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COMPARATIVE HUMAN RIGHTS JURISPRUDENCE IN AZERBAIJAN: THEORY, PRACTICE AND PROSPECTS

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I. INTRODUCTION: THE AZERBAIJAN REPUBLIC AND CONSTITUTION

The Republic of Azerbaijan (Azerbaijan) is a nation of approximately eight million people located on the western shore of the Caspian Sea and at the southeastern end of the Caucasus Mountains region.[1] The population is composed primarily of Azerbaijani Turks, with strong cultural influences from neighboring Russia, Georgia and Iran.[2] Azerbaijan has been independent of the former Union of Soviet Socialist Republics (USSR) since 1991.[3] Nearly 75% of Azerbaijan's gross domestic product is generated by petroleum revenues.[4] Azerbaijan became part of the Russian Empire in the 1820s.[5] By 1900, the Baku/Apsheron region produced more oil than all U.S. wells combined, and approximately half of the world's total output.[6] During and after the First World War, a secular, modernist local elite established the Azerbaijan Democratic Republic from 1918-1920, the first democracy in a Muslim nation.[7]

After a period of increasing output under the rule of the USSR beginning in 1920, Azerbaijan oil output peaked in 1940, then began a slow decline.[8] In 1994, however, Azerbaijan signed the "Contract-of-the-Century" with international oil companies and

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1. Gregory Twyman, *Geography and Climate, in* GATEWAY TO AZERBAIJAN: UNITED STATES-AZERBAIJAN CHAMBER OF COMMERCE (USACC), 2004 VIRTUAL INVESTMENT GUIDE 8 (Lydia Borland ed., 5th ed. 2004), *available at* http://www.usacc.org/investmentguide.pdf.

2. *See* Audrey Alstadt, *Azerbaijan: Historical Overview, in* GATEWAY TO AZERBAIJAN, *supra* note 1, at 6. *See also* Gregory Twyman, *Geography and Climate, in* GATEWAY TO AZERBAIJAN, *supra* note 1, at 8.

3. Alstadt, *supra* note 2, at 6.

4. Frank Verrastro, *Political Environment: Risk Analysis, in* GATEWAY TO AZERBAIJAN, *supra* note 1, at 12.

5. Twyman, *supra* note 1, at 8.

6. Alstadt, *supra* note 2, at 6.

7. *Id.*; *see also* THOMAS DE WAAL, BLACK GARDEN: ARMENIA AND AZERBAIJAN THROUGH PEACE AND WAR 99 (2003) (short-lived republic granted the vote to women before the United Kingdom did).

8. CHARLES VAN DER LEEUW, STORM OVER THE CAUCASUS 49 (1998) (annual oil production declined from 22.2 million tons in 1940 to 10 million tons in 1990); *see also* Elman Rustamov, *Overview of the Banking Sector, in* GATEWAY TO AZERBAIJAN, *supra* note 1, at 34 (annual oil production in 2006-2012 is projected to increase to about 65 million tons per year).

financial institutions for investment in oil and gas resources.[9] This investment currently exceeds $8 billion in oil and gas development projects, including over $4 billion in oil and gas pipelines from the Baku region through Azerbaijan, Georgia and Turkey, which will transport Azerbaijan oil and natural gas to Western markets beginning in 2005.[10] Other Caspian Region nations with oil and gas resources might use this pipeline infrastructure in future years.

Azerbaijan has an elected president and a uni-cameral national assembly, called the "Milli Majlis."[11] The Nakhichevan Autonomous Republic exclave of Azerbaijan, which is separated from the main territory of Azerbaijan by the nation of Armenia, has its own legislature and courts.[12] Azerbaijan lost the region of Nagorny-Karabakh, approximately 14% of its territory, to Armenian separatists, and suffered an influx of refugees as a result of a 1991-1994 war between Azerbaijan and the newly independent nation of Armenia.[13]

Azerbaijan's Constitution was adopted on November 12, 1995.[14] Presidential elections have been held twice under the Constitution.[15] In 1998, Heydar Aliev, a former member of the USSR Politburo,[16] was elected to a full five-year term under the new 1995 Constitution, after first being elected president in 1993.[17] In 2003, Heydar Aliev's son, Ilham Aliev, was elected president for a five-year term.[18] The elections for president and for the Milli Majlis were criticized by foreign observers for, among other things, lack of access by the multiple opposition parties to electronic media controlled by the president's ruling party and its allies.[19]

The judicial system of Azerbaijan operates on the model of Russian civil code systems.[20] The Azerbaijan Constitution provides

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9. Verrastro, *supra* note 4, at 12.

10. David Woodward, The "Contract of the Century"... 10 Years On, Presentation at 11th International Caspian Oil and Gas Conference (June 2, 2004) (on file with author). *See also* Rustamov, *supra* note 8, at 34.

11. AZERBAYCAN RESPUBLIKASI KONSTITUSIYA [Constitution], art. 7, *available at* http://www.constitutional-court-az.org/const-contents.htm (last visited Mar. 1, 2005).

12. *Id.* arts. 134-41.

13. *See generally* DE WAAL, *supra* note 7.

14. HUGH POULTON, ARTICLE 19: GLOBAL CAMPAIGN FOR FREE EXPRESSION, AZERBAIJAN: PRESS FREEDOM OR PERSONAL FIEFDOM? para. 4.1 (Jan. 2001), *at* http://www.article19.org.

15. *See id.* paras. 2.3, 2.5.

16. Svante E. Cornell, *Democracy Falters in Azerbaijan*, 12.2 J. OF DEMOCRACY 118, 119 (Apr. 2001).

17. POULTON, *supra* note 14, para. 2.3.

18. International Foundation for Election Systems and CNN World/Election Watch, *at* http://www.cnn.com (Oct. 15, 2003).

19. *Resolution 1358 (2004): Functioning of Democratic Institutions in Azerbaijan*, paras. 6(i), 8(i), EUR. PARL. ASS. DEB. 2nd Sitting (Jan. 27, 2004), *available at* http://assembly.coe.int (last visited Feb. 16, 2005).

20. FAKHRI AKPEROV GUDRAT, A GUIDE TO THE REPUBLIC OF AZERBAIJAN LAW RESEARCH,

for a Constitutional Court of nine judges.[21] The Court began operations in 1998.[22] It is authorized, among other things, to review the conformity to the Constitution of executive and legislative branch laws, decrees and orders, Supreme Court decisions, municipal acts, and interstate agreements that "have not yet become valid."[23] The Constitution (before the 2002 amendments) authorized the Court to interpret its terms only in response to inquiries of the president, the Milli Majlis, presidential Cabinet Ministers, the Supreme Court, and the Procurator's (Prosecutor General's) Office.[24] The Constitution provides that any laws or treaties cease to be valid and do not come into force, if so specified in a decision of the Court.[25]

II. THEORIES OF INTERNATIONAL LAW INCORPORATION AND COMPARATIVE CONSTITUTIONAL JURISPRUDENCE

A. Theories of Incorporation of International Law into Domestic Law

One of the central issues of constitutional development in previously "closed" societies has been identified as their "opening up to international law . . . reflected in a new approach to the relationship between domestic legal systems of these states and international law."[26] It has been stated that "[c]rucial to the success of *international* standards and institutions. . . is the degree to which national courts respect decisions of the international human rights tribunals and incorporate their jurisprudence into national decisions."[27] The goal of this analysis is to identify where, in the spectrum of relationships between the European Court of Human Rights (ECHR) and national courts, the human rights jurisprudence of the Azerbaijan Constitutional Court exists.

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at http://www.llrx.com (January 15, 2002). *See also* PETER B. MAGGS, THE CIVIL CODES OF CENTRAL EURASIA-A COMPARISON (2003), *at* http://home.law.uiuc.edu (last visited Feb. 16, 2005) (similarity between Azerbaijan and Russian Civil Codes allows Azerbaijan legal scholars to draw on extensive Russian judicial and academic interpretation for guidance).

21. AZERBAYCAN RESPUBLIKASI KONSTITUSIYA art. 130(I).

22. Dr. Svante Cornell, *Government and Institutions*, *in* GATEWAY TO AZERBAIJAN, *supra* note 1, at 16.

23. AZERBAYCAN RESPUBLIKASI KONSTITUSIYA art. 130(III).

24. *Id.*; *see also infra* note 87 (regarding the 2002 amendments expanding the right of access to the Constitutional Court to lower courts, the Ombudsman Office, and individual citizens).

25. AZERBAYCAN RESPUBLIKASI KONSTITUSIYA art. 130(X) (amended 2002).

26. Rein Müllerson, *Introduction*, *in* CONSTITUTIONAL REFORM AND INTERNATIONAL LAW IN CENTRAL AND EASTERN EUROPE xii (Rein Müllerson et al eds., 1998).

27. Holly Dawn Jarmul, *Effects of Decisions of Regional Human Rights Tribunals on National Courts*, *in* INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS 247 (Thomas M. Franck & Gregory H. Fox eds., 1996).

Judge Herczegh of the International Court of Justice has stated that "a State that is well integrated into the community of nations assumes a great number of international obligations, does not consider it necessary to transform them one by one into domestic law and is ready to admit the primacy of international treaties over domestic Acts."[28] It has been further argued that "[i]t is also important that not only treaties as such but also the jurisprudence of different international monitoring bodies (e.g. U.N. Committee on Human Rights, the European Commission and Court of Human Rights) is applied domestically."[29]

National courts can be categorized according to the opposing paradigms of 1) being legally obligated to follow only treaties and international court decisions that are specifically legislated into domestic law ("dualist"), or 2) operating in a system in which such treaties and decisions automatically prevail over one or more levels of domestic legislation or constitutional provisions ("monist").[30] Some factors leading to greater application of international law norms in domestic constitutional law jurisprudence have been identified as 1) the growing interdependence of states in furtherance of national development, 2) the growing importance of human rights in international relations, and 3) the increasing democratization of political and social life.[31]

The growing importance of constitutional court judicial review has been compared with the decline of "parliamentary sovereignty."[32] It has been attributed to post-Second World War reactions to the "tyranny of the majority" in fascist electoral democracies of the 1930s, and to post-Soviet reactions to Marxist legal theory that placed few limits on governmental power.[33] Thus, "[j]udicial review has expanded beyond its homeland in the United States and has made strong inroads in those systems where it was previously alleged to be anathema."[34] These post-fascist and post-

28. Judge G. Herczegh, *Three Years at the Constitutional Court of Hungary (1990-1993) — A personal account, in* CONSTITUTIONAL REFORM AND INTERNATIONAL LAW IN CENTRAL AND EASTERN EUROPE, *supra* note 26, at 90.

