

FATULLAYEV AS A MODEL OF POST-SOVIET MEDIA CONTROL IN THE SHADOW OF ARMED CONFLICTS

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I. INTRODUCTION

When we look at the media control systems in some of the post-Soviet independent states, we often see strong traces of communist-era regulation, adapted to the technological challenges of the 21st century.

Establishing tight control over the media and civil society, following the disintegration of the USSR and the formation in its place of fifteen sovereign states, brought about great social sufferings, loss of life, and loss of home – in the physical sense, loss of jobs and economic sufferings for millions of former Soviets. It was not a peaceful process, as it might stay in our collective memory.

Illustrative are the following figures on the outcome of the armed conflicts:

- The civil war in Tajikistan (in 1992-97) led to up to 157,000 people being killed, 37,500 households being destroyed, some 600,000 people fled to neighboring Afghanistan, and 195,000 were dispersed across other post-Soviet states.¹

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¹ Bakhtiyor Sobiri, *The Long Echo of Tajikistan's Civil War*, OPENDEMOCRACY, (June 23, 2017), <https://www.opendemocracy.net/en/odr/long-echo-of-tajikistan-s-civil-war/>.

- The number of civilian casualties in the first Chechen war (1994-96) is estimated to be at 50,000.² The conflict led to some 260,000 persons displaced.³
- The ongoing Russian military aggression in Ukraine is the latest bloodshed of enormous proportions. By all means, it is also a legacy of the USSR collapse.

The Nagorno-Karabakh war, which started in February 1988, was the first major conflict on the eve of the collapsing USSR. It was also the longest, with still no peace in sight, and—until recently—“the most dangerous conflict in the post-Soviet space.”⁴ The conservative estimates of the total number of civilian and military casualties of the Karabakh war speak of 55,000 lives lost in total just during the period 1988-1996. Over one million people were displaced during the conflict in and around Nagorno-Karabakh,⁵ in addition to the almost complete exodus of some 120,000 ethnic Armenians following the blockade and surrender of the unrecognized independent Artsakh in September 2023.

What are the elements of the post-Soviet media control in the shadow of these conflicts? Is it a Soviet-era legacy adapted to modern times? What happens when it clashes with democratic perception of media regulation and media freedom? Is it realistic to expect dramatic changes in relation to the independence of the press?

These questions are discussed within the example of the court case of *Fatullayev v Azerbaijan* that led to a judgment of the European Court of Human Rights in 2010⁶ and in 2022⁷

² See Christoph Zurcher, *The Post-Soviet Wars: Rebellion, Ethnic Wars, and Nationhood in the Caucasus*, 100 (2007).

³ See Kaz de Jong, et al., *The Trauma of Ongoing War in Chechnya*, Amsterdam: Médecins Sans Frontières, Aug. 2014, at 3, <https://reliefweb.int/report/russian-federation/trauma-ongoing-war-chechnya>

⁴ Thomas de Waal, *The Nagorny Karabakh Conflict in its Fourth Decade*, CEPS Working Document No. 2021-02, Brussels: CEPS, (Sept. 2021) https://www.ceps.eu/download/publication/?id=34122&pdf=WD2021-02_The-Nagorny-Karabakh-Conflict-in-its-Fourth-Decade.pdf

⁵ See Jessica Atwood, *Civil War: Azerbaijan and Nagorno-Karabakh Republic (1992-1994)*, in: *Civil Wars of the World: Major Conflicts since World War II*, Vol. 1, 143, (Karl DeRouen Jr. & Uk Heo., eds., ABC-CLIO, 2007).

⁶ *Fatullayev v. Azerbaijan*, Eur. Ct. H.R., 40984/07, (2010), <https://hudoc.echr.coe.int/fre?i=001-98401>.

⁷ See *Fatullayev v. Azerbaijan (no. 2)*, Eur. Ct. H.R., 32734/11, (2022), <https://hudoc.echr.coe.int/fre?i=001-216685>.

(Azerbaijan is a member of the Council of Europe, and thus subject to the Court's jurisdiction).

In this case, a popular young Azerbaijani journalist was sentenced, for reporting on the Nagorno-Karabakh war in a different way from the official storytelling on the conflict.⁸ There are many elements in the case—and the fate of Fatullayev himself—it's emblematic of the challenges independent journalism faces in the post-Soviet authoritarian countries. These challenges raise a host of issues related to the legal problems of journalism, including, online journalism. The issues are likely pertinent to Azerbaijan, but also to other countries, once called Newly Independent States, who enjoy—or perhaps, suffer from—similar legal and political rules and traditions.

