such provision as Article 323 in the Criminal Code. This article is aimed at imposing restrictions on political statements, which are guaranteed the highest level of protection by the European Court. It is aimed at restricting discussions of issues of public interest, which is another domain where the Court prohibits government intervention. If this article remains part of the Criminal Code, it will protect a figure vested with power, who is not weak, unlike provisions earlier found admissible by the Court. This article of the law also envisages a more severe punishment for insulting through the media, despite numerous Court decisions that the principles of freedom of expression have a particular significance with respect to the press.

A more important argument, however, is the fact that this article contradicts the narrowly defined restrictions admitted by international law, as it is aimed at protection of the interests of a political figure. In the case *Oberschlick vs. Austria* the Court considered an analyst’s characteristic of a politician using “a very smearing insult”. The Court decided that the borders of allowed criticism are wider with respect to a politician’s activities than with respect to a private individual. A political figure should

be aware that he (she) inevitably and consciously subjects every word and action to scrutiny of journalists and the public in general, and hence, should display greater tolerance.

The analyzed Article 323 of the Criminal Code is targeted at a considerable increase of criminal liability for “insulting” the President of Azerbaijan, which contradicts the Republic’s Constitution, that guarantees citizens’ right to freedom of speech, as well as international commitments of Azerbaijan and generally accepted principles of international law guaranteeing a particular level of freedom of speech with respect to political statements and relating to the activity of politicians.

Therefore, Article 323 of the Criminal Code is anti-constitutional. Introduced in Azerbaijani law on 26 June 1990 after the institution of the presidency, it has been used all this time as a weapon for suppressing oppositional criticism. Although there are only several precedents of its use before 1998, it can now be used by courts against participants in oppositional demonstrations. Therefore relevant authorities should request the Constitutional Court to cancel it.

Compensation for moral damage

Dissemination of slanderous reports and materials, not consistent with reality, via the mass media inflicts *moral damage*, subject to compensation by fine (Article 21 and Article 1097 of the Civil Code).

According to civil law, moral damage means “physical or moral suffering experienced by a person as a result of violation or encroachment on his (her) rights”. The forms of such suffering include (as per Resolution of the Azerbaijani SC Plenary Meeting of 14 May 1999): “Suffering inflicted by actions (inaction) encroaching on ... non-material benefits (...personal dignity, business reputation...). ...Moral damage may consist, in part, in moral suffering in connection with ... dissemination of false information defaming a citizen’s honour, dignity, or business reputation...”

All these forms of moral suffering are elusive, and it is impossible to prove the fact of moral damage by investigative or judicial methods, except in individual cases. The connection between the aforementioned forms of moral suffering and abasement of honour and dignity is also

indefinite, not to mention the uncertainty of the very notion of abasement of honour and dignity. Therefore the only legal conclusion is to consider the possible, rather than already inflicted moral damage. Accordingly, the compensation for moral damage should also be based on the logic of possible, rather than already inflicted damage. For instance, it is impossible to determine whether the victim actually experienced humiliation, irritation or desperation as a result of illegal dismissal from job, and if we know that he (she) was irritated – whether this irritation was due to the dismissal. But the very fact of illegal dismissal provides grounds for claiming compensation for moral damage. It is another matter whether such compensation implies the establishment of causal relations between the dismissal and “physical or moral suffering”.

The aforementioned reasoning suggests the conclusion that Azerbaijan should adopt a separate Law of the Azerbaijani Republic on Defamation, which could solve the disclosed problem.

III.

FREEDOM OF INFORMATION

Article 19

FREEDOM OF INFORMATION AND THE MEDIA IN ARMENIA,
AZERBAIJAN AND GEORGIA

Dimitri Kitoshvili

FREEDOM OF INFORMATION IN GEORGIA

Shushan Doydoyan

IMPLEMENTATION OF THE FREEDOM OF
INFORMATION LAW IN ARMENIANURIDDIN

Elmar Huseynov

ACCESS TO INFORMATION IN AZERBAIJAN:
HOW EASY IS TO GET IT?

FREEDOM OF INFORMATION AND THE MEDIA IN ARMENIA,
AZERBAIJAN AND GEORGIA

**A REPORT BY ARTICLE 19,
THE GLOBAL CAMPAIGN FOR FREE EXPRESSION¹**

III

The Right to Freedom of Information

Freedom of expression comprising “the freedom to hold opinions ... and to seek, receive and impart information and ideas through any media and regardless of frontiers”² is one of the essential foundations of a democratic society. It has been widely recognised as essential for the enjoyment of other human rights. “Without a broad guarantee of the right to freedom of expression protected by independent and impartial courts, there is no free country, there is no democracy. This general proposition is undeniable.”³

A good freedom of information regime builds a relationship of trust between the public and the government,⁴ in which the public has the right to access and freely discuss official information, and government creates a favourable environment for an informed political debate and for involving general public in shaping state policies and agendas that affect their lives.

1 The report was presented at the First OSCE South Caucasus Media Conference in Tbilisi (Georgia) on 25-26 October 2004. It covers events up to October 2004.

The report was researched and written by Iryna Smolina, ARTICLE 19 Europe Programme Officer. David Banisar, Deputy Director of Privacy International, wrote an overview of the FOI-related legislation, Chapter 3.2. Editing and comments were provided by Luitgard Hammerer, ARTICLE 19 Europe Programme Director; Peter Noorlander, ARTICLE 19 Lawyer; Mark Grigorian, Producer for BBC World Service; and ARTICLE 19 regional partner organisations (*supra*, note 7). The report’s full text is available from ARTICLE 19 or can be found at <http://www.article19.org>

2 UN General Assembly Resolution 217 A (III), 10 December 1948.

3 Jochen Abr. Frowein, “*Freedom of expression under the European Convention on Human Right*”, Monitor/Inf (1997)3, Council of Europe.

4 Government in a broader sense, implying public institutions at all levels.

ARTICLE 19, the Global Campaign for Free Expression,⁵ believes that the public's right to access government-held information is a fundamental human right,⁶ and considers information to be "the oxygen of democracy".⁷

We have been working in the South Caucasus, in collaboration with local partner organisations,⁸ since April 2003. ARTICLE 19's Law Programme prepared legal analyses of media legislation in Armenia, Azerbaijan and Georgia and assisted local working groups with drafting new specialised laws, while ARTICLE 19's Europe Programme took a leading role in carrying out advocacy work to foster positive developments and initiatives on freedom of expression and freedom of information as well as supporting educational and freedom of information monitoring activities in the South Caucasus region.

This report was commissioned by the Representative on Freedom of the Media of the Organization for Security and Co-operation in Europe (OSCE).

The terms of reference requested us to look at the situation in Armenia, Azerbaijan and Georgia, excluding the three 'separatist' regions of Abkhazia, Nagorny-Karabakh and South Ossetia. Although they have not been included in the report, it is worth mentioning that restrictions on access to information pose a major obstacle for quality journalism in these regions, and have serious repercussions for the wider democratic development in the South Caucasus.

While ARTICLE 19 always emphasises that the right to access government-held information is the right of everyone, the present report

5 Further in the text – ARTICLE 19. This is a London-based organisation with a mandate to promote freedom of expression and access to information worldwide. More information can be found on our website at <http://www.article19.org>.

6 See *The Public's Right To Know: Principles on Freedom of Information Legislation* (London: ARTICLE 19, June 1999). For more details on our activities and documentary sources please refer to the ARTICLE 19's website, *supra*, note 4.

7 See *supra*, note 5, p.1.

8 Yerevan Press Club (<http://www.ypc.am>) and Freedom of Information Centre in Yerevan (<http://www.hetq.am>), Yeni Nesil Union of Journalists in Baku, Stepanakert Press Club, Liberty Institute in Tbilisi (<http://www.liberty.ge>), Media Club in Sukhum/i, Journalists for Human Rights in Tskhinval/i.

examines in how far access to information (or the lack thereof) affects the media's ability to fulfil their vital role as a 'watchdog' in a democracy and to gather and disseminate information in the public interest. The aim has been to examine situations where implemented access to information procedures have facilitated the media's performance, to pinpoint problem areas that still need to be addressed, and to provide recommendations. Most of the information we received, however, highlights shortcomings and problems. Positive stories on access to official information appeared to be rare in the South Caucasus region.

The report is intended to stimulate regional debate and cooperation on the topic among key stakeholders in Armenia, Azerbaijan and Georgia: public officials, the media, NGOs and the general public. It ends with two types of recommendations – country-specific and those addressed to principal interested parties, such as the governments of Armenia, Azerbaijan and Georgia, the mass media, NGOs (both local and international) and inter-governmental organisations.

Freedom of information is a fundamental prerequisite for providing members of the general public, including the media, with information on matters in the public interest. On the one hand, it enables public participation in policy debates and is crucial for making informed choices, while on the other it exposes wrongdoing and corruption, thus contributing to eliminating a culture of secrecy and improving government's accountability and transparency. It is also beneficial to governments in helping to ensure openness and transparency of decision-making processes, making the latter inclusive at all levels and in developing policies and adopting decisions to adequately respond to society's needs, and, finally, help in developing public trust in government actions.

The right to freedom of information is a multi-layered right. It imposes an obligation on public bodies to disclose information; it also implies that public bodies publish and disseminate widely documents in the public interest, for example publicise any decision or policy which affects society.⁹ On the other hand, it grants to every member of the public a

9 See Principle 2, "*The Public's Right to Know*," *supra*, note 5, pp.3–4.

corresponding right to receive information. In exercising these rights and duties, the media is delegated a vital mission as a channel to facilitate the free flow of information.

For the purposes of this report, definitions developed by ARTICLE 19 and publicised in our series of publications on international standards on freedom of expression and access to information are used.¹⁰

The term ‘*information*’ is used to denote “all records held by a public body, regardless of the form in which that information is stored (document, tape, electronic recording and so on), its source (whether it was produced by the public body or some other body) and the date of production.”¹¹

The term ‘*public body*’ refers to “all branches and levels of government including local government, elected bodies, bodies which operate under a statutory mandate, nationalised industries and public corporations, non-departmental bodies or quangos (quasi non-governmental organisations), judicial bodies, and private bodies which carry out public functions...”¹²

The report is based on a presumption that “all information held by public bodies should be subject to disclosure and that this presumption may be waived only in very limited circumstances.”¹³ This is a core element in a set of principles developed by ARTICLE 19 in June 1999 and entitled “*The Public’s Right to Know: Principles on Freedom of Information Legislation.*” These principles provide guidance for developing maximum openness of public bodies in line with international standards. In order to have a positive impact, these principles have to be observed at all levels and by all key stakeholders, including the media, freedom of information advocates, public bodies and the general public.

The right to seek, receive and impart information and ideas has been widely recognised by a number of international bodies with a mandate to promote and protect human rights, including the United Nations, the Council of Europe, the Organization of American States and the African

10 “*The Public’s Right to Know,*” *supra*, note 5; “*A Model Freedom of Information Law* (London: ARTICLE 19, July 2001); “*The Johannesburg Principles. National Security, Freedom of Expression and Access to Information,*” (London: ARTICLE 19, November 1996).

11 “*The Public’s Right to Know,*” *supra*, note 5, p.3

12 *Ibid.*, p.3

13 *Ibid.*, p.2 – Principle 1 – ‘The Principle of Maximum Disclosure.’