29. Müllerson, *supra* note 26, at xiv.

30. Gerald L. Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 55 STAN. L. REV. 1863, 1875 (2003).

31. Judge V.S. Vereshchetin, *Some Reflections on the Relationship between International Law and National Law in the Light of New Constitutions, in* CONSTITUTIONAL REFORM AND INTERNATIONAL LAW IN CENTRAL AND EASTERN EUROPE, *supra* note 26, at 7.

32. TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 2 (2003).

33. *Id.* at 2-3.

34. *Id.* at 3. *See also* KHANLAR HAJIYEV, THE INTERPRETATION OF THE PROVISIONS OF CONSTITUTION AND LAW BY CONSTITUTIONAL COURTS 73 (Rauf Guliyev ed., 2002).

> As opposed to [the] USA[,] in European countries as soon as there arises the solidity of [a] bloc of parliamentary majority and Government[,] the

Marxist democracies usually employ specialized constitutional courts to establish limits on executive and legislative power.[35] Unlike the U.S. Supreme Court, these courts exercise exclusive and centralized jurisdiction over constitutional review and interpretation. They also exercise the power to review the constitutionality of government acts in the abstract, upon the request of government agencies, such as before enactment of proposed legislation, in addition to their power of "concrete" review of government interference with the activity of specific citizens.

Internationally-recognized human rights and constitutional rights have been described by Gerald Neuman as "fundamental rights," with "consensual," "suprapositive," and "institutional" qualities.[36] The consensual quality is rooted in political approval processes, the "suprapositive" quality is rooted in "natural law," and the "institutional" quality is rooted in the practical constraints on the effectiveness of supra-national courts.[37] These competing qualities might cause conflicting jurisprudence among international and national courts. Neuman suggests, however, that possible conflicts in freedom of expression jurisprudence might be resolved through the under-enforcement of one among several fundamental rights.[38] Following Neuman's logic, if the right to personal dignity can be subordinated to the competing right to freedom of expression, then (as argued in Section V) international "suprapositive" interpretations of freedom of expression rights could require the reform of domestic defamation laws and practices, despite countervailing consensual and institutional obstacles.

Political decisions by states to elevate international conventions and treaties over ordinary domestic legislation might be made in order to avoid legislative gridlock and to facilitate compliance with international obligations.[39] National courts might also be authorized "to follow precedents established by international tribunals even where such rulings were in conflict with national laws, either prior

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> separation of powers in fact fades away. Consequently, in order to restore the balance it is necessary that the constitutional judge would intervene to ensure effective control regarding the Government.

Id.

Judge Hajiyev is now the Azerbaijan judge at the European Court of Human Rights. EUROPEAN COURT OF HUMAN RIGHTS, COMPOSITION OF THE COURT: GENERAL INFORMATION, *at* http://www.echr.coe.int (Jan. 27, 2005).

35. *See* GINSBURG, *supra* note 32, at 3.

36. Neuman, *supra* note 30, at 1866.

37. *Id.* at 1874-79

38. *See id.* at 1879.

39. Thomas Buergenthal, *Modern Constitutions and Human Rights Treaties*, 36 COLUM. J. TRANSNAT'L L. 211, 214 (1997).

or later in time" in reaction to legislative and executive deprivations of human rights under previous non-democratic regimes.[40]

There have been two major trends in post-Second World War democratic constitutions. First, the authority of international treaty provisions has been elevated over ordinary domestic legislation.[41] Second, beginning with the Spanish Constitution of 1978, a distinction has been made between human rights conventions and other treaties, with the former given "a normative rank higher than that of other treaties and ordinary domestic law."[42] Although the language of the articles is more ambiguous than the language of incorporation in other nations' constitutions, two articles of the Azerbaijan Constitution can be interpreted to grant to the terms of the European Convention on Human Rights and Fundamental Freedoms (the Convention) and to European Court of Human Rights (ECHR) decisions authority that is at least equal to other constitutional requirements. For example, Article 71(III) states:

> Rights and liberties of a human being and citizen may be partially and temporarily restricted [only] on announcement of war, martial law and state of emergency, and also mobilization, *taking into consideration international obligations of the Azerbaijan Republic.* Population of the Republic shall be notified in advance about restrictions as regards their rights and liberties.[43]

Further, Article 12(II) provides, "Rights and liberties of a person and citizen listed in the present Constitution are implemented *in accordance with international treaties wherein the Azerbaijan Republic is one of the parties.*"[44]

International agreements are compared with constitutional provisions and ordinary legislation in two other Articles of the Azerbaijan Constitution. Article 148(II) states: "International agreements wherein the Azerbaijan Republic is one of the parties constitute an integral part of [the] legislative system of the Azerbaijan Republic."[45]

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40. *Id.*
41. *Id.* at 218-19.
42. *Id.* at 216-17.
43. AZERBAYCAN RESPUBLIKASI KONSTITUSIYA art. 71(III) (emphasis added).
44. *Id.* art. 12(II) (emphasis added).
45. *Id.* art 148(II).

Article 148(II) by itself suggests that international agreements unrelated to individual rights are only equal in status to ordinary Azerbaijan legislation, but this issue is resolved by Article 151, Legal Value of International Acts, which states:

> Whenever there is disagreement between normative-legal acts in [the] legislative system of the Azerbaijan Republic (except [the] Constitution of the Azerbaijan Republic and acts accepted by way of referendum) and international agreements wherein the Azerbaijan Republic is one of the parties, provisions of international agreements shall dominate.[46]

Azerbaijan can, therefore, be described as one of the growing class of nations which accords quasi-constitutional status to international human rights obligations, while giving other international treaty obligations superiority over ordinary domestic legislation.[47] Like Article 39(1)(b) of the South Africa Constitution, which requires consideration of international law in interpretation of constitutional rights,[48] these Azerbaijan constitutional incorporations of international jurisprudence could be examples of "strong consent to the influence of international human rights norms,"[49] which nevertheless permits different national interpretations of those norms as constitutional rights.

Rapporteurs for the European Commission for Democracy through Law of the Council of Europe (Venice Commission) opined in 2001 that, once ratified by the Republic of Azerbaijan, the Convention would be incorporated automatically into the Azerbaijan legal system, and its provisions would become "directly applicable," or "self-executing:"

> Furthermore, in the light of Article 151 read in conjunction with Article 12, it can also be argued that even in case of an apparent disagreement between the ECHR and the Constitution, the latter's provisions shall be interpreted and implemented in the light of the ECHR provisions. Consequently, the

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46. *Id.* art. 151. But note the criticism of the non-governmental organization in POULTON, *supra* note 14, para. 4.1 (Article 151's exception "[u]ndermines the legal principle *pacta sunt servanda* (treaties create legally binding obligations that States should observe) which states that: 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.'") (citing Vienna Convention on the Law of Treaties, Article 26, 1969).

47. *See* Buergenthal, *supra* note 39, at 215.

48. S. AFR. CONST. ch. 2, § 39(1)(b) (1997), *available at* http://www. oefre.unibe.ch.

49. Neuman, *supra* note 30, at 1897.

> essence of the ECHR guarantees will be safeguarded. *Indeed, Article 12 can be regarded as a specific rule that establishes the equal status of the ECHR and the Constitution of Azerbaijan.*[50]

The ultimate authority of the Convention over the Azerbaijan Constitution on human rights matters was further assumed by the Venice Commission in that, "[b]ecause of the direct effect of the ECHR, it must be assumed that behaviour that amounts to a violation of the ECHR will be prohibited in Azerbaijan even though there is no specific constitutional prohibition of this behaviour."[51]

The relationships between treaty obligations under the Convention and the domestic law of Convention parties can been placed into several categories, including: 1) elevation of Convention provisions and ECHR decisions to the same level as constitutional provisions; 2) elevation of Convention provisions and ECHR decisions above ordinary legislation, but below the level of constitutional provisions; 3) superiority of Convention provisions, but not ECHR decisions, over ordinary legislation; 4) equality of Convention provisions and ECHR decisions with ordinary legislation; and 5) incorporation of Convention norms into domestic law only through specific legislation.[52]

The profile of the Azerbaijan legal system's relationship with the Convention and the ECHR, at least according to textual analysis, places it at the highest level of complete incorporation into domestic constitutional law of Convention requirements and ECHR interpretations of those requirements.[53] This is the level of incorporation and authority required by the Austrian Constitution[54] and the Spanish Constitution,[55] and is a level above most other Convention parties' legal systems in terms of the authority of Convention provisions and ECHR decisions over national constitutional norms.[56] In part III, I will examine whether or not this institutional profile, and the external factors described in Part II, contribute to a "strong consent to the influence of international

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50. *Draft Opinion on the Draft Constitutional Law on Regulation of the Implementation of Human Rights and Freedoms*, Eur. Comm'n for Democracy through Law (Venice Comm'n), CDL (2001) 132, para. 18, *at* http://venice.coe.int (Dec. 10, 2001) (emphasis added).

51. *Opinion on the Draft Constitutional Law on Regulation of the Implementation of Human Rights and Freedoms of Azerbaijan*, Eur. Comm'n for Democracy through Law (Venice Comm'n), CDL-INF (2001) 27, para. 14 [hereinafter *Opinion on the Draft Constitution*], *at* http://venice.coe.int (Dec. 21, 2001).

52. Jarmul, *supra* note 27, at 263-81.

53. *See generally id.*; Buergenthal, *supra* note 39.

54. Jarmul, *supra* note 27, at 263.

55. Buergenthal, *supra* note 39, at 217.

56. Jarmul, *supra* note 27, at 263-81.

human rights norms"[57] in Azerbaijan Constitutional Court decisions.