Union.¹⁴ It is regarded as an essential requirement for developing and maintaining a civil and democratic society.

Freedom of information is included in Article 19 of the Universal Declaration of Human Rights, as it is integrally linked to freedom of opinion and expression: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.” The same principle was repeated in the 1966 Covenant on Political and Civil Rights.

In 1998, in his annual report, the UN Special Rapporteur on Freedom of Expression noted that “the right to seek, receive and impart information imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government...”¹⁵

Within the CSCE/OSCE, the Helsinki Final Act of 1975 acknowledges the importance of inter-state dissemination of information and emphasises the role of the media in this process.¹⁶ Furthermore, as provided in section 9.1 of the 1990 Copenhagen Document of the Conference on the Human Dimension, “...everyone will have the right to freedom of expression including the right to communication. 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 prescribed by law and are consistent with international standards.” Paragraph 26 of the 1999 Istanbul Charter for European Security, reaffirms “the importance of independent media and the free flow of information as well as the public’s

13 Ibid, p.2 – Principle 1 – ‘The Principle of Maximum Disclosure.’

14 Universal Declaration of Human Rights, UN General Assembly Resolution 217A(III), adopted 10 December 1948; International Covenant on Civil and Political Rights, UN General Assembly Resolution 2200A(XXI), adopted 16 December 1966, in force 23 March 1976; American Convention on Human Rights, Adopted 22 November 1969, in force 18 July 1978; European Convention on Human Rights, Adopted 4 November 1950, in force 3 September 1953; African Charter on Human and Peoples’ Rights, Adopted 26 June 1981, in force 21 October 1986.

15 Report of the Special Rapporteur, Promotion and Protection of the Right to Freedom of Opinion and Expression, UN Doc. E/CN.4/1998/40, 28 January 1998, para.14.

16 See *Freedom of Expression, Free Flow of Information, Freedom of the Media, CSCE/OSCE Main Provisions 1975-2001* (OSCE).

access to information [as an] ... essential component of any democratic, free and open society.”¹⁷

On 26 November 1999, a joint declaration was adopted by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS¹⁸ Special Rapporteur on Freedom of Expression, emphasising that “implicit in freedom of expression is the public’s right of open access to information and to know what governments are doing on their behalf, without which truth would languish and people’s participation in government would remain fragmented.”¹⁹

The Council of Europe took an important step in recognising the right to freedom of information in a series of documents adopted by its political bodies. In 1981 the Committee of Ministers adopted Recommendation No. R (81) 19 on Access to Information Held by Public Authorities.²⁰ In 1994 the 4th European Ministerial Conference on Mass Media Policy adopted a Declaration recommending that the Committee of Ministers consider “preparing a binding legal instrument or other measures embodying basic principles on the right of access of the public to information held by public authorities.”²¹ In 2002 the Committee of Ministers of the Council of Europe adopted a Recommendation on Access to Official Documents according to which “member states should guarantee the right of everyone to have access, on request, to official documents held by public authorities. This principle should apply without discrimination on any ground, including national origin.”²² Although it foresees limitations on the right of access to official documents, it makes clear that they should be “set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting [the

17 <http://www.osce.org/docs/english/1990-1999/summits/istachart99e.pdf>

18 Organization of American States.

19 Quoted by Toby Mendel, in “*Freedom of Information: A Comparative Legal Survey*” (UNESCO, 2003).

20 Adopted on 25 November 1981.

21 Declaration on Media in a Democratic Society, DH-MM (95) 4, 7-8 December 1994, para. 16.

22 Recommendation 2002 (2) of the Committee of Ministers to Member States on Access to Official Documents.

public interest].”²³ This corresponds to court precedents established in international law that set out a three-part test for assessing the restrictions on the right to freedom of information and requires that these restrictions be narrowly drawn and based on a principle of maximum disclosure. That is, to examine whether:

- (1) “the information relates to a *legitimate aim* listed in the law;
- (2) disclosure threatens to cause a *substantial harm to that aim*; and
- (3) such harm to the aim is greater than the *public interest* in having the information.”²⁴

Other international instruments recognising the importance of freedom of information include but are not limited to the UNECE²⁵ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention)²⁶ and the UN Convention on Corruption.²⁷

The existing regional and international standards set the framework for states to adopt freedom of information acts.²⁸ Adopting such laws is particularly important for societies in transition that emerged after the collapse of Communism (in the Soviet Union) or other authoritarian forms of government as they have to overcome a profound culture of secrecy and their democratic institutions are still weak, although they proclaimed a commitment to the rule of law and to fostering democratic reforms.

23 Ibid. ‘Prescribed by law’ means that any restricting norm should be formulated in a clear way and be accessible for review by the local public.

24 See “*The Public’s Right to Know*”, p.6, *supra*, note 5. The third element is crucial because it has an element of public scrutiny. ‘Legitimate aim’ includes legitimate grounds intended to protect state and public interests, as well as other rights of individuals. Some of these legitimate grounds include the protection of national security, territorial integrity and public safety, and the prevention of disorder or crime. However, if the information relates to an important matter of public concern, the public interest is greater than the harm caused by releasing the information, the information should still be disclosed.

25 United Nations Economic Commission for Europe.

26 UN Doc. ECE/CEP/43, adopted at the Fourth Ministerial Conference in the “Environment for Europe” process, 25 June 1998, entry into force, 30 October 2001

27 Adopted by the UN General Assembly by Resolution 58/4 of 31 October 2003

28 More than fifty countries worldwide have declared their commitment to international standards on freedom of information by adopting comprehensive laws to facilitate access to information. The oldest is the Swedish Freedom of the Press Act of 1766. For more details, see David Banisar, *Global Survey “Freedom of Information and Access to Government Record Laws around the world”* (28 September 2003, <http://www.freedominfo.org>).

The Media and Freedom of Information

In reality most people rely on the media to keep themselves informed about important developments and events, especially because the media closely follow parliamentary sessions and have access to court trials. An interference with the right of journalists to seek, receive and impart information is an interference with the public's right to information.

However, the media do not have a special right to information; rather it is a right which pertains to all people.²⁹ Nevertheless, the mass media are key players in exercising this right because it is important for the media for a number of reasons. It is "a powerful tool for journalists who are developing stories and require government information."³⁰ The media are a vital force in the democratic system of checks and balances because they take a leading role in shaping public opinion. They help expose corruption and malpractice. Only with unobstructed access to government-held information can media stimulate political debate and function as a communication channel between the authorities and the public. Where freedom of information (FOI) laws cover not only government in the narrow sense but also other actors performing public functions, the media will also help to ensure accountability of such other actors as private businesses and civil society institutions.

It is a principle that everyone should have information made available to them in a speedy manner. This is particularly important to the media as it enables the news media to provide timely coverage of issues in the public interest, and thus perform their role of a public 'watchdog' in a democratic society.

Freedom of Expression and Freedom of Information in Armenia, Azerbaijan and Georgia

Over the past thirteen years, three South Caucasus states have made significant progress in ensuring freedom of expression – through including

²⁹ See Chapter 4, *Virtual Freedom of Expression Handbook*, available at <http://www.article19.org>.

³⁰ David Banisar, "Transparent Government. Developing Public Access to Government Information", p.12. The report will shortly be available at <http://www.ndi.org>.

guarantees in their Constitutions and developing a number of specialised laws.³¹

Constitutions of Armenia, Azerbaijan and Georgia foresee supremacy of international legal norms (Articles 6, 151 and 6.2 respectively) over national legislation. Although national laws make reference to international treaties, in practice international legal norms are not widely used when mass media are concerned.

All three states, Armenia, Azerbaijan and Georgia, have Human Rights Commissioners (Ombudsmen).³² Due to the lack of funding in Armenia and because much of the political engagement of the Azerbaijani Ombudsman is with the present authorities, neither of them is fully involved in securing and promoting freedom of expression and access to information. Despite the lack of funding, the situation is somewhat different in Georgia. Appointed in September 2004, Sozar Subari,³³ Georgia's Public Defender, in his public statements declared that freedom of expression is a priority issue, and has taken an active stand on freedom of expression and access to information cases. According to him, "the main spheres that need to improve [in Georgia] are the penitentiary system, detention, civil police,

31 The Constitutions adopted in the Soviet Union contained declarative guarantees of the freedom of speech and of the press. For example, Article 50 of the 1977 Constitution reads: "In accordance with the interests of the people and in order to strengthen and develop the socialist system, citizens of the USSR are guaranteed freedom of speech, of the press..." Ironically, it was the state machine, mainly the Politburo (the central leadership of the Communist Party) who defined what is in the interests of the public). Such practice resulted in media legislation that imposed many limitations to the right to free expression. The Constitutions of Armenia, Azerbaijan and Georgia adopted after the collapse of the Soviet Union, contain guarantees of freedom of expression (Article 24 of the Armenia's Constitution, Article 47 of the Azerbaijani Constitution and Article 19 of the Georgian Constitution). While provisions on freedom of information appear in the same Article 24 in Armenia's Constitution, the Constitutions of Azerbaijan and Georgia provide for the right to seek and receive information in separate articles (Article 50 in the case of Azerbaijan and Article 41.1 in the case of Georgia). Constitutions of Azerbaijan and Georgia include guarantees of the freedom of mass media (Articles 50.II and 24.2 respectively). Constitutions of Azerbaijan and Georgia ban censorship (in articles 50.II and 24.2 respectively). The Georgian Constitution goes further in that it prohibits monopolising of the media in Article 24.3.

32 The Armenian Human Rights Defender Larisa Alaverdyan was appointed to this position in February 2004. The Azerbaijani Commissioner on Human Rights Elmira Suleymanova was appointed to this position in July 2002.

33 A former journalist and a member of the Liberty Institute.

freedom of speech and freedom of religion.”³⁴ However, Sozar Subari mentioned during his meeting with the author of this report that despite his efforts to inform the media about his work, the mass media in Georgia show little or no interest, and do not always publicise this information.

As signatories to a number of significant international human rights treaties, such as the International Covenant on Civil and Political Rights and the European Convention on Human Rights,³⁵ Armenia, Azerbaijan and Georgia have binding obligations under international law to respect freedom of expression. Upon accession to the Council of Europe, they assumed a responsibility to “accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms.”³⁶

Since the breakup of the Soviet Union in 1991, the right of access to information has also improved in the South Caucasus but it still is not as robust as in other nearby countries.³⁷

Within the region, there are significant differences. Of the three countries, Georgia has the longest standing and most developed FOI legislation,³⁸ Armenia has recently made great strides forward with the

34 “New Ombudsman Makes Waves”, September 24, 2004, No. 182 (0706), www.messenger.co.ge/issues/0706_september_24_2004/news_0706_1.htm. The Public Defender’s office plans to have five departments in the future. These departments will be responsible for the judiciary and legal issues, freedom and equality, social and criminal matters, administrative issues (working mainly on the freedom of information, local self-government and citizens’ rights), and the army department overseeing the issues related to the military servicemen. At present, the Public Defender’s Office has a complaints form and a procedure for filing-reviewing the complaints.

35 Armenia ratified the ICCPR on 23 June 1993 and the ECHR on 26 April 2002; Azerbaijan ratified the ICCPR on 13 August 2002 and the ECHR on 15 April 2002; Georgia ratified the ICCPR on 3 May 1994 and the ECHR on 20 May 1999. Armenia and Georgia also ratified the Aarhus Convention (in 2001 and 2000 respectively) while Azerbaijan acceded to the Aarhus Convention in March 2000.

36 Statute of the Council of Europe, London, 5.V.1949, Article 3.

37 Nearly all countries in Central and Eastern Europe and a few further East have adopted laws on access to information held by government bodies: Albania (1999), Bosnia (2000), Bulgaria (2000), Croatia (2003), Czech Republic (1999), Estonia (2000), Hungary (1992), Latvia (1998), Lithuania (1996), Moldova (2000), Poland (2001), Romania (2001), Serbia (2004), Slovenia (2003), Slovakia (2000), Tajikistan (2002), Ukraine (1992), Uzbekistan (2002).

38 It was the first country in the South Caucasus to adopt a comprehensive Freedom of Information Law in 1999 as Chapter Three of the General Administrative Code. The Law was amended in 2001.

39 The Law on Freedom of Information was approved by Parliament in September 2003. It entered into force in November 2003.

adoption of a new FOI law,³⁹ while Azerbaijan remains significantly behind in providing legal rights of access.⁴⁰ In all the countries, there are problems with the implementation of the existing laws, broad state secrets acts and criminal code provisions.

The Constitutions in all three countries include express provisions guaranteeing freedom of expression. However, all of the Constitutions also include limitations for areas such as state security, public order and public safety, and protecting personal privacy. None of them provide for a broad right to access government held information as is found in many constitutions in Central and Eastern Europe.⁴¹ Georgia's Constitution provides for the greatest access by giving individuals the right to obtain information on their working and living conditions, and also on personal information held by government bodies.

Georgia and Armenia have adopted comprehensive laws on access to information held by government bodies. The laws provide a right of access generally consistent with international standards, but are hampered by broad exemptions, resistance from officials, poor implementation and a lack of external oversight bodies (both countries have recently created Ombudsman institutions who may in the future provide this function). In Azerbaijan, a 1998 act promotes freedom of information but does not include substantive procedural rights. The Parliament is currently reviewing a bill that would replace the 1998 law with one that is more based on international standards.

The media laws in the three countries provide some rights and protections for the media. The 2004 Georgian law is the most progressive,

39 The Law on Freedom of Information was approved by Parliament in September 2003. It entered into force in November 2003.

40 The Law on Freedom of Information adopted in 1998, is a declarative proclamation on freedom of information rather than an operational freedom of information law. The Government made a commitment to the Council of Europe to adopt a full FOI act as part of the democratic reforms necessary to join the Council of Europe. The Milli Mejlis (Parliament of Azerbaijan) has held a first reading on a draft law entitled, "The Law of the Republic of Azerbaijan on Freedom of Information" which was developed by a coalition including NGOs, media and members of the Milli Mejlis. Officials have opposed the second reading of the draft.

41 E.g. see the Constitutions of Albania, Bulgaria, Hungary, Estonia, Moldova, Poland, Romania, the Russian Federation, Slovakia.

adopting many international media standards: it protects freedom of speech and expression including the right to search, receive, create, store, process and distribute information and ideas in any form; it prohibits censorship and gives journalists the right to protect sources. It also protects whistleblowers.⁴² Only the Azerbaijani Law provides for specific rights of access to information by the media. However, laws also can limit publishing certain categories of information such as state secrets and information relating to the individual's personal life. Current media legislation in Armenia and especially Azerbaijan, and the Georgian Law on State Secrets, bear all the hallmarks of their Soviet legacy whose aim was to preserve state control over the media and use the latter as a 'mouthpiece' of the ruling body.

The state secrets laws in all three countries are quite similar and strongly resemble in both structure and content the 1993 Russian State Secrets Law.⁴³ All three laws give the authorities almost unlimited discretion to classify information relating to the military, economy, scientific, foreign relations, intelligence and law and order. They create three categories of secrets: Of Special Importance (Extraordinary Importance in Georgia), Top Secret and Secret. Armenia's and Azerbaijan's laws allow classification of information for thirty years initially, while Georgia limits it to twenty. Similarly, the Criminal Codes also provide for heavy penalties for disclosing state and other types of secrets. There are also penalties found in the Civil Codes.

All three countries have adopted laws on environmental protection that provide for some access to environmental information. However, only Azerbaijan has passed specific legislation on access to environmental information.

All three countries also have adopted a variety of other laws including business secrets, civil code provisions and other laws that limit disclosure of certain types of information.

42 See "*The Public's Right to Know*", *supra*, note5, 'Principle 9 –Protection for Whistleblowers': "individuals should be protected from any legal, administrative or employment-related sanctions for releasing information on wrongdoing."

43 Law of the Russian Federation on State Secrets and Amendments (No 5485-1) of July 21, 1993.

Media environment in Armenia, Azerbaijan and Georgia

In the South Caucasus region none of the conditions underpinning the existence of a free media in a democratic society – “financial independence, well-being of the media environment and a liberal approach from the state”⁴⁴ – is entirely fulfilled. According to the latest Freedom House press freedom rankings, of the 27 states representing Central and Eastern Europe and the former Soviet Union, Georgia was considered to be ‘Partly Free’ while Armenia and Azerbaijan were rated ‘Not Free.’⁴⁵ While Georgia maintained its position from last year’s ranking, “Armenia’s rating declined from ‘Partly Free’ to ‘Not Free’ as a result of the government’s repeated use of security or criminal libel laws to stifle criticism, as well as the forced closing of the country’s leading independent television station [A1+]”, and Azerbaijan’s rating dropped from ‘Partly Free’ in 2002 to ‘Not Free’ in 2003.⁴⁶

In all three countries, state control over the media persists in new forms, by both direct and indirect means. Direct mechanisms include over-restrictive laws which allow governments to control the media, and a lack of independent oversight bodies. Indirect mechanisms include, for example, a political climate which fosters widespread self-censorship among the media, or the use of economic pressures such as high taxes, limited advertising markets, state-controlled printing houses and overly expensive paper.

The lack of sustenance for an independent media in the South Caucasus is further exacerbated by tensions in the three countries related to the ‘frozen’ conflicts – those between Abkhazia and South Ossetia and ‘Georgia proper’; and over the disputed territory of Nagorny-Karabakh, which involves Armenia’s and Azerbaijan’s interests.

It has become a widespread pattern in the South Caucasus that the state-owned media express mainly the political views of the ruling elite thus ignoring the opposition. In Georgia, it has been noted that after the

44 Promoting independent and ethical journalism in the Southern Caucasus, a report by IFJ, 2002, p.5, at www.ifj.org/default.asp?index=771&Language=EN

45 *Freedom of the Press 2004* at <http://www.freedomhouse.org>

46 Ibid.

“Rose Revolution” of 2003 certain respected media, such as Rustavi-2 TV company previously known for its criticism of the authorities and unbiased coverage during the Shevardnadze period, became less critical of the present administration.

Financial problems remain a serious concern for the media. There is still a big gap in financial sustainability between state-controlled media and the media outlets financed through other sources. The sources of funding for the latter often come from ‘oligarchs’ who own them (and are often closely linked to politics), from political parties, businesses, or international donors in case of regional media. Privately owned media often do not enjoy more editorial independence than state owned media, and more or less reflect the political opinions of their owners. These owners are prepared to sack journalists who do not ‘toe the line’. Journalists in turn fear losing their jobs that are relatively highly paid. Such financial insecurity inhibits the media from engaging in high-quality journalism and explains widespread self-censorship among the media professionals in the region.

Another issue of serious concern is the authorities’ lack of tolerance to criticism. For example, according to Baku Press Club, in Azerbaijan, public officials filed 126 lawsuits against media management and staff during 2001-2003, mainly concerning protection of the honour, dignity and business reputation. Authorities in all three countries ‘punish’ the media for voicing dissenting opinions with defamation suits, through tax inspections, removal of licences as in case of Noyan Tapan and A1+ TV companies in Armenia, and other direct and indirect means.

The rights of journalists are fragile and in a vulnerable position in all three states. This is highlighted by cases of journalists being killed, numerous examples of physical violence against media professionals, especially during the elections, and the arrests of the journalists based on false evidence.

Public service broadcasting remains *terra nova* yet to be explored. Where a public broadcaster exists, as in the case of Armenia, it is largely controlled by the President and does not fulfill its role of presenting diverse opinions and views, including those of the opposition, as well as

having and editorial and operational independence.⁴⁷

Media self-regulation mechanisms are immature in Azerbaijan and Georgia, while in Armenia it does not exist *per se*. The Azerbaijani Press Council, established in February 2003, turned into a defence mechanism to tackle violence against journalists. Professional standards for the media in Georgia were also adopted in 2003, resulting from coordinated activities by the Liberty Institute, when major print and electronic media as well as free-lance journalists signed a Code of Ethics. The implementation of the media self-regulatory mechanism remains problematic due to disagreements between media associations and media outlets. Low demand for professional standards among the editors and the publishers weakens the implementation of professional standards in Georgia.⁴⁸ A Media Council is due to be formed in 2005. In Armenia an initiative group has been formed under guidance from the Yerevan Press Club; they are exploring the grounds for establishing a self-regulation model in this country.

Overall, the region's media lack professionalism, they are distrusted by the public and the standard of media reporting has declined. This can partly be explained by the low quality and outdated teaching methods in journalism schools and departments in universities, with little or no focus on practical training. In addition, many practicing journalists have no special training at all, and come from other educational backgrounds, such as economics, the arts, teaching, and philology. As a result, investigative journalism is poorly developed in the South Caucasus, except for some rare examples as in case of the Association of Investigative Journalists in Armenia or the "60 minutes" investigative programme on Rustavi-2 in Georgia. Grounds for the practice of investigative reporting in the South Caucasus are limited.

A crisis of values within the media community is a common pattern in the South Caucasus, expressed by the lack of understanding of the role of journalism, the lack of ethical and responsible journalism, and the lack of professional solidarity among the media.

47 Azerbaijan and Georgia have very recently begun the establishment of public service broadcasters, but it is too early to judge the quality of their performance.

48 Generally, professional standards are higher among TV channels than among the print media.

Finally, there are many technical issues that make it difficult to engage in quality journalism. They include the lack of equipment (predominantly due to the lack of funds), the limited number of non-state printing houses and restricted Internet access in the regions.