The ECHR's effectiveness in obtaining contracting states' consent, first to accept its jurisdiction, and second to assist in enforcing compliance with its judgments, has been described as derived in part from Convention provisions giving individuals the right to petition the ECHR against their own governments.[58] Helfer and Slaughter describe the compliance procedures for ECHR decisions as follows:

> Approximately half of the signatories to the Convention have incorporated the treaty into domestic law, thereby allowing individuals to invoke the treaty and the ECHR's judgments in national judicial proceedings. The remaining states fulfill their Convention obligations by giving effect to specific judgments of the ECHR, in nearly all cases agreeing to introduce legislative amendments, reopen judicial proceedings, grant administrative remedies, and pay monetary damages to individuals whose treaty rights have been violated.[59]

Judge Khanlar Hajiyev, the former Chairman of the Constitutional Court of the Azerbaijan Republic, has concluded that:

> The interpretation of conventional norms on citizens and human rights and freedoms by [the] European Court of Human Rights is binding for all who ratified the European Convention on Human Rights and Fundamental Freedoms. For the time being, a lot of domestic statutes contradict . . .the principles enshrined in the European Convention and are interpreted by European Court of Human Rights. In this situation the Constitutional Courts of CIS countries should play the role of mechanism that ensures the harmonization of European and domestic constitutional law within the process of interpretation of constitutional provisions.[60]

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57. Neuman, *supra* note 30, at 1897.

58. Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 277 (1997).

59. *Id.* at 295 (citations omitted).

60. HAJIYEV, *supra* note 34, at 171-2. *See also* GUDRAT, *supra* note 20:

B. Theoretical Reasons for Comparative Constitutional Jurisprudence

Comparative jurisprudence also occurs in the absence of treaty obligations. In this less formal relationship, it has nevertheless been described as having a central place in modern constitutional adjudication, balanced against the unique expressions of national identity inherent in particular constitutions.[61] Three alternative interpretative methods used by constitutional courts have been categorized by Sujit Choudhry according to their use of foreign constitutional sources to support the political acceptance of their decisions.[62] These three methods, using universal values, historical antecedents, and contrasting approaches to similar cases, create different results in scope, legitimization and effect on "constitutional culture."[63]

Judge Hajiyev also identifies these three interpretative methods, called by Choudhry the "universalist," "genealogical," and "dialogical,"[64] as the theoretical grounds for the Azerbaijan Constitutional Court's comparison of its domestic jurisprudence with that of the Russian constitutional court and European courts.[65]

> While expressly stipulating that an international treaty may not contravene the Constitution and laws adopted by referendum (Art. 151), see also Art. 130(III(6)), [t]he Constitution . . . implicitly, as a lex specialis rule, provides for the primacy of international human rights over the appropriate constitutional provisions (Art. 12). Thus Art. 12(II) of the Constitutions [sic] empowers domestic courts to apply International Human Rights treaties to which Azerbaijan is party. This is a very progressive statement which needs to be corroborated and developed by the judicial practice, particularly by the jurisprudence of the Constitutional Court.

61. *See* Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819, 822-23 (1999).

62. *Id.* at 885-92.

63. *Id.*

64. *Id.* at 825-26.

65. *See* HAJIYEV, supra note 34, at 3-4.

> [A]s to the comparative jurisprudence the representatives of the science of constitutional law of Azerbaijan Republic should first of all pay more attention to the study of those countries' legislation that is similar to it: those are the countries formerly constituting the single State and first of all the legislation of Russian Federation. This is stipulated by the fact that from one hand some institutions of Russian constitutional law have [a] higher degree of experience and thus can serve as an example for the constitutional law of Azerbaijan Republic; from another, the conduct of comparative analysis of a number of institutions including the institution of [the] interpretation of norms of Constitution and statute by Constitutional Courts of Azerbaijan Republic and Russian Federation contribute to revelation and elimination of gaps of the legislation in force and, accordingly, its perfection.
>
> Finally ... the present-day tendency of European constitutionalism ... is especially important for development of domestic constitutionalism.

In Judge Hajiyev's view, the "concrete," or law application-oriented, and the "abstract," "sense-of-the-law"-oriented theories of judicial review both proceed from an assumption of the applicability of universal values to domestic jurisprudence.[66]

The logical/objective and the experiential/subjective elements of the process of legal interpretation identified by Judge Hajiyev could also be viewed as alternatives within the "dialogical" mode.[67] This internal judicial dialogue is amplified by the collective character of appeals court decisionmaking.[68]

Judge Hajiyev characterizes the Azerbaijan Constitutional Court's role as participating "[s]trictly within its competencies . . . in law-making by means of filling the interpreted norm by new content . . . ."[69] This judicial law-making is based on principles that can be external to the constitutional text, including the clarification and development of such principles in accordance with the jurisprudence of the ECHR.

III. PRACTICAL AND POLITICAL REASONS FOR COMPARATIVE HUMAN RIGHTS JURISPRUDENCE

A. Practical

Practical reasons can be identified for the use of foreign judicial reasoning in constitutional adjudication of human rights protection. The European Court of Justice (ECJ) and the ECHR operate as supranational courts in furtherance of the goals of the European Union (EU) treaties and the Convention, respectively.[70] Neither court has a direct enforcement apparatus for its decisions, although individuals can invoke "directly effective" EU legislation.[71] Current and prospective members of the EU, however, seek international approval of their constitutional and human rights policies. Successful membership in the Council of Europe (COE) (which obligates all members to comply with the judgments of the ECHR) has been a prerequisite to EU membership. Therefore, prospective EU members are encouraged to harmonize their domestic constitutional human rights jurisprudence with ECHR jurisprudence.[72]

Id.

66. *See id.* at 6.
67. *See id.* at 14-15.
68. *Id.* at 15.
69. *Id.* at 150.
70. Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1104-11 (2000).
71. *Id.* at 1105.
72. Vince Burskey, *Times of Change — Can Turkey Make the Necessary Changes in its Human Rights Policies to be Admitted to the European Union?*, 29 N.C. J. INT'L L. & COM.

Incorporation of ECHR jurisprudence into national constitutional jurisprudence is also driven by the influence and institutional prestige of the ECHR. The ECHR has been described as a "world court of human rights,"[73] whose decisions and analyses have been relied upon by the highest courts of states and entities that are not legally bound by the Convention, such as South Africa, Zimbabwe, Jamaica, the Inter-American Court of Human Rights, and the U.N. Human Rights Committee.[74]

Another practical reason for comparative jurisprudence has been described as the growth of "judicial comity" and deference to the jurisdictional interests of foreign courts in international disputes.[75] New constitutional courts proliferated in Western Europe after the Second World War, and in Eastern Europe and elsewhere after the fall of the Soviet Union.[76] It is natural that similarly situated constitutional court judges would take advantage of modern communication and transportation facilities to share information and methodologies on common legal issues.[77] Margaret Burnham described the practical advantages of comparative jurisprudence for the South African Constitutional Court as "locating authority for its actions in the legal expression of the international community . . . [and] establishing the legitimacy of its own actions while strengthening the international norms upon which it relies."[78]

Finally, general principles of statutory interpretation require analysis of common legal terms in light of their common meaning at the ordinary legislative level. Similarly, prevalent constitutional norms such as "freedom of expression" should be analyzed with the benefit of the perspective of international and foreign experience in application of such norms. The more universally-recognized such norms are, the more easily international and foreign decisions may be applied to their domestic constitutional adjudication.[79]

REG. 713, 728-29 (2004).

73. John B. Attanasio, *Rapporteur's Overview and Conclusions: of Sovereignty, Globalization, and Courts, in* INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS, *supra* note 27, at 383.

74. Slaughter, *supra* note 70, at 1109-12.

75. *Id.* at 1112-13.

76. *Id.* at 1117.

77. *Id.* at 1120-23.

78. Margaret A. Burnham, *Cultivating a Seedling Charter: South Africa's Court Grows Its Constitution*, 3 MICH. J. RACE & L. 29, 44 (1997).

79. "Indeed, it may be that the legitimacy of these principles exists in proportion to the extent to which they are found abroad." Choudhry, *supra* note 61, at 844.

B. PACE and Venice Commission Political Leverage

Azerbaijan became a member of the Council of Europe on January 25, 2001.[80] Opinion 222 (2000) of the Parliamentary Assembly of the Council of Europe (PACE) established certain conditions subsequent to Azerbaijan's admission, including a commitment to human rights protections and continued monitoring by PACE of those protections.[81] In 2002 and 2004, PACE enacted resolutions requiring improved functioning of democratic institutions in Azerbaijan.[82] Lack of electronic media access for opposition candidates and administrative harassment of non-government media and journalists were criticized by PACE.[83]

The Venice Commission was established in 1990 to advise new democratic governments in Eastern Europe on "constitutional engineering" during and after revolutionary change.[84] The Venice Commission summarized its view on the degree of incorporation of ECHR case law under Articles 12(2), 71(3), 148(2), and 151 of the Azerbaijan Constitution as follows:

> It follows from the above provisions that, once ratified by Azerbaijan, the ECHR will be incorporated automatically in the domestic legal system and its self-executing provisions will be directly applicable.
>
> It is also clear from the above provisions that where the provisions in the ECHR conflict with domestic law other than the Constitution, the former will prevail.
>
> Because of the direct effect of the ECHR, it must be assumed that behaviour that amounts to a violation of the ECHR will be prohibited in Azerbaijan even though there is no specific constitutional prohibition of this behaviour. Furthermore, in the light of

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80. *Resolution 1305 (2002): Honouring of Obligations and Commitments by Azerbaijan*, EUR. PARL. ASS. DEB. 31st Sitting (Sept. 26, 2002) [hereinafter *Resolution 1305*], *available at* http://assembly.coe.int (last visited Feb. 16, 2005).

81. *Opinion No. 222 (2000): Azerbaijan's Application for Membership of the Council of Europe*, paras. 14, 17, EUR. PARL. ASS. DEB. 21st Sitting (June 28, 2000) [hereinafter *Opinion 222*], *available at* http://assembly.coe.int (last visited Feb. 16, 2005).

82. *Resolution 1305*, *supra* note 80, para. 1; *see also Resolution 1358*, *supra* note 19.

83. *Resolution 1358*, *supra* note 19, paras. 8-9.

84. *Brief Presentation*, CDL (2002) 64, Eur. Comm'n for Democracy through Law (Venice Comm'n), para. 1 [hereinafter *Brief Presentation*], *available at* http://venice.coe.int (June 26, 2002).