The Status of Freedom of Information Implementation

Armenia today is the only country in the region where there exists a detailed strategy for the implementation of their FOI Law. Unfortunately, this to a great extent remains an excellent plan ‘on paper’, as it is mainly being implemented by NGOs while the Government failed to develop and/or put in place the necessary mechanisms and procedures to fulfill its part. Positive transformations in respect to freedom of information in Armenia have, to a great extent, originated from work carried out by the Freedom of Information Initiative,⁴⁹ a coalition of three NGOs – the Freedom of Information Centre, the Media Law Institute and the Civil Society Institute – which developed the comprehensive strategic plan for the implementation of the freedom of information legislation⁵⁰ and joined forces with other active groups to support the achievement of their goals. For example, in 2004 both the Freedom of Information Initiative (on 19 February) and the Partnership for Open Society, a coalition of more than 30 NGOs working in the field of human rights and specifically freedom of expression (on 5 March), successfully campaigned against the threatening

49 Freedom of Information Initiative (FOI Civic Initiative) is a civil society-driven coalition, established on 15 November 2003, whose main purpose is to monitor and support the implementation of the Freedom of Information Law in Armenia. The Initiative is also a member of the International Network of FOI advocates, http://www.foiadvocates.net/index_eng.html. The FOI Civic Initiative is currently carrying out its four-year implementation strategy for the FOI Law (runs until 2007). The full text of the implementation strategy can be requested from the Freedom of Information Centre. Some of the key strands include public awareness campaigns, training of the key stakeholders, amending the related legislation and drafting the relevant by-laws, strategic litigation, e-governance reform, establishment of a post of FOI Ombudsman, development of appropriate mechanisms within the public bodies, and ongoing monitoring. The Initiative set up a network of 11 coordination councils designed to oversee the observance of FOI law in all marzes (regions) in Armenia and in the capital Yerevan. The network involves local communities, journalists, NGOs and local government authorities.

50 The adoption of the FOI Law in Armenia on 23 September 2003 (the Law entered into force on 15 November 2003) was a result of a successful collaboration between the Parliament and civil society. The Law’s first draft was developed by the Yerevan Press Club in 2000. For details, see YPC Weekly Newsletter, 19-25 September 2003, at <http://www.ypc.am>.

amendments to the Law on Freedom of Information.⁵¹

The Freedom of Information Centre was established on 1 July 2001 by the Association of Investigative Journalists of Armenia.⁵² From then on the Centre received 480 complaints from the general public about denied or restricted access to official information. As one of their numerous responses, the Centre composed and publicised (in the media, through its website,⁵³ and in the bulletin “You Have a Right To Know”) a ‘black list’ of those public officials who infringed the right of the media, NGOs and the general public to access the official information.⁵⁴

The Anti-Corruption Strategy of the Government of Armenia⁵⁵ gives access to information central priority in Armenia’s domestic policy. It declares that “access to information will significantly enhance the publicity and transparency of the civil service and promote the expansion of public involvement in a decision-making process.”⁵⁶

Despite such positive developments, the implementation of the FOI Law is a great challenge for Armenian society. As yet, the Government of the Republic of Armenia has not developed the corresponding regulations and procedures for ensuring access to official information. Many public bodies have not appointed officials to be in charge of responding to information queries.

51 For details, see YPC Weekly Newsletter of 20-26 February 2004, at <http://www.ypc.am>. The amendments were put forward by the Ministry of Justice.

52 For details, see <http://www.hetq.am>

53 It shares a website with the Association of Investigative Journalists, <http://www.hetq.am>

54 In 2001 Armen Avetisyan, chief of the State Customs Committee, headed this list (his name appeared twice); in 2002 he was replaced by Mr Vardan Ayvazyan, Minister of Environment (who appeared six times on the list); in 2003 the top three officials on the list were Mr Hayk Harutiunyan, head of the National Police Service, Mr Hrayr Karapetyan, former governor of the Aragatsotn region, and Mr Yerem Yesoyan, chief of staff of the Erebuni-Nubarashen Community Court; during January–June 2004, the list was led by Mr Aghvan Vardanyan, Minister of Labour and Social Affairs, Ms Gayane Karakhanyan, Yerevan City Kentron and Nork-Marash Community First Instance Court’s judge and Mr Yervand Zakaryan, Yerevan’s Mayor. A complete list can be found at <http://www.hetq.am> In December 2003 FOI Civic Initiative held an annual awards ceremony. The Ministry of Social Security received a ‘Golden Key’ for being the most open and transparent public institution. The Parliament of the Republic of Armenia was awarded with the ‘Golden Key’ for the best website. No one was awarded a ‘Black Lock’, a symbol of bad practices, in 2003. In 2004 the ceremony will take place on 10 December.

55 Adopted on 6 November 2003.

56 Presentation by Shushan Doydoyan of FOI Centre, “*Implementation of the FOI Law in Armenia*”, delivered on 24-26 October 2004 at the OSCE Conference in Tbilisi.

As mentioned above, *Georgia* was the first South Caucasus country to adopt, in 1999, a detailed FOI Law.⁵⁷ Its adoption supported the development of investigative journalism in Georgia, which in its turn played an effective oversight role over a government ‘swamped’ in corruption.

Although the mass media were not active in defending their access rights, a number of NGOs in Georgia carried out a multi-stage campaign for the promotion and implementation of the FOI Law. This campaign has been carried out by UNA Georgia,⁵⁸ Liberty Institute and the Georgian Young Lawyers Association (GYLA).⁵⁹ It has been reinforced after IRIS⁶⁰ Georgia set the promotion of the FOI Law among its key priorities. While UNA Georgia focused its work on the public institutions, Liberty Institute and GYLA carried out long-term monitoring and delivered legal assistance to those whose access rights were breached. The campaign was accompanied by numerous publications aimed at better public awareness. Since 2001, UNA Georgia has implemented a project “Promotion of the Implementation of the FOI Law in the Public Institutions”. Activities involving over 200 targeted public bodies both, in Tbilisi and the regions, included advising on the implementation procedure and the key FOI principles in the General Administrative Code, training for public officials, drafting of model FOI request/reply and other related forms, and ongoing monitoring and evaluation. The Liberty Institute and GYLA provided legal counselling, advocacy activities as well as developing numerous guides on FOI, both for officials and the general public. GYLA put a database containing contact information for the legal advisors on FOI cases on their website. Both NGOs successfully acted as human rights defenders in court cases on FOI. The Liberty Institute was the first

57 Despite strong resistance from the authoritarian Shevardnadze regime, the Law set high FOI standards in the region. It has been drafted by the experts of the Liberty Institute, a leading civil liberties group in Georgia. Its adoption was made possible due to strong pressure from Georgia’s civil society.

58 The United Nations Association of Georgia, <http://una.org.ge>

59 <http://www.gyla.ge>

60 The Center for Institutional Reform and the Informal Sector, a research and advisory centre linked to the Department of Economics at the University of Maryland, U.S., <http://www.iris.ge>

organisation that won a group court case involving the implementation of the Aarhus Convention in Georgia during 2002-2004.⁶¹ Since 2001, both Liberty Institute and GYLA have monitored FOI implementation by the public bodies at different levels of authority. The Liberty Institute drafted and lobbied for a number of amendments to the FOI legislation in order to bring it fully in line with international standards.

Over the last few years, due to the active and persistent work by these NGOs, the Georgian public bodies who practice a ‘closed-door policy’ have been challenged in more than 40 FOI-related court cases, 16 of which were initiated by the civil society groups.

Despite the fact that Georgia’s General Administrative Code contains progressive freedom of information provisions, many public bodies to date have failed to establish procedures and practices that would facilitate its full implementation. The same is true for many officials in public institutions who, notwithstanding the change of regime during the “Rose Revolution” in Georgia, retained ‘old-fashioned’ styles and attitudes and thereby continue to follow the ‘secrecy rules’ of past administrations.

With the lack of legal guarantees for the right of access to information and as exemplified by the court cases and situations below, Azerbaijan is further behind the other two states.

Although Article 8 of the Azerbaijani Law on Mass Media guarantees the right to receive information, many officials fail to cooperate with journalists. They refuse to answer information requests, restrict access to events, bring defamation suits with high charges when the media publish unfavourable information, and on some occasions use force to remove media representatives from official buildings and other venues where public events take place, or harass the opposition media who cover the elections (as happened during the last Presidential elections in October 2003).⁶²

61 The first case involving the Aarhus Convention has been initiated by the Centre for Strategic Research and Development. In 2002 the Mtatsminda-Krtsanisi Regional Court ruled in favour of the Centre and requested their participation in the execution of the Court’s decision.

62 National level officials tend to have tight control over what type of information is released by the regional level authorities. For example, a recent Decree on establishing a public relations centre within the Public Prosecutor’s Office bans regional Prosecutors from giving interviews unless agreed with the Prosecutor General.

Most of the denials of access to official information in Azerbaijan are politically motivated. Journalists themselves often side with political parties, resulting in a limited and biased coverage of events. From work experience in Azerbaijan, the author of this report knows that the media often employ a ‘waiting’ practice, that is choose not to search for news and rather wait for the news to find them, and thus do not provide timely coverage of events of importance to the general public.

The general culture of secrecy has been deeply rooted in government institutions since the Soviet times. A ‘closed door policy’ is common practice among all public bodies, with some worse than the others. The lack of an advanced freedom of information act and great reluctance among the national authorities to adopt it, further complicate the situation.⁶³

Media’s Access to Information

Many of the issues and problems around media’s access to information are common to all three South Caucasus states.

In Armenia, Azerbaijan and Georgia various types of information are hardly accessible by the media including information on the state of the environment, on health care, budget, education, contact information of public bodies, and on issues related to national security.

In order to obtain first-hand information on the relationship between the mass media and officials in relation to access to official information, ARTICLE 19, with the help of our partner organisations in the region,⁶⁴ carried out a survey in Armenia, Azerbaijan and Georgia among 135 media professionals and 105 public officials.⁶⁵

63 Notwithstanding, Para 5 of the Article 2 of the State Programme on Fighting Against Corruption states that freedom of information is one of the indicators of government transparency. This Programme recommends that the responsibilities of public bodies are clearly defined in regard to providing information, and improve procedures for requesting and releasing information.

64 Liberty Institute in Georgia, Yeni Nesil Union of Journalists in Azerbaijan and Freedom of Information Centre in Armenia. Yerevan Press Club (our main partner in Armenia) consulted on media landscape section of the report.

65 By holding face-to-face interviews. In Armenia 40 media representatives and 40 public officials were interviewed in five regions of Shirak, Lori, Syunik, Ararat, Tavush, and in the city of Yerevan. In Azerbaijan 40 media representatives and 40 public officials were interviewed in Baku, Ganja, Mingechevir and Masally. In Georgia 55 media representatives and 25 public officials were interviewed in Tbilisi and in three regions of Imereti, Ajara and Kakheti.

Journalists interviewed during the survey, related the following examples of illegitimate refusals of information:

- In Georgia, the State Property Management Ministry refused to provide information concerning salaries paid to its board members.
- The National Bank of Georgia refused to provide information about financial loans provided by order of then President Shevardnadze.
- Several journalists from Georgia said that information related to the environment is easy to obtain, unless it relates to international agreements. For example, information on the Baku-Tbilisi-Jeyhan pipeline and environmental issues linked to it is difficult to obtain.
- A number of Georgian journalists mentioned that during the escalation of the conflict in South Ossetia in the summer 2004, information related to this situation was classed as secret by public officials, for example the number of Georgian soldiers involved in the operation in South Ossetia or information on the flak jackets for soldiers.
- Several Georgian journalists mentioned that any information that would shed a light on Abashidze's corrupt regime in Ajara autonomous region was hard to obtain from the Ajara public bodies.
- A journalist from Masally in Azerbaijan was not able to obtain information on state budget funds allocated for one of the district schools.
- An editor from Baku, Azerbaijan's capital, said that none of the public bodies responded to his queries relating to corruption issues.
- An official from the Armenian Ministry of Health refused to provide information to a journalist on the grounds that he did not know how the requested information would be used.