> Article 151 read together with Article 12, it can be assumed that even in the case of an apparent "disagreement" between the ECHR and the Constitution, the latter's provisions will be interpreted and implemented in the light of the ECHR provisions. Consequently, the essence of the ECHR guarantees will be safeguarded.[85]

One way that the Venice Commission attempts to "engineer" the development of democratic constitutionalism in new Convention states is by proposing and commenting on draft national legislation that impacts human rights.[86] The Venice Commission's comments on four specific types of legislation (constitutional court-related, ombudsman-related, election-related and Convention implementation-related) illustrate these techniques of collaborative law-making.[87] The standards applied by the Commission to Azerbaijan draft legislation are "whether the provisions of the draft law are in conformity with the Constitution of Azerbaijan, and whether their adoption is advisable in the light of common European standards and practices."[88]

In 1996 the Commission began analyzing draft legislation for the Azerbaijan Constitutional Court.[89] The Commission's comments included recommendations for individual citizen access to the Constitutional Court through complaint procedures.[90] The Council of Europe made establishment of the right of individual citizen complaint to the Constitutional Court a condition subsequent to Azerbaijan's admission.[91]

The Commission's analysis of expanded access to the Azerbaijan Constitutional Court included comment on the issue of complaint-screening procedures, on the best methods to allow ordinary courts to refer questions to the Constitutional Court, and on the collateral

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85. *Opinion on the Draft Constitution*, *supra* note 51, paras. 12-14.

86. *Brief Presentation*, *supra* note 84, paras. 1-8.

87. *Id.* para. 17.

88. *Draft Law on the Constitutional Court of the Republic of Azerbaijan Interim Opinion*, Eur. Comm'n for Democracy through Law (Venice Comm'n), CDL-INF (2001) 28, para. I, *available at* http://venice.coe.int (Dec. 21, 2001).

89. *See Opinion on the Draft Law on the Constitutional Law of the Republic of Azerbaijan*, Eur. Comm'n for Democracy through Law (Venice Comm'n), CDL (1996) 086e-restr, *available at* http://venice.coe.int (Oct. 28, 1996).

90. *Opinion on the Draft Constitution*, *supra* note 51, para. 31.

91. *Opinion 222*, *supra* note 81, para. 15ii. *Cf.* Helfer & Slaughter, *supra* note 58, at 294. ("Commentators have stressed the importance of this individual access right [to the ECHR] as crucial to the success of the Convention in altering the domestic legal landscape.").

effects on interested parties of judgments that existing laws violate constitutional requirements.[92]

The Commission's comments on draft legislation encouraged expansion of access to the Constitutional Court, not only through individual complaints and lower court referrals, but also through the new office of the Ombudsman.[93] Noting the obligation under Article 13 of the Convention for each contracting state to provide an effective remedy before a national authority for everyone whose rights and freedoms set forth in the Convention are violated, the Commission stated, "[t]he Ombudsman may play an important subsidiary role in providing an effective remedy."[94] Reference to human rights under the Convention was recommended to be included in the legislative description of the function and duties of the Ombudsman, because in the Commission's words it "is of great importance for the future implementation by Azerbaijan of its obligations under the European Convention on Human Rights."[95]

The importance of developing administrative interpretations of electoral legislation that recognize the limits on speech restriction of the Convention and the Azerbaijan Constitution was emphasized by the Commission in 2000.[96] For example, "restrictions to these freedoms must be prescribed by law, be motivated by the public interest and respect the principle of proportionality."[97] Also, "[e]lectoral propaganda by its very essence lacks objectivity. That is why only the courts should be able to prohibit such material, and only when a criminal offence or a tort is about to be committed. In general, the limits placed on political speech should be less strict than for ordinary speech."[98] Finally, regarding advocacy of new government, "[t]he incitement to change the constitutional basis of government may be forbidden, according to international standards, only when it is proposed to introduce such a change by force."[99]

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92. *Opinion on the Draft Constitution, supra* note 51, paras. 36-37.

93. *Draft Law on the Ombudsman of the Republic of Azerbaijan Comments,* Eur. Comm'n for Democracy through Law (Venice Comm'n), CDL (2001) 41, para. 2, *available at* http://venice.coe.int (May 9, 2001).

94. *Id.*

95. *Id.*

96. *Law on Parliamentary Elections of the Republic of Azerbaijan Comments,* Eur. Comm'n for Democracy through Law (Venice Comm'n), CDL INF (2000) 17, para. 1, *available at* http://venice.coe.int (Nov. 15, 2000).

97. *Id.*

98. *Id.*

99. *Id.*

C. Legislative and Other Responses to Political Leverage

Legislation establishing the office of the Ombudsman was enacted by the Milli Majlis in 2001.[100] Legislation on the Constitutional Court, including access by individual citizen complaints and lower court referrals of constitutional issues was enacted in 2003.[101] Constitutional amendments establishing these three new avenues of access to the Constitutional Court were approved by referendum on August 24, 2002.[102]

The Venice Commission and PACE continue to monitor democratic institutional development in Azerbaijan. The fairness of the presidential elections of 2003 was criticized by PACE.[103] The Venice Commission commented in 2004 on election laws and procedures.[104] Council of Europe experts have provided advice in furtherance of the requirement of PACE Opinion 222 that Azerbaijan reform its legal profession licensing and discipline laws.[105]

IV. AZERBAIJAN CONSTITUTIONAL COURT OPINIONS INCORPORATING EUROPEAN COURT OF HUMAN RIGHTS DECISIONS

A. Constitutional Court Typologies and Comparative Jurisprudence

In granting effective remedies under Article 13 of the Convention, contracting states have "considerable latitude" in achieving compliance with ECHR judgments.[106] This latitude has been described as "a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations permit a different treatment in law."[107] As noted in Part

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100. *See Draft Law of the Republic of Azerbaijan on the Ombudsman*, Eur. Comm'n for Democracy through Law (Venice Comm'n), CDL (2001) 77, *available at* http://venice.coe.int (July 3, 2001).

101. *See Law on the Constitutional Court of Azerbaijan*, Eur. Comm'n for Democracy through Law (Venice Comm'n), CDL (2004) 005, *available at* http://venice.coe.int (Feb. 9, 2004).

102. *See Constitution of the Republic of Azerbaijan with modifications*, Eur. Comm'n for Democracy through Law (Venice Comm'n), CDL (2003) 48, *available at* http://www.venice.coe.int (July 10, 2003).

103. *Op. 222, supra* note 81, para. 3.

104. *Joint Recommendations on the Electoral Law and the Electoral Administration in Azerbaijan*, Eur. Comm'n for Democracy through Law (Venice Comm'n), CDL-AD (2004) 016rev, available at http://venice.coe.int (June 1, 2001).

105. *See* Council of Europe, Transcript of Expert Meeting Concerning the Drafting of the Examination Questionnaires for the Bar Exam and Preparation of Bank of Examination Questions, Mar. 22, 2002 (on file with author).

106. James v. United Kingdom, 98 Eur. Ct. H.R. 9 (ser. A) at 44 (1986).

107. *Id.*

II.A, a broad split has been identified between approximately half of the contracting states, which formally incorporate the Convention into domestic law, and the other states that require legislative amendments, judicial proceedings, administrative remedies, or monetary awards in order to provide an effective remedy to persons whose Convention rights are violated.[108]

As noted above, national incorporation practices can be further subdivided into at least five categories.[109] Within each of these categories, national constitutional courts have used ECHR decisions to bolster their reasoning or supplement their decisions without explicitly acknowledging their binding authority.[110] The text of relevant constitutional articles and the prevailing Azerbaijan theories of jurisprudence place the Convention text and ECHR decisions at the level of constitutional equivalence with the provisions of the Azerbaijan Constitution and Constitutional Court decisions.[111] The record of actual incorporation of ECHR jurisprudence into Azerbaijan constitutional jurisprudence should confirm or refute whether or not this harmonization of norms exceeds formal resemblances.[112]

The Azerbaijan Constitutional Court issued seventy-one decisions between August 1998 and May 2004.[113] Ten of those decisions cited provisions of the Convention in support of their reasoning, with specific ECHR decisions cited in five cases. No other foreign or international court opinions are cited.[114] In twenty-two decisions, the Constitutional Court refers to provisions of the United Nations (U.N.) Universal Declaration of Human Rights of 1948.[115] Articles of the U.N. International Covenant on Civil and Political Rights are referred to in eleven decisions.[116] In five decisions, provisions of the U.N. International Covenant on

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108. *See generally* Helfer & Slaughter, *supra* note 58.

109. Jarmul, *supra* note 27, at 263-81. Those categories are: 1) complete incorporation of the Convention and all ECHR jurisprudence into domestic constitutional law; 2) elevation of "directly effective" or "self-executing" Convention provisions and ECHR decisions above all ordinary legislation, but below the level of Constitutional provisions; 3) elevation of other Convention provisions, but not ECHR decisions above prior ordinary legislation only; 4) equality of Convention provisions and ECHR decisions with ordinary domestic legislation; and 5) Convention provisions taking effect only upon enactment of specific domestic legislation incorporating them into national law. *Id.*

110. *Id.* at 283.

111. *See, e.g.*, Jarmul, *supra* note 27, at 263-81; Buergenthal, *supra* note 39.

112. *See, e.g.*, Jarmul, *supra* note 27, at 263-81; Buergenthal, *supra* note 39.

113. *See* THE CONSTITUTIONAL COURT OF AZERBAIJAN REPUBLIC, DECISIONS, *available at* http://www.constitutional-court-az.org/decisions/htm (last visited Feb. 28, 2005).

114. *See id.*

115. *See id.*

116. *See id.*

Economic, Social, and Cultural Rights are cited.[117] Articles of various conventions of the International Labour Organization are cited in four decisions.[118]

B. *Freedom of Expression in the Convention and the Azerbaijan Constitution*

Article 10 of the European Convention on Human Rights and Fundamental Freedoms states:

> Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.[119]

At the time of its invitation to membership in the Council of Europe (COE), the COE Committee of Ministers invited the Venice Commission to give its assistance to reforming the Azerbaijan Constitution, electoral law and "media law in conformity with Council of Europe standards."[120] In 2000, the Parliamentary

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117. *See id.*

118. *Id.*

119. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 10, paras. 1 & 2, 312 U.N.T.S. 221 [hereinafter European Human Rights Convention].

120. Council of Europe, Committee of Ministers, Armenia and Azerbaijan: invitation to become members of the Council of Europe, CM (2000) 170, *available at* https://wcm.coe.int (Nov. 9, 2000).