Public bodies employ different ways of restricting access to information. Some of them include:

- the requested information because officials do not believe that such information should be made public;⁶⁶
- ‘tacit denials’;⁶⁷
- releasing information at the discretion of public officials, that is only to media considered to be ‘loyal’ to the authorities;⁶⁸
- delays in responding to requests, thus diminishing the value of the requested information;⁶⁹
- releasing only partial information which may adversely affect writing a complete and accurate investigative story or preparing full coverage of a particular event;
- denial of accreditation, and unlawful closures of official meetings and court sessions to the public and the media;⁷⁰ and
- refusals due to procedural problems, such as lack of appropriate mechanisms and regulations in place, and little or no communication among public bodies.

Access to information for the media often turns into a hurdle-race in which it is public bodies that create the obstacles.

66 For example, many public officials in Georgia provide access to information only in cases where they regard it as having some positive public relations effect, and rarely if information is of interest to the media and likewise to the general public.

67 A tacit denial is when the person seeking information never receives a reply and therefore is effectively denied access to information.

68 Such practice results in a serious breach of the right of the media to receive information, and society, in its turn, receives limited information on public events. Many such cases were reported in 2003, the year of the Presidential Elections in Azerbaijan, when journalists from the opposition media were denied access to the polling stations.

69 For example, a journalist of the *Hetq* online newspaper received a response from the Yerevan City Hall asking to clarify the request 40 days after an information request was submitted. With such an approach information, if ever provided, will in most cases have lost its value for the journalist who needed timely data. Such behaviour discourages journalists from seeking information from public bodies.

70 In the South Caucasus public bodies sometimes remove accreditation from the journalists because the latter are critical of the officials. The Azerbaijani authorities often use such measure against the opposition media. The withdrawal of accreditation is not a legal or proportionate measure. Despite open trials guarantees in the Constitutions of Armenia (Article39), Azerbaijan (Article 127, section V) and Georgia (Article 85.1), examples of denied access are common.

Both the survey findings and over fifty collected FOI stories and court cases, contained in the longer version of this report, reveal the following major obstacles to accessing official information by the media in Armenia, Azerbaijan and Georgia:

- the lack of procedures and mechanisms for access to information, or the lack of appropriate legislation (as in Azerbaijan) creating the environment for arbitrary refusals, manipulation of information, and, in extreme cases, even release of false information by the officials;
- the lack of awareness among the journalists of their legal rights;
- Soviet style attitudes and traditions of secrecy amongst officials; and
- the lack of professionalism and solidarity among the media.

65 per cent of journalists-respondents in Armenia mentioned absence of appropriate mechanisms and procedures as an obstacle to accessing official information, while 67.5 per cent of media professionals in Azerbaijan and 61.8 per cent in Georgia mentioned the absence of appropriate mechanisms. 96 per cent of the interviewed public officials in Georgia said they would not release classified information to the media in an emergency situation. Significantly, 75 per cent of the interviewed Azerbaijani officials declared that the adoption of a new law on Freedom of Information would improve the situation with access to official information in the country. This suggests that officials would appreciate clearer guidelines as to what information could be released, encouraging them to act in a less secretive manner. In Armenia awareness of the FOI Law is better among the regional officials than among the national level authorities.⁷¹

The survey suggests a greater understanding of the concept of freedom of information in Georgia than in the other two countries. Although many key actors, including officials as well as the media and the general public in Armenia, are aware of the right to access information, they

71 All 19 of the interviewed regional public officials were familiar with the Law on Freedom of Information.

lack knowledge on how to exercise it. Thanks to some active journalists and lawyers, in a number of precedent cases, this right was successfully defended in court, which highlights the crucial importance of journalists' persistence in seeking justice. In Azerbaijan, with the adoption of a freedom of information bill pending, to date journalists and the public lack effective legal tools to access information, and public bodies are in most cases reluctant to respond to information requests. An additional difficulty is the politicisation of the media in Azerbaijan and its polarisation along political lines, resulting in a situation where information is being granted or denied by officials based on questions of political loyalty or rivalry.

The survey we conducted has highlighted many obstacles – of a structural, procedural, legal, cultural or political nature – that media face when trying to access information. The repercussions of this situation are serious: it perpetuates poor-quality journalism, and leaves the general public ill-informed, and excluded from decision-making processes and policy debates. The media are greatly disempowered by the difficulties they face in trying to obtain information that is necessary for them to be able carry out their work in a responsible and effective manner. As a result, public's ability to make informed choices during elections is limited. Public bodies wield levels of power and control that are open to abuse and they are unaccountable for any malpractices and infringements of human rights.

At the same time, this lack of information available to the public also has serious disadvantages for public administration itself: as it undermines public trust in institutions and their work. The lack of public debate leads to poorly informed decision-making and weak policies that do not adequately address real needs.

Government transparency and accessible information are among the most important prerequisites for fighting corruption, especially for societies in transition where democratic institutions are fragile. Therefore, the role of the public bodies in Armenia, Azerbaijan and Georgia should be to ensure accessibility to complete and comprehensive information on their activities. E-governance⁷² is hardly developed in all three countries; official websites are either absent or exist but are not regularly updated,

and/or contain insufficient basic information. In all three countries public bodies do not make enough use of the opportunities the Internet offers to make their activities transparent to the public.⁷³ Official websites contain incomplete information, and often their main focus is photographs of high ranking officials and their personal biographies. According to the Global E-Government Survey, in 2002 Armenia was at 78th position, Azerbaijan at 91st position and Georgia at 122nd position out of 198 countries in the world.⁷⁴ In the summer 2004, Armenia and Georgia showed slight improvements (66th position for Armenia and 98th position for Georgia) while Azerbaijan's position lowered to 184 out of 198 countries.⁷⁵

Some of the other significant findings of ARTICLE 19's full report include:

- Defence and security institutions, alongside Public Prosecutor's Offices, prove to be the least accessible to the media, while local authorities are generally the easiest to access.
- When refused, media professionals prefer to use personal contacts or alternative sources to find the information they seek.

72 E-governance is the use of information and communication technology, such as the Internet, in order to provide greater access to government information, promote civic participation, make government more accountable through greater transparency of its operations, and deliver services online, saving time and financial resources.

73 For example, none of the Ombudsman's offices in the South Caucasus countries have websites. The websites of the National Legislatures are good in comparison to some other official websites (<http://www.parliament.ge>; <http://www.parliament.am>; <http://www.meclis.gov.az>). Websites of the Armenian ministries can be found on <http://www.gov.am>. According to the Civil Society Development Union, officials in Armenia believe they are not under an obligation to publish information because everything is available through a database Irtek, which is a commercial product and not free of charge, <http://www.IRTEK.am> (for an overview of the official Armenian websites, see <http://www.hetq.am>). Websites of the Georgian ministries are available through the Parliament's website, <http://www.parliament.ge/gov/ministries/ministries.html> (however, most of them do not function; some websites contain information, including contact details, only in English, like the site of the Ministry of Foreign Affairs and the Ministry of Environmental and Natural Resources Protection). Links to some of the Azerbaijani ministries are available on the website of the Ministry of Ecology and Natural Resources, <http://eco.gov.az>

74 Annual ranking of the official websites in 198 countries, prepared by the Center for Public Policy at the Brown University, U.S. The full global e-government study is available at <http://www.insidepolitics.org>

75 Also see country gateway portals. For example, <http://www.gateway.az/eng/edev/government.shtml> for an overview of the e-government system in Azerbaijan.

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- Even where there is awareness of their rights and provisions exist in local FOI legislation guaranteeing those rights, there is no tradition among the media of defending their rights in courts, often because of deep scepticism about the fair administration of justice together with the lengthy nature of court proceedings.

The report's key conclusion is that concerted efforts of the media and their professional associations, civil society groups, international actors, and, above all, government institutions themselves are needed to advance the important right of access to information and to enable the media to play their key role as an intermediary between the people and the government.

Recommendations:

a) To the Governments of Armenia, Azerbaijan and Georgia:

- Engage in transparent law and decision-making processes. Involve key stakeholders such as the media, NGOs, and independent experts in drafting legislation, for example through joint working groups and advisory bodies within appropriate parliamentary commissions/committees, and within specialised Ministries, other state institutions, including at a regional and local level. Carry out public consultations on draft laws, and invite broad public debate of the latter.
- All public institutions and government departments must be required to establish procedures and mechanisms (for example, appointment of information officers, setting up information management systems, creating and maintaining official web sites) to effectively enable the media and the public to access information held by the institution.
- Take measures to change the culture of secrecy prevailing in public institutions. Civil servants need to be instructed that openness is the presumption, and secrecy constitutes an exception. Design and implement regular on-the-job training programmes for public officials on the right to access information.

- Place responsibility at the correct level: the management of public institutions has to be made responsible for ensuring access to information, and for fostering cultural change in their institutions. The management of public institutions and government departments who fail to comply with freedom of information duties has to be reprimanded. (The ‘scapegoating’ of individuals who deny information within an overall climate strongly discouraging openness is not the solution.)
- Take steps to implement existing national and international human rights standards on freedom of information. Develop, jointly with the media and NGOs, a comprehensive strategy for the implementation of freedom of information legislation.
- Freedom of information legislation must provide for an independent review mechanism to challenge denials, and include a protection for ‘whistleblowers’.
- Restrictions on the right to freedom of information have to be brought in line with international standards and best international practices. Restrictions have to be prescribed by law, and must relate to a legitimate aim as outlined in the ECHR (Article 10) or the ICCPR (Article 19). They should include a ‘harm test’ and a ‘public interest override’, i.e., denial of information is only permissible if its disclosure would do substantial harm to one of the legitimate aims prescribed by law. But if the public interest is better served in having the information and is greater than the harm caused, the information should still be disclosed.
- The independence of the judiciary has to be strengthened, so that the right of access can be enforced through legal process if otherwise denied.
- Include freedom of information training in the curriculum of public administration academies, journalism departments and law schools.
- Accreditation requirements for journalists should be established only for technical reasons such as safety considerations or lim-

ited space. All accreditation rules and procedures must be fair and transparent.

- All illegal restrictions on freedom of information, attacks on journalists, cases of punishment of journalists for seeking and publishing information deemed to be in the public interest should be fully investigated.

b) To the Mass Media of Armenia, Azerbaijan and Georgia:

- Follow the principles of professional ethics. Engage in quality reporting.
- Know your legal right in relation to access to information.
- Use the legal right of access rather than personal connections when seeking information.
- Quote the corresponding laws when making information requests.
- Challenge unlawful denials in courts. Create positive court precedents of freedom of information protection.
- Cooperate with specialised NGOs who work to promote access to information.
- Actively participate in the development of high-quality freedom of information legal frameworks by commenting on draft laws and regulations.
- Give media coverage to freedom of information issues, also ensure wide coverage of the court cases, especially those involving FOI, so as to increase public awareness of the right to access information. Explain the meaning of the FOI law to the public.
- Give media coverage to illegal denial cases and publicise violation cases through all media, including the Internet, to prevent further violations.

c) To NGOs of Armenia, Azerbaijan and Georgia:

- Actively participate in the development of high-quality freedom of information legal frameworks by participating in the development of draft laws and regulations.

- Support the implementation of freedom of information legislation by helping public institutions to build their capacity: provide know-how, training and advice.
 - Assist public institutions in making use of modern communication and information technologies such as the Internet for greater transparency of governance and stronger involvement of the public in decision-making processes.
 - Watch over the implementation of legislation by carrying out ongoing monitoring projects and publicising results.
 - Educate both the media and the public on how to exercise their right to access information.
 - Foster cross-border cooperation between neighbouring counties to transfer know-how and share best practices.
- d) To International Governmental and non-Governmental Organisations:
- Help initiate and widen discussion around access to official information and the rights of the media.
 - Provide support to advocacy campaigns for the adoption and implementation of the freedom of information laws.
 - Assist NGOs in designing monitoring tools to ensure accountability of officials and transparency of their decision-making processes.
 - Assist governments of the region in developing mechanisms and procedures to promote freedom of information.
 - Train media and professional NGOs in strategic litigation.

Country-Specific Recommendations

A) Armenia:

- With the participation of civil society the relevant government institutions should immediately draft and adopt the regulations needed for information provision in the state bodies, as required by the Law on Freedom of Information. The government should

introduce standards for referencing, titling, indexing and the security control of records.

- State and local government bodies should speedily set up internal mechanisms to provide access and openness of their activities as stated by the Law on Freedom of Information. Each central, regional and local government department must have in place a record-keeping system. This will preferably be an electronic system, though paper records management systems are acceptable where this is not possible. Within a short period of time state bodies should nominate Freedom of Information Officers in charge of providing access to information and publish a register of information they possess, on a regular basis as stated by the law.
- State bodies, both central and regional, are strongly recommended to construct their own official websites, as well as keep them regularly updated, and post there all information listed in the FOI law.
- It is important that public officials are trained in FOI issues by including FOI legislation as part of the curriculum, of State Administration Academy and the Council of State Service qualification training.
- The law does not foresee an independent administrative appeals mechanism. Such a mechanism should be created for the review of freedom of information cases. For a transitional period, appoint a representative on freedom of information with the Human Rights Defender's office.
- The legislative and sub-legislative acts of the Republic of Armenia, that are related to the activities of media and to access to official information must be brought into compliance with the laws "On Freedom of Information" and "On Mass Communication", adopted in 2003.
- The Law on State and Official Secrets and associated decrees on secrets should be revoked. It should be replaced with a law that protects for a limited time information whose disclosure would, or would be likely to, substantially harm the legitimate national security interests of the country.

- Limit provisions in the Criminal Code that criminalise disclosure of state secrets to cases where the disclosure caused harm and there is no compelling public interest in the disclosure of the information.
- Journalists need to be familiarised with the provisions of the FOI law and how to use it in their work. It is recommended that manuals and guidelines be produced for journalists on how to use the FOI legislation. The same applies to the Aarhus Convention.
- A full investigation should be carried out into the cases of violence against journalists on 22 October 2002 and on 5, 12 and 23 April 2004.
- The media community should develop a functioning media self-regulation mechanism that will help uphold standards of professional ethics.

B) Azerbaijan:

- The government should bring the freedom of information draft law in line with established international standards. This shall include a provision for an independent information commission (or a post of an Information Commissioner) to oversee the implementation and operation of the Law and a provision for the protection of ‘whistleblowers’.
- The law should be adopted as soon as possible, and implemented without delay.
- The government should make law development processes generally more transparent and base them on broad public consultation. It should set up a working group involving NGOs, members of parliament, lawyers, media and other qualified experts to design a strategy and action plan for the implementation of the freedom of information law.
- All legislation that conflicts with the right to access information should be amended or repealed to bring it in line with freedom of information requirements.

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- The draft State Secrets Act should be amended to limit coverage to only information whose disclosure would or would be likely to substantially harm the legitimate national security interests of the country. The 2002 Decree on State Secrets should be repealed.
 - Limit provisions in the Criminal Code that criminalise disclosure of state secrets to cases where the disclosure caused harm and there is no compelling public interest in the disclosure of the information.
 - The Mass Media Law should be amended to limit the restrictions in Article 10.
 - The Press Council should be strengthened for the media to observe professional and ethical standards.

C) Georgia:

- The government should ensure the implementation of requirements of the General Administrative Code (Chapter Three) and make sure that public institutions follow its requirements, such as appointment of persons responsible for releasing official information, publishing contact information, putting in place internal regulations for accessing information both by media and the general public, and creating and regularly updating official websites.
- Mechanisms of internal and external accountability of public officers and institutions on FOI should be elaborated. Administrative review bodies within the public institutions should be formed to review complaints on restrictions of access to information.
- An independent administrative appeals mechanism should be created: for a transition period, the Public Defender's office could serve as an external oversight institution for freedom of information cases, while in the long run it is recommended that a post of Information Commissioner be established.
- The General Administrative Code should be amended to shorten timeframes for court proceedings. The current law defines a

5 months waiting period for FOI request court proceedings. Necessary amendments should be undertaken to the administrative legislature to define the new time limits (10 days) for requesting proceedings as the media in many cases avoid initiating court proceedings against information refusals due to the lengthy waiting period.

- The Law on State Secrets should be revoked. It should be replaced with a Law that protects for a limited time information whose disclosure would, or would be likely to substantially harm the legitimate national security interests of the country.
- Limit provisions in the Criminal Code that criminalise disclosure of state secrets to cases where the disclosure caused harm and there is no compelling public interest in the disclosure of the information.
- There should be a series of training sessions for public officials on FOI legislature and other related laws, media relations and human rights should be undertaken in order to improve access to information in accordance with the public's right to know.
- A series of training sessions on FOI legislation and other related laws, ethical issues and freedom of speech and expression should be organised for journalists, editors, and other media representatives.
- Civil society and the media should make a joint effort to promote professional and ethical standards within the media, including the establishment of self-regulation mechanisms.
- NGOs and other civil society groups should initiate and support long-term media monitoring programmes and ensure results are being published on regular basis. Support professional publications and discussions over media issues. Support cooperation and exchange of ideas between media professionals, academics, students and other groups of interest.
- Media professionals, civil society and NGOs should undertake the necessary activities aimed at promotion of media literacy within the society and targeted audiences.

DIMITRI KITOSHVILI

FREEDOM OF INFORMATION IN GEORGIA

In what circumstances did the state acknowledge its obligation to freely provide governmental information to the citizens and to ensure their access to the official sessions? What discussions preceded enactment of the freedom of information chapter within the Administrative Code?

In 1995, after the democratic Constitution was enacted in Georgia, an extensive discussion began on the legislation that would ensure the right to freely receive and distribute the information. Many lawyers, journalists, human rights activists, Georgian and foreign experts participated in intense disputes during the following four years.

The key point of these discussions was a single issue: should the press obey the rules prescribed by the state, or must the government obey the laws prescribed by people? Should a law set the limits of obtaining and distributing the information by the press, or the government must be bound by the law to open official documents and sessions? Should the journalists have some special rights regarding receipt and distribution of the information, or should all citizens be equal before the law?

In June 1999 the Parliament, on one of the last sessions and just few months before the elections, passed the General Administrative Code that contained chapter 3 on the freedom of information. It was resolved that establishment of democracy in Georgia needs the freedom of information rather than a restrictive law on the media.

The first and foremost guarantee of the Freedom of Information is the Constitution of Georgia and the laws adopted on the grounds of the Constitution: Chapter Three of the General Administrative Code – the Freedom of Information Law, the Law on the State Secret, and some other laws regulating ecology and health care issues.

In accordance with Article 24 of the Constitution, any individual has the right to receive and distribute information freely. Since one of the

principal sources of information of interest for the modern society is government, Article 41(1) of the Constitution acknowledges the right of each citizen of Georgia to examine, according to the rules prescribed by law, the information related to him/her and kept in a state agency, as well as official documents kept in the agency unless they contain the state, professional, or commercial secret.

While the first part of Article 41 of the Constitution establishes the principle of open government, the second part of this Article defines that the information contained in the official records that is related to health and finances of a citizen or to other personal issues may not be disclosed to anyone without prior consent of this citizen, except in the cases prescribed by law. In accordance with Article 37 of the Constitution, an individual has the right to receive complete, objective, and timely information with respect to his working and living environment and conditions.

After the Constitution, the principal legislative act that regulates FOI issues is Chapter Three of the General Administrative Code – freedom of information.

By this law, it is people who are the main actors and who have all lawful means to protect their rights. In order to obtain the necessary information, or to attend a session of a governmental agency, everybody has the right to apply to any level of government and, if no desired answer is given within the predetermined period of time, to file a lawsuit directly with a court.

Requirements of the freedom of information extend to, but are not limited to, all state and self-government agencies. The same requirements apply to those who were entrusted by the state to exercise certain powers or who are financed, in full or in part, from the state or local budgets.

By law, all such persons, agencies, and organizations are grouped in one category and named public agencies, and the information kept in a public agency, as well as the information received, processed, created, or communicated by the agency or its employee and related to their official duties, is deemed to be the public information.

Public information may be either open or closed. Any information that is not classified as secret according to the rules prescribed by law is open. By law, the information is closed if it contains state, commercial or personal secret. In addition, the information protected by executive privilege is also closed and not available for disclosure. In order to exercise right of access to the information, it is not required to prove to the respective governmental agency that our request is legal or that our interest is valid. All requests are deemed legal and valid until the respective state agency proves otherwise.

The law “On the State Secrets” regulates classifying of the public information as secret. In accordance with this law, only the following information may be classified as a state secret:

1. In the military-defence sphere:

a) The information that contains strategic and operational plans, documents on preparation and execution of military operations, issues related to strategic and operational relocation, mobilization and alertness of armed forces and use of mobilization resources;

2. In the economic sphere:

The information about the specific types of the state monetary reserves included in the common gold reserve – precious metals, precious stones and other values, the operations related to production, safekeeping, guarding, circulation, exchange or removal from circulation of the banknotes and securities, as well as about the operations related to prevention of counterfeiting.

3. In the external affairs:

b) The information on the issues of military, scientific-technical and other types of cooperation with foreign states, disclosure of which may harm the interests of Georgia.

4. In the spheres of intelligence service, state security and law enforcement:

b) The information on security systems and regime of guarding of the top officials, administrative buildings and governmental residences of Georgia defined by the law of Georgia “On the Special Service of State Guarding”;

Information classified as a commercial secret is the information about a plan, formula, process or method having some commercial value or any other information that is used for production, preparation or processing of goods or for rendering services, and/or that represents innovation or significant achievement of technical creative work, or other information disclosure of which may diminish competitiveness of a person. Furthermore, commercial secret is a secret of legal persons of private law and other entrepreneurial entities and constitutes their property. In the cases prescribed by law, such information may happen to be in the possession of a public agency. The public agency is obligated not to disclose such information to third persons.

Information classified as a personal secret is the information that contains personal data of a natural person. This person, about whom such information exists in a public agency, makes the decision on classifying the personal data as her personal secret. By law, the personal data is the information that enables identification, i.e. recognition of a person. Typically, personal secret consists of the information about the health status and finances of a person, as well as other private issues. The agency is obligated not to disclose the information classified as a personal secret (personal data), except in the cases prescribed by law – after the justified court decision – or except when the person gives consent thereto.

According to the law, the information that constitutes a personal or commercial secret of another person and that was made known to a person in connection with the latter's professional duties, is deemed to be the professional secret. Information that is not a personal or commercial secret of another person may not be the professional secret. Hence, only those individuals may possess professional secrets exercise of whose professional duties is impossible without the knowledge of others' personal or commercial secrets (e.g. medical doctor, attorney).