Assembly of the Council of Europe issued Opinion 222 recommending specific areas of necessary media reform.[121]

Freedom of expression is protected in the Azerbaijan Constitution. Article 47, "Freedom of thought and speech," provides that:

> (I) Everyone may enjoy freedom of thought and speech.
>
> (II) Nobody should be forced to promulgate his/her thoughts and convictions or to renounce his/her thoughts and convictions.
>
> (III) Propaganda provoking racial, national, religious and social discord and animosity is prohibited.[122]

Article 50, "Freedom of information," provides that:

> (I) Everyone is free to look for, acquire, transfer, prepare and distribute information.
>
> (II) Freedom of mass media is guaranteed. State censorship in mass media, including press[,] is prohibited.[123]

The limitation of free speech stated in Article 47(III) is expanded upon in other Articles. Article 46, "Right to Defend Honor and Dignity," provides that:

> (I) Everyone has the right to defend his/her honor and dignity.
>
> (II) Dignity of a person is protected by [the] state. Nothing must lead to [the] humiliation of dignity of human beings.
>
> (III) Nobody must be subject to tortures and torment, treatment or punishment humiliating the dignity of

121. *See Opinion 222, supra* note 81.
122. AZERBAYCAN RESPUBLIKASI KONSTITUSIYA art. 47.
123. *Id.* art. 50.

> human beings. Medical, scientific[,] and other experiments must not be carried out on any person without his/her consent.[124]

Article 57, "Right to Appeal," paragraph (II) provides that:

> (II) Citizens of the Azerbaijan Republic have the right to criticize activity or work of state bodies, their officials, political parties, trade unions, other public organizations[,] and also activity or work of individuals. Prosecution for criticism is prohibited. Insult or libel shall not be regarded as criticism.[125]

The limitations on free speech in Article 47(III) might be viewed as tolerable exceptions designed to eliminate "hate speech" that provokes physical, rather than intellectual, reactions. The provisions of Article 46 might also be viewed in isolation, especially in the context of paragraph (III)'s reference to torture and medical experimentation without consent, as only prohibitions of universally-condemned physical and mental human rights abuses. The last sentence of Article 57(II), however, creates a potential conflict between the freedom of expression jurisprudence of the ECHR and Azerbaijan constitutional and statutory defamation law.[126]

The application of the Azerbaijan Criminal Code defamation penalties against journalist criticism of government officials, as described hereafter, requires a resolution of this potential conflict between Azerbaijan judicial practices on one side, and constitutional provisions, ECHR jurisprudence, and Convention requirements on the other side. This resolution should reasonably determine the hierarchy between the competing norms of protection of individual dignity and honor and protection of freedom of expression.

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124. *Id.* art. 46.

125. *Id.* art. 57.

126. POULTON, *supra* note 14, para. 3. This tension between Article 57's last sentence and ECHR jurisprudence remains despite the statement in Article 5 of the 1999 Law on Mass Media that, in case of conflict, international law obligations supercede national law. Article 5 could be interpreted as merely a restatement of Constitution Article 151's placement of international agreements above ordinary domestic legislation in the hierarchy of norms.

C. *The Criminal Defamation Prosecutions*

Although criminal defamation statutes remain in the official codes of many nations and American states, their use in most European countries and in the United States is infrequent and often disfavored.[127] The 2000 Criminal Code of Azerbaijan provides criminal penalties for defamation in the following three Articles:

> Article 147 Defamation
>
> 147.1 Defamation, namely the distribution of knowingly false information, that defames the honour and dignity of another person or undermines his reputation in public, in publicly displayable work or in the mass media — is punishable by a fine from one hundred to 500 minimum wages, or community service for a period of up to 240 hours, or correctional labour for up to one year, or imprisonment for up to six months.
>
> 147.2 Defamation, linked with an accusation against a person of committing a serious or especially grave crime — is punishable by correctional labour for a period of up to two years, or restrictions of freedom for up to two years, or imprisonment for up to three years.

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127. *See* Elena Yanchukova, *Criminal Defamation and Insult Laws: An Infringement on the Freedom of Expression in European and Post-Communist Jurisdictions*, 41 COLUM. J. TRANSNAT'L L. 861 (2003). *See also* ARTICLE 19 STATEMENT ON CERTAIN LAWS OF THE REPUBLIC OF AZERBAIJAN RELATING TO FREEDOM OF EXPRESSION, para. II. [hereinafter STATEMENT ON LAWS OF AZERBAIJAN] (citing Council of Europe, Declaration on Freedom of Political Debate in the Media (2004)), *at* http://www.article19.org (June 10 2004). *See also Report of the Rapporteur for Freedom of Expression 1999*, General Secretariat, Organization of American States, *available at* http://www.summit-americas.org (criticizing criminalization of speech targeted at public officials as incompatible with the guarantee of freedom of expression in Article 13 of the American Convention on Human Rights). *See generally* Gregory C. Lisby, *No Place in the Law: The Ignominy of Criminal Libel in American Jurisprudence*, 9 COMM. L. & POL'Y 433 (2004) (application of English criminal libel laws to aggrieved American colonists inspired armed revolution, and ideals of liberty and equality discouraged later use of criminal libel laws, such as the federal Sedition Act of 1798 that expired without renewal in 1801).

> Article 148 Insult
>
> 148.1 Insult, namely degrading the honour and dignity of another person, expressed in an indecent form in public, in publicly displayable work or in the mass media — is punishable by a fine from 300 to 1,000 minimum wages, or up to 240 hours of community service, or correctional labour for up to one year, or imprisonment for up to six months.
>
> Article 323 Discrediting or Degrading the Honour and Dignity of the Head of State: the President of the Republic of Azerbaijan.
>
> 323.1 Discrediting or degrading the honour and dignity of the head of state, the president of the Republic of Azerbaijan, in public or in publicly displayable work or in the mass media — is punishable by a fine from 500 to 1,000 minimum wages, or correctional labour for up to two years, or imprisonment for the same period.
>
> 323.2 The same deeds linked with an accusation of committing a serious or especially grave crime — are punishable by imprisonment from two to five years.[128]

In addition, the 2001 Law on Mass Media imposes a maximum fine of three months' income for cases of criminal defamation by a broadcast licensee,[129] and allows the banning of publications that have been found guilty of defamation three times.[130]

Besides being criticized as unnecessary and excessive for the legitimate protection of unfairly damaged reputations, the application of these statutes has been criticized for their failure to require complainants to prove the false nature of the allegedly defamatory statements.[131] Criminal Code Article 148's crime of "Insult" has been criticized for not requiring the insulting statement to be false and for allowing prosecution of mere opinion.[132] Article

128. *See* POULTON, *supra* note 14, para. 4.2 (unofficial translation from official language text).
129. *Id.* para. 4.5.1.
130. *Id.*
131. *Id.* para. 4.2.
132. *Id.*

323 is subject to the same criticism regarding truthful allegations.[133] As described below in Section E, Article 323's special provisions protecting the reputation of the president also contravene ECHR jurisprudence that public officials should tolerate more, rather than less, criticism than ordinary individuals.[134]

It has been reported that criminal defamation lawsuits have been used by government officials to intimidate critical and investigative journalists and news outlets.[135] Most of these critical

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133. POULTON, *supra* note 14, para. 4.2. *See also* Columbani et al. v. France, 2002-V Eur. Ct. H.R. 25, 43 (holding that *Le Monde* newspaper and journalists' publication of article on Moroccan drug trafficking that relied on official government reports and allegedly insulted the King of Morocco and resulted in criminal libel convictions did not allow the truth defense, and therefore violated Article 10 of Convention, and stating that "the press should normally be entitled, when contributing to public debate on matters of legitimate concern, to rely on the content of official reports without having to undertake independent research"); Lisby, *supra* note 127, at 448 (explaining that the English Court of Star Chamber source of common law criminal libel, based on complaints by powerful English nobles, made truth not merely immaterial as a defense, but an aggravating factor in the crime, giving rise to the maxim "the greater the truth the greater the libel"); *id.* at 461-62 (criticizing the other major rationale for criminal libel, the prevention of violence by the objects of insult and criticism). Yanchukova, *supra* note 127, at 870 (arguing that truth defense to criminal libel actions is made irrelevant by the "defense of fragile democracy" rationale in some post-communist countries). *But see* Garrison v. Louisiana, 379 U.S. 64 (1964) (holding that truthful statements about the conduct by public officials of public business may not be punished by criminal or civil libel laws, even if published with ill-will).

134. POULTON, *supra* note 14, para. 4.2. *See also* Castells v. Spain, 236 Eur. Ct. H.R. (ser. A) 4, 23 (1992).

135. POULTON, *supra* note 14, para. 4.1:

> The provisions in Article 46 and that concerning insult and defamation in Article 57 [of the Constitution] are reflected in key articles of the Criminal and Civil Codes, which have . . . been misused repeatedly by high state officials and others to try and silence critical voices in the media. Since the introduction of the Law on Mass Media (LMM) in February 2000, the provisions of the criminal code have been commonly used in combination with Article 19 of the LMM to ban publications ... Although [Article 47(3) of the Constitution] appears little used, the values it represents are reflected in Article 281 of the Criminal Code which . . . is used on occasions to stifle reporting of which the authorities disapprove.

See also STATEMENT ON LAWS OF AZERBAIJAN, *supra* note 127, para I, n.1:

> According to the Azerbaijan Committee to Protect Journalists, 40 lawsuits were brought against 18 journalists or media outlets during 2003, resulting in fines of approximately $325,000 (1.6 billion manat). Similarly, in 2002, journalists and media outlets were fined about $149,000 (750 million manat). Given the country's weak economy, such high fines frequently lead to the bankruptcy of media outlets.

Even if few of these fines are ever paid, any large contingent liability can threaten the financial survival of small businesses. *See* THE COMMITTEE TO PROTECT JOURNALISTS, ATTACKS ON THE PRESS 2003: DOCUMENTED CASES FROM EUROPE AND CENTRAL ASIA (describing defamation lawsuits against Azerbaijan journalists who criticize public officials), *at* http://www.cpj.org (2003); THE COMMITTEE TO PROTECT JOURNALISTS, 2005 NEWS ALERT – AZERBAIJAN: ASSETS OF OPPOSITION NEWSPAPER FROZEN (concerning the shutdown on 12/31/04 of the major opposition newspaper *Yeni Musavat* following a court order freezing the newspaper's assets in order to satisfy libel awards totaling $160,000 in favor of

outlets have been low circulation newspapers sponsored by opposition political parties. The highest quality and lowest cost printing press is the government-owned printer, which has sometimes refused to print opposition newspapers.[136] The government has a monopoly on the purchase of newsprint paper and has the only national print media distributor.[137] Few television or radio outlets critical of government have been licensed.[138] It has been reported that most Azerbaijan cases of alleged defamation or insult have been brought by government ministers, relatives of the president, and parliamentary deputies.[139]

D. The Moral Damages Civil Defamation Case

In response to a petition of the Azerbaijan Supreme Court, on May 31, 2002, the Constitutional Court published its decision *On Interpretation of Articles 21 and 23 of the Civil Code of Azerbaijan Republic*.[140] The Supreme Court sought a determination of whether compensation for "moral damage" was available to a plaintiff suing under Article 23.4 of the Civil Code, which provides: "Where information harming the honor, dignity or business reputation of a natural person is disseminated, such person has the right to recover damages caused by such dissemination and obtain a declaration that the information is untrue."[141]

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government officials), *at* http://www.cpj.org (Jan. 7, 2005); U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, Feb. 25, 2004 (describing criminal libel suits and convictions of newspapers and journalists for insulting high government officials — 40 lawsuits in 2003, resulting in fines of approximately $325,000, and an additional $149,000 in fines in 2003 resulting from suits brought in 2002), *at* http:www.state.gov. But see Peter Krug, *Civil Defamation Law and the Press in Russia*, 13 CARDOZO ARTS & ENT. L.J. 847, 849-50 (1995) for an analysis of the increase in civil defamation lawsuits in Russia:

> [E]xpansion [in Russian law] of personality rights protection has been accompanied by a significant increase in the number of civil lawsuits, many of them against press defendants and the predominance of civil defamation over criminal defamation lawsuits because of the availability of moral damages compensation and a lower standard of proof of fault.

136. INTERNATIONAL FEDERATION OF JOURNALISTS, QUELLING DISSENT IN AZERBAIJAN, A POST-ELECTION ANALYSIS OF MEDIA UNDER PRESSURE 7 (2003), *at* http://www.ifj.org.

137. *Id.*

138. *See* POULTON, *supra* note 14, para. 4.5.1 (case study of small newspaper, Uch Nogde, sued three times for criminal defamation for publishing criticisms of government media control, a local government official and a local fish company).

139. *Id.* para. 6.1.3. *See also* TRANSPARENCY INTERNATIONAL, GLOBAL CORRUPTION REPORT 2004, *available at* www.globalcorruptionreport.org (last visited Feb. 5, 2005). Azerbaijan is ranked 124th out of 133 countries in the Corruption Perceptions Index for 2003. *Id.*

140. On Interpretation of Articles 21 and 23 of the Civil Code of Azerbaijan Republic (Constitutional Court of Azerbaijan Republic), *available at* http://www.constitutional-court-az.org (May 31, 2002).

141. *Id.*

A parallel statute provides damages for untrue information harming business reputation.[142] "Moral damage" is defined by the Constitutional Court as non-physical, subjective harm to "dignity, honor, business reputation, family privacy, right to move and choose the domicile, copyright [or] other private non-material rights and material goods" without direct economic significance. Such "moral damage" "shocks a physical person and imposes anguish."[143]

After analyzing provisions for "moral damage" compensation in other domestic legislation (but not the Criminal Code defamation statutes), the Court cited Azerbaijan Constitution Article 46's protection of individual honor and dignity.[144] It noted, however, that "[a]t the same time . . . one of the basic principles of development of society is the guarantee of the freedom of thought and expression . . . enshrined in Article 47 of the Constitution ..."[145] The Court then noted Convention Article 10's protection of freedom of expression, and the ECHR 1986 decision of *Lingens v. Austria*,[146] in which "the right to freedom of expression is recognized to be one of the important foundations of society and is the necessary precondition for its development."[147]

Therefore, implementation of the right to protect honor and dignity "cannot be accompanied by restriction or complete rejection of other rights."[148] Further, "when defending the dignity and honor one should respect the constitutional provisions concerning the right to freedom of thought and expression and observe the proportionality between these two rights."[149]

The Constitutional Court concluded that compensation for "moral damage" was a remedy provided by Article 21 of the Civil Code. However, "[t]he compensation of moral damage as well as the application of other restrictions specified in the legislation should be proportional to other rights and freedoms ensured by the

142. *Id.*

143. *Id.* (The Court also cited provisions for mental and emotional injury in Article 1 of the U.N. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power Nov. 29, 1985.).

144. *Id.*

145. On Interpretation of Articles 21 and 23 of the Civil Code of the Azerbaijan Republic (Constitutional Court of Azerbaijan Republic), *available at* http://www.constitutional-court-az.org (May 31, 2002).

146. Lingens v. Austria, 103 Eur. Ct. H.R. (ser. A) at 11 (1986).

147. On Interpretation of Articles 21 and 23 of the Civil Code of the Azerbaijan Republic (Constitutional Court of Azerbaijan Republic), *available at* http://www.constitutional-court-az.org (May 31, 2002).

148. *Id.*

149. *Id.*

Constitution of [the] Azerbaijan Republic and depend in each concrete case on the court's discretion."[150]

The Court, as is usual in its decisions, did not describe any specific fact situation that prompted the Supreme Court's request for its opinion. No specific dispute is required for the court to exercise its power of "abstract review."[151] The Court did not describe to what extent the *Lingens v. Austria* reasoning was authoritative in resolving the conflicts presented by "moral damages" cases.[152]

The argument can be made, as stated in Part III above, that Article 12 of the Azerbaijan Constitution requires consideration of *Lingens v. Austria* and its ECHR case law progeny as equal in authority to the articles of the Azerbaijan Constitution.[153] *Lingens v. Austria* should, therefore, be examined further to analyze the implications of its reasoning on the conflict between criminal defamation lawsuits by public officials against media defendants in Azerbaijan and the internationally recognized right of freedom of expression.

E. Lingens v. Austria

The case of *Lingens v. Austria* came to the ECHR upon a complaint by an Austrian magazine editor.[154] Peter M. Lingens had written and published a series of articles in 1975 that criticized Austrian Chancellor Bruno Kreisky's public support of political party leader, Friedrich Peter.[155] Peter had been criticized by the president of the Jewish Documentation Centre, Simon Wiesenthal, for volunteering to join the Nazi SS first infantry brigade during the Second World War.[156] Besides defending Mr. Peter, Chancellor Kreisky described Mr. Wiesenthal's organization as a "political mafia" using "mafia methods."[157] Mr. Lingens's first article stated that if the Chancellor's remarks had been made by someone else, "this probably would have been described as the basest opportunism," but at least Mr. Kreisky believed what he was saying.[158] The second article stated that "[i]n truth Mr. Kreisky's

150. *Id.*
151. *See* AZERBAYCAN RESPUBLIKASI KONSTITUSIYA art. 130.
152. On Interpretation of Articles 21 and 23 of the Civil Code of the Azerbaijan Republic (Constitutional Court of Azerbaijan Republic), *available at* http://www.constitutional-court-az.org (May 31, 2002).
153. *See supra* Part III.
154. *Lingens*, 103 Eur. Ct. H.R. (ser. A) at 11-13.
155. *Id.* at 11.
156. *Id.* at 11-13.
157. *Id.* at 17.
158. *Id.*

behaviour cannot be criticised on rational grounds but only on irrational grounds: it is immoral, undignified."[159]

Chancellor Kreisky initiated two private prosecutions against Mr. Lingens based on the defamation statutes of Articles 111 and 112 of the Austrian Criminal Code.[160] Mr. Lingens was convicted of criminal defamation by the trial court for using the expressions "basest opportunism," "immoral," and "undignified."[161] The trial court fined Mr. Lingens, but noted that because his articles constituted political criticism, the politicians criticized must "show greater tolerance of defamation than other individuals" and awarded the Chancellor no damages.[162] The trial court did, however, order confiscation of the offending articles.[163]

The regional appeals court twice affirmed the judgment against Lingens.[164] Despite Lingens's defense that his criticisms were value judgments or opinions that could not be considered defamatory, the court found that his comments had gone beyond permissible limits because they were directed at the Chancellor personally, rather than against his policies or administration.[165]

The Vienna Court of Appeal found that Lingens had criticized Mr. Kreisky in his capacities both as a politician and as a private individual, but that Mr. Kriesky could not be accused of having acted immorally or in an undignified manner because he was personally convinced that Mr. Wiesenthal used "mafia methods."[166] Mr. Lingens thereafter applied to the European Commission on

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159. *Id.* at 15.

160. *Id.* at 19. The relevant statutes cited by the court read:

> 1. Anyone who in such a way that it may be perceived by a third person accuses another of possessing a contemptible character or attitude or of behaviour contrary to honor or morality and of such a nature as to make him contemptible or otherwise lower him in public esteem shall be liable to imprisonment not exceeding six months or a fine.
>
> 2. Anyone who commits this offense in a printed document, by broadcasting or otherwise in such a way as to make the defamation accessible to a broad section of the public shall be liable to imprisonment not exceeding one year or a fine.
>
> 3. The person making the statement shall not be punished if it is proved to be true. As regards the offence defined in paragraph 1, he shall also not be liable if circumstances are established which gave him sufficient reason to assume that the statement was true.

Id. Article 112 puts the burden of proof of truth and good faith on the defamation defendant, stating in part that "evidence of the truth and of good faith shall not be admissible unless the person making the statement pleads the correctness of the statement or his good faith." *Id.* at 19.

161. *Lingens*, 103 Eur. Ct. H.R. (ser. A) at 20.

162. *Id.*

163. *Id.* at 21.

164. *Id.*

165. *Id.* at 20.

166. *Id.* at 23.