The term *Executive Privilege* denotes the authorization of an administrative agency not to disclose the identities of other public officials who may have participated in the preparation of decisions made by the officials of this agency. This protection is not applicable only to the state-political officials. The essence of the above provision is to facilitate comprehen-

sive and all-inclusive review of the issues before the respective decision is made, which, among other factors, includes submission of various and diverse viewpoints. Such viewpoints may not have been put forward if the respective public servant had not had the guarantee that his identity would not be disclosed in connection with the respective issue.

By law, the consumers have the right to receive goods and services safe for the health and environment. Hence, the information on the condition of the environment, as well as on the potential danger to the life and/or health of a person. In addition, the information about the structure and officials holding positions in administrative agencies, process of decision-making, election of elective officials in these agencies, as well as the information about the collection, processing and release of information and financial activities of the public agencies may not be classified as secret.

In accordance with the securities legislation, the corporations are bound to publish key information so as to enable the society – the consumer of the stock market – to make an informed choice.

In the past it was often the case when relations of an administrative agency with various persons was the sole prerogative of the head officials of the agency. Under the conditions of normal functioning of a civil society, this process is so frequent and laborious work, and so often requires making prompt decisions, that if the top officials were to perform this obligation too, then they may have been left with no time to perform their principal duties. For that reason, the law defines that a public agency is bound to designate a public servant who will be responsible for ensuring the availability of public information. The identity, work address, telephone number and other contact information of such a person must be put in the place of public agency that is available for everyone.

In accordance with Article 40 of the General Administrative Code, a public agency is obligated to release public information without delay. *Without delay* means that the issue is to be resolved immediately upon filing of application and its registration by the agency, on the same day. The law defines several exceptions to this rule:

Information may be released within 10-day period if replying to the request for public information requires:

- retrieval of the information from the agency's structural subdivision situated in another locality and its subsequent processing;
- retrieval and processing of several documents of significant volume and not associated with each other;
- advice from the agency's structural subdivision situated in another locality or from another public agency.

The requirement of publicity of sessions must be observed by all such sessions where more than one person meet in order to make decision or to prepare a decision on behalf of a public agency. If a state agency denies our request for obtaining of some information or for access to some session, then the legality and validity of such refusal must also be justified.

For example, in Georgia the following are such agencies:

- The government of Georgia;
- The national regulatory commission of energy sector of Georgia;
- The central electoral commission of Georgia;
- The national security council of Georgia, etc.

Of course, this is not a complete list. It represents only a small part of corporate public agencies. Complete listing of such agencies is in fact even impossible, because this notion encompasses various ad hoc panels and commissions as well.

In accordance with Articles 32 and 28 of the General Administrative Code of Georgia, each corporate public agency is obligated to hold its sessions openly and publicly, except in the cases when the session considers the information containing state, commercial or personal secret.

A corporate public agency is obligated to announce publicly a forthcoming session at least one week in advance before the session begins.

In accordance with Article 49 of the general Administrative Code of Georgia all public agencies are bound to submit to the President and the parliament of Georgia reports on their activities related to Chapter 3 of the General Administrative Code of Georgia by December 10 of each year.

The report ought to contain the following information:

- The number of requests for release of public information and for rectification of public information received by the public agency;
- The number of decisions made to satisfy or to refuse the requests;
- The information on the appeals taken from the decisions refusing to release the public information; etc.

A person has the right to petition a court for annulment or alteration of the public servant's decision in the following cases prescribed by law, when:

- a) The request for public information is refused;
- b) Session of a corporate public agency is closed, in full or in part;
- c) Public information is classified as secret;
- d) Incorrect public information is created or processed;
- e) Personal data are illegally collected, processed, kept or released;
- f) Personal data is illegally handed over to another person or other public agency;
- g) Public agency or public servant has violated other requirements of Chapter 3 of the General Administrative Code of Georgia.

It should be also mentioned that by law, in order to ease filing process, a citizen is not required to pay any fees until the court proceedings are completed. In addition, in some cases the filing party is completely released from payment of the state fees.

SHUSHAN DOYDOYAN

IMPLEMENTATION OF THE FOI LAW IN ARMENIA

The Anti-corruption Strategy of the Government of Armenia adopted on November 6, 2003 puts the access to information at one of the central places in the overall policy. It recognizes that “access to information will significantly enhance the publicity and transparency of public service, which will promote the expansion of public involvement in the decision making process”. The strategy emphasizes the importance of the Law on Freedom of Information (FOI) regulating the disclosure process by government institutions, the procedures of requesting information by citizens, as well as improving the legislation on processing the complaints of citizens by civil servants. It attaches a great importance to the introduction of public complaint (alert) mechanism in terms of discovering deficiencies in public administration system. It is important that high compliance with the new FOI law and a stronger culture of transparency is introduced if Armenia is to genuinely fulfil the pledges made in its Anti-Corruption Policy.

The Armenian FOI law was adopted on September 23, 2003 was a result of a successful and productive collaboration between the Parliament and civil society. The law came into force on 15 November 2003. It covers not only state and self-regulating bodies but also private organizations which conduct public functions or have a monopoly or a leading role in the product market.

However, it became obvious that it is one thing to have a good law on paper, and it is another thing to have it applied in real life. The implementation of the FOI Law and substantial access to information is a great challenge for the Armenian society at large. The law has been in force for a year, however very few significant measures have been taken by the Government for the proper implementation of the Law. Regulations and procedures for providing information, as well as for the filing and the documentation of the information records possessed by institutions were

not drafted and adopted by the Government. The process of assigning information officers goes extremely slowly.

The summarized results of several monitoring projects conducted by the FOI Center and other partner organizations prove that access to information and mechanisms for ensuring implementation of FOI legislation in the state and self-regulatory bodies of Armenia are inadequate. The state bodies do not function transparently and openly; the legislative provisions are infringed.

A number of common problems can be identified during our monitoring in Armenia. Many of these are similar to the problems we found in other countries, and are not at all surprising given the current status of administrative transition in Armenia. We nevertheless want to highlight the issues which need to be addressed to ensure better implementation of the FOI.

Major violations of journalists' access rights are as follows:

1. Information requests were refused without any legal grounds -

Although the FOI law sets limited grounds for information refusals the state agencies find ways to get rid of journalists' requests in written and oral forms. "I have no time, we don't have the requested information" these are among the most frequent replies. In one case the answer was "we don't have a Xerox machine". Afterwards, the requestor journalist took a Xerox machine from Gyumri to Yerevan for making a copy of documents to prove that there should be sufficient access to information. Another frequent ground for denials is the answer "are not authorized to provide information". This could be a true or a false answer depending on the particular case. Officials also say that the information is in the stage of development. Sometimes institutions delay the response for so long, that it becomes useless for the journalist.

2. Requests get mute refusals - To our opinion the main reason for the big number of mute refusals is that the State bodies do not want to leave any evidence and give ground for further appeal. There is always an available excuse, such as bad postal service. Practice shows that officials prefer not to respond at all, rather than formally refuse to answer. The law demands that written refusals should be justified with a reference to the

appropriate provision of the law. Last year we conducted a monitoring filing 100 requests to the state institutions, out of which 29 received mute refusal, and only 10 requests got written formal refusal.

3. Demand to justify the request - The issue of justification for information requests causes concerns among the journalists. This demand contradicts the FOI law. The officials also ask other questions, such as when the information will be published, which part of it will be published, etc.

4. Discrimination toward different media representatives - Unfortunately this is very wide-spread practice. Discrimination is particularly obvious in cases of opposition and pro-government journalists. The latter enjoy more possibilities and privileges. The Institutions also treat the media and ordinary citizens differently. The first enjoy more privileges. The journalists are more respected and welcomed while ordinary citizens are mostly ignored and illegally rejected. Most negative results were received in case of minorities, such as refugees, or disabled people.

5. Lack of internal mechanisms for providing access to information within state institutions - For example, in response to the written request of the journalist of *Aravot* daily sent to the Defense Minister, the Legal Department of the Ministry proposed in written form to apply to the PR Department, while the Legal Department could and was obliged to pass the request directly to the appropriate Department. This fact provides evidence that in the course of providing information the Departments within the same institution do not cooperate with each other.

This practice is affected by several objective and subjective key factors, some of which are:

a. Transitional period inherited many deficient practices from the Soviet era, including that of running public offices in secrecy or in a closed manner, which results in predominant lack of **transparency and corruption**.

b. Participatory mechanisms for governance cannot function properly when information holders do not provide information and citizens fail to demand information. Lack of communication and information flow between the officials and the citizens is the first and probably the most important, reason for people's alienation from government participation.

c. State officials are **unaware** of their duties stated by the FOI Law. They do not know how to implement the law, how to correspond their activities to the law requirements. People are deprived of the opportunity to participate in local town hall meetings as they are mostly held behind closed doors. Thus issues important to the public are discussed and decided without the public's participation. During a meeting on the obstacles to free access of information, the representative of the Ministry of Health asked why they should provide information to everybody who makes a request. Moreover, some other officials had never even heard of the FOI law, which has existed for about a year.

d. Another factor is the **unawareness** of people and journalists. They do not use the law and are not aware of the legal mechanisms on how to use the law. They are also unaware of the mechanisms granted by the newly adopted FOI Law that need to be applied when access rights are violated. When access rights are illegally denied most people and journalists do not appeal in court. Here another factor derives. ***Lack of impartial and independent court system*** which will be the best guarantee for protection of this fundamental right. ***Low confidence*** toward the court system. As well as in the course of the long court hearings the information becomes outdated and the necessity of its receiving elapses. It's worth mentioning that so far, no individual journalists applied the court for protecting access right. There have been a number of court cases related to protection of the person's right to receive information (in total nine cases out of which 6 happened before the law's adoption and three afterwards). Judging from the cases' content and the amount, one can say that concept of FOI is alien to the Armenian judges who are still not ready to protect journalists and people's right of access if the other party is a state agency or an official. Journalists mostly prefer to publicize illegally refused cases (60%), or address the superior of the official who refused to provide the information.

e. We found that in most ministries, governor's offices and local self-governing bodies there is no unified system for providing information. Different departments within a government body have their own administrative procedures, which results in a randomized responsiveness. In ad-

dition, many of the bodies monitored do not have guides for citizens on how to access information. Clearer procedures with easily identifiable information officers could greatly improve information access.

f. The efficiency of information provision also depends *on personal diligence of the employees*, their experience and knowledge in FOI issues. The practice shows, that in cases when an information officer works professionally, requests are responded properly and timely. Unfortunately, our observations showed that information officers have gained their work experience and knowledge mainly due to long work experience, but not due to any training. Their knowledge in freedom of information is very limited and is based on the traditions and on instructions from supervisors.

g. *Absence of sub-legislation* which should give sufficient legal ground for the proper implementation of the law, in particular, *records management: recording, classifying and maintaining official information*, as well as *defining fees to be charged to applicants for information under the FOI Law*.

h. There also is a *lack of financial and technical resources* in the central and local governments, including computer databases and even computer systems for registering and tracking requests, documentation, and filing.

What should be done?

Recommendations

Based on our observations during last 4 years, the following recommendations are proposed for promoting Implementation of the freedom of information law in Armenia.