Human Rights and the ECHR to determine whether his conviction for criminal defamation had violated Article 10 of the Convention.[167]

After finding that Mr. Lingens's freedom of expression had been interfered with by a public authority, and that the interference had met the requirements of Article 10, paragraph 2, that it be "prescribed by law" and with legitimate aims, the ECHR analyzed whether such interference was "necessary in a democratic society" under Article 10, paragraph 2.[168] The Austrian government's assertion that a conflict existed between Article 10's protection of freedom of expression and Convention Article 8's right to respect for private and family life was rejected by the ECHR because of the public nature of the Chancellor's criticized comments.[169]

The ECHR examined first, whether the interference was "proportionate to the legitimate aim pursued," and second, whether the reasons given by the Austrian courts to justify this interference with free expression were "relevant and sufficient."[170] The ECHR noted that freedom of expression "constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment [sic]."[171] The right applies "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."[172] Because "freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention," the "limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual."[173]

The ECHR agreed with Mr. Lingens that his criticisms of Mr. Kreisky were value judgments that could not be proved true or false.[174] Therefore, the criminal defamation statute's requirement that a defendant prove the truth of his opinions by itself infringed freedom of opinion that is protected by Convention Article 10.[175] The ECHR unanimously concluded that the Austrian government's interference with Mr. Lingens' freedom of expression was not "necessary in a democratic society . . . for the protection of

167. *Lingens*, 103 Eur. Ct. H.R. (ser. A) at 23.
168. *Id.* at 24
169. *Id.* at 25.
170. *Id.* at 26.
171. *Id.*
172. *Id.*
173. *Lingens*, 103 Eur. Ct. H.R. (ser. A) at 26.
174. *Id.*
175. *Id.*

reputation . . . of others," and was "disproportionate to the legitimate aims pursued."[176]

F. Other Constitutional Court Cases Relying on ECHR Jurisprudence

In response to a petition of the Supreme Court, on June 11, 2002, the Constitutional Court published its decision *On Articles 67 and 423 of the Civil Procedure Code of Azerbaijan Republic*.[177] The Supreme Court sought a determination of whether civil procedure statutes that required the participation of licensed lawyers in the presentation of complaints to the highest appeals court complied with constitutional requirements.[178]

After reviewing relevant constitutional protections of the right to challenge judicial actions through appeals and examples of legislative provision for public payment of lawyers' fees for low income persons in civil cases, the Court reviewed relevant international law. Article 6 of the Convention guarantees the right to a fair trial.[179] The Court cited the 1979 ECHR case of *Airey v. Ireland*[180] for the rule that "Article 6 para. 1 . . . may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court . . . because legal representation is rendered compulsory." The Court opined that "[w]here it is required by interests of a fair trial . . . the State should ensure not only the Constitutional right to get the qualified legal assistance but it should also ensure such right to low-income persons in [a] real situation."[181] The Court concluded its decision by finding that the civil procedure statutes were in conformity with the Constitution.[182] It recommended that the Cabinet of Ministers fix "the amount and procedure of the payment

176. *Id.* at 28.

177. On Articles 67 and 423 of the Civil Procedure Code of Azerbaijan Republic (Constitutional Court of Azerbaijan Republic Decision), *available at* http://www.constitutional-court-az.org (June 11, 2002).

178. *Id.*

179. European Human Rights Convention, art. 6, *supra* note 119.

180. Airey v. Ireland, 32 Eur. Ct. H.R. (ser. A) at 4 (1979). *Airey v. Ireland* was brought to the ECHR by application of an Irish citizen whose efforts to obtain a judicial decree of separation were thwarted by her inability to pay for the services of a lawyer before the High Court of Ireland. *Id.* at 4-8. The ECHR, in a divided opinion, concluded that the Irish government, by not providing free legal assistance, had violated Ms. Airey's rights under Articles 6 and 8 of the Convention. *Id.* at 12-20.

181. On Articles 67 and 423 of the Civil Procedure Code of Azerbaijan Republic (Constitutional Court of Azerbaijan Republic Decision), *available at* http://www.constitutional-court-az.org (June 11, 2002).

182. *Id.*

at the governmental expenses for legal assistance in civil court proceedings."[183]

In response to a petition of the Supreme Court, on December 27, 2002, the Constitutional Court published its decision *On Article 440.4 of the Civil Code and Article 74.1 of the Law of Azerbaijan Republic "On Execution of Court Decisions."*[184] The Supreme Court sought a determination of whether the provisions of civil statutes providing for payment of judgment creditors only after payment of execution expenses from proceeds of execution against debtor property, and payment of "expenses connected with implementation of executive measures as well as the penalties imposed to a debtor on the basis on execution documents within legal proceedings," conformed to the Constitution.[185]

After citing domestic, constitutional, and other international treaty provisions, the Constitutional Court cited the 1997 ECHR case of *Hornsby v. Greece*[186] for the rule that Convention Article 6's "right to a court would be illusory if a [contracting state's] domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party."[187] The Court concluded that the relevant statutes were "null and void" because of their non-conformity to various articles of the Azerbaijan Constitution.[188]

In response to a petition of the Prosecutor General's Office, on August 1, 2003, the Constitutional Court published its decision *On Interpretation of the Provision "having no obligations before other states" of Article 100 of the Constitution of Azerbaijan Republic.*[189] The Prosecutor General's Office sought an interpretation of the meaning of the limitation on eligibility of candidates for the position

183. *Id.*

184. On Article 440.4 of the Civil Code and Article 74.1 of the Law of Azerbaijan Republic "On Execution of Court Decisions" (Constitutional Court of Azerbaijan Republic), *available at* http://www.constitutional-court-az.org (Dec. 27, 2002).

185. *Id.*

186. Hornsby v. Greece, 33 Eur. Ct. H.R. 495 (1997).

187. *Id.* at 510. *Hornsby v. Greece* was brought to the ECHR by application of two British citizens whose application to open an English language school in Rhodes had been frustrated by administrative non-compliance with judgments of the European Court of Justice and the Supreme Administrative Court of Greece. *Id.* at 498-504. The applicants claimed denial of effective judicial protection of their civil rights under Article 6, paragraph 1, of the Convention. *Id.* at 504-10. The ECHR concluded that the Greek administrative authorities who refused to license the school had violated the Convention. *Id.* at 509-13.

188. On Article 440.4 of the Civil Code and Article 74.1 of the Law of Azerbaijan Republic "On Execution of Court Decisions" (Constitutional Court of Azerbaijan Republic), *available at* http://www.constitutional-court-az.org (Dec. 27, 2002).

189. On Interpretation of the Provision "having no obligations before other states" of Article 100 of the Constitution of Azerbaijan Republic (Constitutional Court of Azerbaijan Republic Decision), *available at* http://www.constitutional-court-az.org (Aug. 1, 2003).

of president such that the candidates have "no liabilities in other states."[190]

The Court cited the 2001 ECHR case of *Ferrazzini v. Italy*[191] as authority for the position that tax obligations are civil law obligations owed to a state by the taxpayer.[192] The Court concluded that taxes and other obligations owed by the taxpayer to a foreign state are obligations causing the dependency of the taxpayer on the foreign state, and, therefore, are disqualifications to eligibility for the office of president of the Republic of Azerbaijan under the Constitution.[193]

In response to a complaint lodged by three individuals on behalf of an advocacy organization for the homeless and indigent of the city of Baku, on May 11, 2004, the Constitutional Court published its decision *On complaint lodged by E. Alizadeh and others concerning verification of conformity of judicial acts to laws and Constitution of Azerbaijan Republic.*[194] This appears to be the first published decision arising from individual complaints under this new method of access to the Constitutional Court.[195] Three individuals sought a determination of the conformity of certain judicial decisions to the laws and Constitution. These lower court decisions had denied complaints by the individuals that the government had improperly denied their application for registration of their organization.[196]

The Constitutional Court cited protections of the rights to freedom of association and of peaceful assembly in the Azerbaijan Constitution, the U.N. Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the European Convention on Human Rights and Fundamental

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190. *Id.*

191. Ferrazzinni v. Italy, 2001-VII Eur. Ct. H. R. 351.

192. *Id. Ferrazzini v. Italy* was brought to the ECHR by application of an Italian citizen who alleged denial of a hearing within a reasonable time by a tribunal regarding his civil rights and obligations under Article 6, paragraph 1 of the Convention, because of the lengthy duration of three sets of tax proceedings to which he was a party. *Id.* at 351-55 In a split opinion, however, the court concluded that tax disputes fall outside the scope of civil rights and obligations as described in Article 6, paragraph 1. *Id.* at 355-61.

193. On Interpretation of the Provision "having no obligations before other states" of Article 100 of the Constitution of Azerbaijan Republic (Constitutional Court of Azerbaijan Republic Decision), *available at* http://www.constitutional-court-az.org (Aug. 1, 2003).

194. On complaint lodged by E. Alizadeh and others concerning verification of conformity of judicial acts to laws and Constitution of Azerbaijan Republic (Constitutional Court of Azerbaijan Republic Decision), *available at* http://www.constitutional-court-az.org (May 11, 2004).

195. *See supra* notes 91-92.

196. On complaint lodged by E. Alizadeh and others concerning verification of conformity of judicial acts to laws and Constitution of Azerbaijan Republic (Constitutional Court of Azerbaijan Republic Decision), *available at* http://www.constitutional-court-az.org (May 11, 2004).

Freedoms.[197] The Court cited Article 11.2 of the latter Convention for the rule that "no restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety."[198]

The Court cited the 1998 ECHR case of *Sidiropoulos v. Greece*[199] for the rule that:

> [Contracting] States have a right to satisfy themselves that an association's aim and activities are in conformity with the rules laid down in legislation, *but they must do so in a manner compatible with their obligations under the Convention and subject to review by the Convention institutions . . . . [T]he provisions of Constitution, including the constitutional guarantees for human rights and freedoms which have highest and direct legal effect within the territory of Azerbaijan Republic, should be in the center of attention.*[200]

The Court concluded that the judgments of the lower courts that the government had not violated the complainants' right of assembly by denying and delaying their attempts to register their organization, were not in conformity with the judiciary's constitutional obligations to protect individual rights.[201]

The May 11, 2004, Constitutional Court decision on the homeless advocacy group complaint establishes three important principles upon which future comparative jurisprudence should proceed: 1) the effectiveness of individual citizen complaints as an avenue of access to Constitutional Court protection of individual rights; 2) the equality of the provisions of international human rights conventions with constitutional provisions in the hierarchy

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197. *Id.*

198. *Id.*

199. Sidiropoulos and Others v. Greece, 79 Eur. Ct. H.R. 1594, 1614 (1998). The *Sidiropoulos v. Greece* case was brought to the ECHR upon the application of Greek citizens whose request to form a regional culture society was denied by the government because the applicants were suspected of supporting secessionists. *Id.* The court unanimously concluded that the reasons given by the government and the national courts for preventing the registration of the organization did not satisfy the test of "necessary in a democratic society." *Id.*

200. On complaint lodged by E. Alizadeh and others concerning verification of conformity of judicial acts to laws and Constitution of Azerbaijan Republic (Constitutional Court of Azerbaijan Republic Decision), *available at* http://www.constitutional-court-az.org (May 11, 2004) (emphasis added).