- **Internal Systems:** To promote standardized information management procedures for all state institutions. It is also important to promote information sharing between different branches of government so that state institutions can exchange information.
- **Technical capacity:** To strengthen technical capacities of all state institutions and to ensure that the information officers / public relations departments of the institutions have sufficient computing resources to carry out their work.

- **FOI Officers:** State and local government bodies should urgently nominate a person responsible for providing access to information (information officers).
- **Use of Web sites:** All institutions are encouraged to post the information they possess on their web sites to ease the access to government-held documents. Those who have not constructed web sites yet should be encouraged to create them. Resources should be made available to do this. At the same time, having information on the Internet should not make it impossible for requestors request in a written or oral form, and receive the appropriate answer. Private organizations of public importance should make sure that their records are properly maintained, so they comply with the FOI law.
- **Equal treatment of requestors:** Discrimination toward various requestors, such as oppositional journalists or ordinary citizens should be totally eliminated. Discrimination is illegal and will not be tolerated.
- **Adoption of regulations:** Within a short period of time with the participation of the civil society the Government should draft and adopt regulations needed for information provision in the state bodies. The government should introduce standards for referencing, titling, indexing, and the security control of records. Two key by-laws should be drafted and adopted by the Government: **regulation on records management: recording, classifying and maintaining information, and regulation on fees to be charged from applicants for information under the FOI law** which requires the government to introduce a Regulation to decide the level of fees payable for the provision of information.
- **Protection of access rights:** The Ombudsman should be more active in examining violation cases and taking proper measures to protect people's infringed right of access. The officials should carry liability for illegal actions. ***It is highly recommended that in the nearest future the Ombudsman has a special assistant or staff for handling information access appeals.***

- ***Training of Public Officials:*** It is recommended that training courses are provided to all information officers and these should cover both legal aspects of access to information and technical skills for information management. It is quite possible to use the internal human resources of the institutions along with external assistance. Thus, the gap of awareness among representatives of self-governance bodies in providing community people with access to information and access to the meetings will be filled. Civil Society expert in the FOI law can also be called upon to contribute to these trainings.
- ***Public Awareness Raising:*** It is recommended that both the government and civil society groups take steps to inform the general public about their rights to access information and the mechanisms for doing so. Government web portals should include information on how to request information. Publication of FOI guides for citizens would contribute to this purpose and can be widely disseminate and made available in all government bodies. Journalists from all the mass media are encouraged actively to use the law and to cover freedom of information issues so as to increase awareness of the right to access information. ***Journalists may become monitors of the FOI practice as well as the most active users of the law, thus promoting the establishment of a transparent regime in the country.***
- ***Public Use of the Law:*** Members of the general public are encouraged to exercise their right to information by making use of the new law and asking for information from the local and central government.

How civil society groups are facilitating the above mentioned needs:

To promote these processes towards freedom of information and transparency power, three local NGOs (FOI Centre, Media Law Institute, Civil Society Institute) role set up a Freedom of Information Civic Initiative (hereafter **FOICI**) on November 15, 2003 in support of the proper implementation of the FOI Law. These NGOs also took a leading role

in drafting and adopting the FOI law. The FOICI now implements its 4 years strategy up to 2007 as follow-up work in order to make the law effective. In the beginning of 2004, in the frames of the Civic Strategy, the FOI Civic Initiative set up 11 Coordination Councils designed to oversee the observance of FOI Law in Armenia and to promote the exercise of the citizens' right to freely seek and receive information. The established network of coordination councils involve community people, journalists, NGOs, representatives of central and local government bodies all over the country. The Network of coordination councils is the core group for mobilizing local community people in addressing, raising and solving public issues through promoting access to information and will be the moving wheel for further activities of FOICI.

On 10 December 2004 International Human Rights Day FOICI organized the second annual Award Ceremony to recognize the institutions with good and bad practices. The good awards will be “Golden Keys” and the negative award is a “Black Lock”.

The nominations were defined as follows:

- Award for a citizen who has actively exercised his/her right of access to Information under FOI Law
- Award for a state institution with the best system of providing information
- Award for best web site from the perspective of FOI Act
- Award for the best FOI related article/broadcast program
- Award for an NGO, which has contributed to the exercising of the rights of access to information
- ***Negative*** award for a state institution, which does not fulfill its obligations in FOI field.

The nominees were selected by an independent and impartial Jury represented by local and international organizations' members, journalists, scientists, researchers in the field. The Jury summed up the registered results of the several past and ongoing monitoring projects conducted by FOI Center. Another source for unbiased decision-making was the monthly and annual Black list of those officials and institutions which

infringed people's right to access to information (composed by the FOI Center during past three and a half years).

Civil society groups are ready to assist the Government. The government, which already declared its *commitment to Transparency*, should be monitored. It has to demonstrate a strong political will for to implement the FOI legislation, and put theory into practice.

ELMAR HUSEYNOV

ACCESS TO INFORMATION IN AZERBAIJAN: HOW EASY IS TO GET IT?

The accountability of government institutions to the public, the transparency of government actions, is the most important principle of democracy. The public should have the opportunity to get reliable information on the actions of the authorities and government agencies to take an active part in elections and in public (civil) review of draft laws in order to prevent the government from dominating the public.

Obviously, none of the desired actions will be effective if the public and its institutions are denied access to information on the activity of the authorities. Access to information is access to the entire complex of material and documents which both regulate the activity of the authorities and record the current process of their actions. Practically not a single element or mechanism of civil society can function steadily and efficiently in the absence of a legislative framework ensuring the public's free access to information on the activity of the bodies of state administration. We must draw on the experience of those countries which have efficiently functioning Freedom of Information acts.

Undoubtedly, the independent media are an important factor influencing the authorities' actions. This is a legitimate method of exerting influence upon the state within the framework of the Constitution, which accords with the generally accepted democratic principles. Azerbaijan, however, is a country where such principles exist only on paper.

The informational openness of the government is proclaimed by law. According to the Constitution, all citizens are guaranteed freedom of thought and speech, censorship is forbidden, and every citizen has the right to seek, obtain, transmit, produce, and disseminate information by any lawful means. Particular liability is envisaged for persons vested with power in the event of their interfering with journalists' lawful activity – either by compelling them to disseminate certain information or

compelling them to refrain from doing so; liability is also envisaged for violating the right of an editorial office to request and procure information. Reality, however, is far from the ideal laid down by the law. In actual fact, journalists often have to deal with situations where the authorities either ignore their requests, or provide incomplete or distorted information, or refuse to supply information without any reason whatsoever. The cause of all that is the unwillingness of the Azerbaijan authorities to afford journalists access to socially meaningful information.

Particularly worth mentioning are those provisions of the Criminal Code which support the now widespread right to obtain information by introducing liability for state officials who have unlawfully denied access to government information. The law envisages various penalties for that. But the actual number of appeals to court in connection with the violation of journalists' right to having access to official information has been zero. For Azerbaijan's courts have earned the reputation of being just another branch of executive power, and so lodging a complaint against the authorities is considered completely futile. It should be noted that the problem in question has more aspects than a mere judicial one.

As far as the constitutional rights of the media to seek and obtain information are concerned, there are two groups of legal problems regarding access to information. The first group concerns the necessity of realizing generally undefined rights of gaining access to information by way of detailed legal norms relating to practical aspects of procuring information: specifying persons in charge of responding to requests for information; establishing the time limits for responding to such requests; determining the mechanism of taking legal action in connection with a refusal to provide information, etc. The second group of problems concerns restrictions imposed by legal systems on the right of access to information. These restrictions fall into separate categories depending on access to various types of information: government, judicial, personal and commercial.

Despite the existing legislation, it is very difficult for the citizens of Azerbaijan to get information. Furthermore, restrictions in affording broad access to information concern not only the procurement of documents

and other information possessed by the state and private organizations but also attending government meetings as well as legislative and court sessions. The government, the President's staff, and the ministries and departments have no infrastructure for ensuring access to information. The government still has no press service of its own, while the President's press service is in a state of permanent paralysis. It is extremely difficult for journalists on the staff of the independent and opposition media to obtain not only information but also commentaries from officials. The Azerbaijan authorities practise political discrimination against the media everywhere. For instance, special permission is required for being accredited at parliament, and if its leaders do not like the tone of a journalist's reports, such accreditation can be revoked at will. The opposition press is being discriminated against in particular: its members are not invited to official briefings, and the President refuses to give interviews to them. During the year that he has been in office, President Ilham Aliyev has not given a single interview to any of the national media. Other officials behave in a similar manner, and so journalists have to get their information from whatever sources they consider reliable.

The Constitution of Azerbaijan guarantees to all citizens, including those employed by the media, the right to seek and obtain information. Some of its articles state in no uncertain terms that information regarding matters of public health and environmental protection must be open to all. However, those provisions, depending on one's interpretation of "obtain" and considered together with the rights envisaged by the laws on the media, could be construed as limiting, to a certain extent, the right to seek information.

The constitutional provision of the right of all to have access to information is based on the premise that collection of information is an essential element of disseminating information in society by the media, which, is the main condition for the functioning of a democratic system of government. As for the special rules regulating the right of access to information, they were included in the law on the mass media itself along with more general provisions for the right of journalists to seek and obtain information; they were also included in the draft law on freedom

of information. None of those laws, however, can change the real state of affairs in Azerbaijan, which remains a country where it is very difficult to obtain socially meaningful information.

While fulfilling no provisions of the laws ensuring free access of citizens, including journalists, to socially meaningful information, the authorities are also trying to formalize legislatively the collection and propagation of information in entire segments of social life. For instance, besides the above-mentioned legislative acts, there is a law on state secrets, a most important regulatory instrument which governs access by the media to information. Its provisions contain details concerning the procedure of gaining access to government information. None of them is being fulfilled, however; on the other hand, the provisions of this law concerning the range of issues which may be regarded as state secrets are poorly defined. The law is formulated in such a way that it may be broadly interpreted to include any information on the country's inner political life (for instance, the activity of the local officialdom), as well as its foreign policy. This permits the authorities to include in that category a wide range of socially meaningful issues.

With great difficulty and with the support of the Council of Europe and the OSCE, it has been possible to amend the law's provisions which impose on journalists criminal liability for spreading information relating to a state secret. However, it is clear that the media may be punished for divulging state secrets in a different way: the law envisages repressions against the media for violating the rules of disseminating information which constitutes a state secret. These facts, as well as the vaguely formulated provisions of the law, make it possible to define this law as potentially dangerous to freedom of speech.

Summing up, one may state that Azerbaijan remains a country whose citizens and mass media are actually deprived of the opportunity to get information of social importance. Despite the presence of a legislative framework, in real life one runs up against the total unwillingness of the authorities to act in accordance with the Freedom of Information principles. Clearly, a solution to the entire set of problems of the authorities' openness should be based on a carefully adjusted ethical

balance of the informational interests of the state and the public. It is impossible to describe in laws and bylaws all of the various situations in which access to information may be afforded or denied. It is necessary to foster civilized relations between the mass media and the authorities. We must yet learn to live in conditions of freedom of speech. Obviously, the authorities' accountability to the public as regards access to information must be of a high standard. Otherwise, we will not be able to build a free, democratic society in which all the rights and liberties of citizens are respected.