201. *Id.*

of national law; and 3) "review by the Convention institutions" of government interference with individual rights includes review by the Constitutional Court of conformity of government actions with the standards set in relevant ECHR decisions.[202] The specific Convention test applied in *Sidiropoulos* of "prescribed by law and are necessary in a democratic society"[203] should also apply to the evaluation of government interference with freedom of speech under the Azerbaijan Constitution and Article 10 of the Convention.[204]

V. PROSPECTS FOR FUTURE COMPARATIVE JURISPRUDENCE

In *Lingens v. Austria*, the ECHR stated its view of the appropriate comparative human rights jurisprudence among contracting states.[205] In connection with its interpretation of the restrictions on freedom of expression permitted by Convention Article 10 that are "prescribed by law and are necessary in a democratic society,"[206] the ECHR stated that "[t]he Contracting States have a certain margin of appreciation in assessing whether such a need exists . . . but it goes hand in hand with a European supervision, *embracing both the legislation and the decisions applying it, even those given by an independent court.*"[207]

The comparative human rights jurisprudence stated in *Lingens v. Austria* is consistent with the positioning of the international human rights agreements of Azerbaijan at the level of constitutional equivalence.[208] The interpretations by the ECHR of Convention rights that are also constitutional rights are, according to both constitutional and judicial sources, at least as authoritative as, and possibly superior to, competing constitutional mandates. These interpretations should supercede all ordinary domestic legislation. Where decisions of the ECHR appear to conflict with restrictions on constitutional rights in domestic legislation, therefore, these ECHR decisions must be weighed against the interests motivating such restrictions. For example, regarding freedom of expression restrictions by criminal and civil defamation laws, the ECHR has stated that "the national margin of appreciation is circumscribed by the interest of democratic society in enabling the press to exercise its vital role of 'public watchdog' in

202. *Id.*
203. *Sidiropoulos and Others*, 79 Eur. Ct. H.R. at 1626.
204. European Human Rights Convention, *supra* note 119.
205. *Id.*
206. *Id.*
207. *Lingens*, 103 Eur. Ct. H.R. (ser. A) at 25 (emphasis added).
208. *See generally* Buergenthal, *supra* note 39.

imparting information of serious public concern."[209] Where serious public issues are debated in the press, the ECHR has taken a strong pro-expression position that exempts opinion from suppression or punishment, even when delivered as personal insult,[210] and that protects even false factual statements if made in good faith[211] and in reliance on government documents.[212]

The ECHR has accepted the existence of criminal libel laws as measures adopted by State authorities "in their capacity as guarantors of public order . . . intended to react appropriately and without excess to defamatory accusations devoid of foundation or formulated in bad faith."[213] The Azerbaijan Constitutional Court should recognize, however, that criminal defamation laws, especially when applied to public groups and figures, should not be used "to punish discussions of matters of public concern."[214]

Whether the standard for liability for publishing false statements of fact about a public official is ordinary negligence[215] or malice/recklessness,[216] the ECHR has held that:

> The limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician . . . . Furthermore, the 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.[217]

Four elements of unfairness in criminal libel prosecutions by politicians who have a civil libel remedy available have been identified as: 1) elimination of the risk of financial loss or payment

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209. Bladet Tromso and Stensaas v. Norway, 1999-III Eur. Ct. H.R. 289, 322.

210. Prager and Oberschlick v. Austria, 313 Eur. Ct. H. R. (ser. A) 4, 17-19 (1995).

211. Schwabe v. Austria, 242 Eur. Ct. H.R. (ser.A) 23 (1993).

212. *Bladet Tromso and Stensaas*, 1999-III Eur. Ct. H.R. at 325-27; Columbani et al. v. France, 2002-V Eur. Ct. H.R. 25, 43.

213. Castells v. Spain, 236 Eur. Ct. H .R (ser. A) 4, 24 (1992) (applicant to the ECHR had been convicted of criminal defamation and imprisoned for writing a magazine article claiming government responsibility for attacks on and murder of Basque separatists). *Cf.* Zana v. Turkey, 57 Eur. Ct. H. R. 2533 (1997) (finding that a criminal prosecution of a former mayor for statements to journalists defending a separatist party accused of terrorism did not violate the Convention's freedom of expression rights).

214. Beauharnais v. Illinois, 343 U.S. 250, 272 (Black, J., dissenting).

215. Reynolds v. Times Newspapers Limited, 4 All E.R. 609 (U.K. 1999).

216. Lange v. Atkinson, 3 NZLR 424 (Ct. App. New Zealand 1998); NY Times v. Sullivan, 376 U.S. 254 (1964).

217. *Castells*, 236 Eur. Ct. H .R. (ser. A) at 23-24.

of defendant costs by losing complainants; 2) elimination of attorney fees and costs for the complainants; 3) creation of a public presumption of guilt of the accused because of public faith in prosecutorial fairness; and 4) penalization of accused parties through imprisonment and appearance bond requirements prior to trial or conviction.[218] These unfair advantages combine to create punishment without trial, a warning to others against similar speech, and prior restraint of potential speakers.[219]

Principles have been proposed by Article 19: The Global Campaign for Free Expression (Article 19), a human rights monitoring group, for the harmonization of Azerbaijan defamation legislation with international standards of freedom of expression protection.[220] Among these international standards are: 1) the ECHR *Lingens v. Austria* jurisprudence protecting expression of opinion and exposing public officials to wider criticism than private individuals; 2) the ECHR *Bladet Tromso and Stensaas v. Norway* jurisprudence on good faith reliance on official reports as a defense to defamation; 3) the placement of the burden of proof of falsity on criminal defamation complainants;[221] and 4) the ECHR *Castells v. Spain* jurisprudence disfavoring the use of criminal defamation statutes by government agencies and officials and public figures, and encouraging the reform of criminal defamation statutes for use only in cases of alleged knowledge of falsity or reckless disregard for the truth.[222]

Azerbaijan journalists, executive branch representatives, and legislators have begun to work on a draft set of principles closely resembling Article 19's principles. In their comment on this Azerbaijan draft, Article 19 recommended that a principle of interpretation be considered that would require Azerbaijan courts to apply the provisions of defamation law in accordance with the guarantees of the Convention and the jurisprudence of the ECHR.[223]

Full incorporation by the Azerbaijan Constitutional Court of ECHR jurisprudence on the use of criminal defamation prosecutions against journalist criticism of the performance of government officials is required by the theoretical and political foundations of

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218. Lisby, *supra* note 127, at 470-471.

219. *Id.*

220. ARTICLE 19: THE GLOBAL CAMPAIGN FOR FREE EXPRESSION, DEFINING DEFAMATION: PRINCIPLES ON FREEDOM OF EXPRESSION AND PROTECTION OF REPUTATION [hereinafter DEFINING DEFAMATION], *at* http://www.article19.org (July 2000).

221. *See Schwabe*, 242 Eur. Ct. H.R. (ser.A) 23; *Castells*, 236 Eur. Ct. H .R. (ser. A) 4.

222. DEFINING DEFAMATION, *supra* note 220.

223. ARTICLE 19: THE GLOBAL CAMPAIGN FOR FREE EXPRESSION, NOTE ON THE PRINCIPLES OF THE LAW OF THE AZERBAIJAN REPUBLIC ON DEFAMATION, *at* http://www.article19.org (Mar. 2004).

judicial review in Azerbaijan. The Constitutional Court has begun this process of incorporation through its reliance on five ECHR decisions, including the important *Lingens v. Austria* decision on freedom of expression and defamation.

The establishment of the constitutional rights of individuals, lower ordinary courts, and the office of the Ombudsman to seek review of the constitutionality of government statutes and actions, will increase the number of complaints requiring decisions of the Constitutional Court. The Court's decision on the Baku homeless and indigent advocacy group confirms its nascent process of comparative jurisprudence. It confirms the application of relevant ECHR decisions on human rights to similar constitutional rights requiring the Constitutional Court's interpretation. The Constitutional Court should extend the application of Convention-protected rights and ECHR jurisprudence to situations in which the constitutional protections of the Azerbaijan Republic have not yet reached.

The current use of criminal defamation prosecutions against media defendants for their criticism of public officials provides an opportunity for comparative human rights jurisprudence to contribute to the growth of democratic institutions in Azerbaijan. A positive correlation has been identified between the length of time a new democracy has been subject to the Convention's requirements and its freedom of the press ranking by the Freedom House organization.[224] The Constitutional Court has established the principle that it has the power to reach issues that arise in its interpretations of constitutional requirements, whether or not they are argued by the parties requesting an interpretation.[225] A future citizen complaint might be presented to the Constitutional Court for interpretation of the conformity of a criminal defamation lawsuit by a government official or public figure against a journalist defendant for criticism of official performance regarding public issues. In such a case, the Court should apply the ECHR tests stated in *Lingens v. Austria* and its progeny. This jurisprudence protects statements of opinion, permits reasonable journalist reliance on government reports, requires proof by criminal defamation complainants of intentional falsehood or recklessness by defendants, and discourages use of criminal defamation prosecutions by government

224. Yanchukova, *supra* note 127, at 890. *See also* FREEDOM HOUSE, FREEDOM OF THE PRESS 2004 (Karin Deutsch Karlekar ed., 2004), *available at* http://www.freedomhouse.org/pfs2004/pfs2004.pdf.

225. *See* HAJIYEV, *supra* note 34, at 104, 142 (Constitutional Court must interpret challenged legislation as well as determine its constitutionality; by eliminating defects in legislation, Constitutional Court participates in law-making.).

entities and officials. These are the developing contours of the ECHR's tests for government interference with freedom of expression that is "necessary in a democratic society . . . for the protection of reputation . . . of others," and "proportionate to the legitimate aim pursued."[226]

226. *Lingens*, 103 Eur. Ct. H.R. (ser. A) at 130.