II. NATIONAL COURTS ON *FATULLAYEV*

At the peak of the events discussed below, Mr Eynulla Fatullayev, was thirty years old, and the founder and editor-in-chief of the weekly Russian-language newspaper “Realny Azerbaijan,” (translated as “Real-life Azerbaijan”). The newspaper was published in the country's capital, Baku, and was popular for its investigations and frequent criticism of state authorities and officials. Some, including the Interior Minister and members of the Parliament, have repeatedly demanded initiation of criminal defamation cases and filed civil defamation lawsuits against him.⁹

Azerbaijan is one of the eight post-Soviet states that opted to keep criminal defamation in its national Penal Codes, as was a tradition of the Soviet criminal laws.¹⁰

Despite the public promises to decriminalize defamation by the national authorities, including a relevant commitment in the National Programme for Action to Raise Effectiveness of Protection of Human Rights and Freedom, decreed by President Aliyev in 2011, this legacy of the Soviet times is firmly in place

⁸ Fatullayev v. Azerbaijan, *supra* note 6.

⁹ See Zaur Rasulzade, *Family of the editor-in-chief of newspaper "Real Azerbaijan" is under pressure*, Caucasian Knot, (October 3, 2006), <https://eng.kavkaz-uzel.eu/articles/4749>.

¹⁰ See Andrei Richter, *Gesetze und Strategien zur Medienfreiheit im postsowjetischen Raum*, Religion & Society in East and West (RGOW) Zurich 2, 2019 at 20-23.

today.¹¹ Also, Aliyev called for a “moratorium” of civil defamation lawsuits by civil servants to the press, but somehow it was not implemented into practice.¹²

As a result of a criminal defamation trial, Fatullayev was found guilty of slandering a member of the Government and sentenced to two years of suspended imprisonment in 2006.

In addition, Fatullayev was severely beaten in the streets of Baku, and his father was kidnapped. The kidnappers’ ransom note demanded a closure of his publications. Furthermore, both he and other editorial staff repeatedly received threatening phone calls in connection with published and forthcoming articles.

In 2005, shortly before the publication in question, Fatullayev traveled, as a journalist to Nagorno-Karabakh (or Artsakh, as Armenians call it), which went under the control of Armenian forces following an outburst of the armed conflict in 1991-94.

This was, however, a rare case of an Azerbaijani citizen visiting those places, since there was virtually no travel across the separation line or between the nationals of the two countries. As noted by de Wall in 2021, “The two societies have had practically no contact with one another since the late 1980s.”¹³

During his trip, Fatullayev met and talked with some local officials, as well as with ordinary people. As a result of this trip, the journalist published in his weekly, “Realny Azerbaijan,” an article titled “The Karabakh Diary.”

A. “THE KARABAKH DIARY”

Written in the form of a travelogue about what the author saw during his trip, the story conveyed the content of his conversations with locals. The controversial moment of the “diary” was the topic of the bloodshed that happened in the Karabakh settlement of Khojali on February 26, 1992. This day was a turning point in the history of the conflict. Khojali was the place of the only airport in Nagorno-Karabakh.

¹¹ See Press Release, OSCE, OSCE Media Freedom Representative Concerned About Increasing Pressure on Media in Azerbaijan Following Online Defamation Provisions (May 15, 2013), <https://www.osce.org/fom/101513>.

¹² Parliamentary Assembly of the Council of Europe, *Honouring of obligations and commitments by Azerbaijan*, Resolution 1545 (2007), Apr. 16, 2007 at 8.1.1, <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17527&lang=en>.

¹³ Thomas de Waal, *supra* note 4 at 15.

In Azerbaijan, by a decree of President Heydar Aliyev,¹⁴ what happened then was formally considered as an episode in the genocide by Armenians of the peaceful Azeri population.¹⁵ On that day, according to the Azerbaijani official history, Armenian armed formations, with the help of the Soviet army, killed hundreds of unarmed people from among the inhabitants of Khojali.

In “The Karabakh Diary,” the journalist recalled a conversation, a few years before his trip in 2005, with refugees from Khojali, who were living in the Azerbaijani town of Naftalan. They told him: on the eve of the assault on the encircled Khojali, Armenians repeatedly warned the Azerbaijani civilians about the coming offensive with the help of loudspeakers, calling them to leave through a safe corridor along the Kar-Kar river. According to these refugees, they did use the safe passage and were not shot at. At the same time, some paramilitaries from the battalions of the Popular Front of Azerbaijan (PFA), who were defending Khojali, abandoned their positions and joined other civilians, and for an unknown reason crossed the Kar-Kar and led them towards the village of Nakhichevanik, which at that time was under the control of armed Armenians. He recalled the conversation in his article, as during the trip to Karabakh it was confirmed by a local official, an ethnic Armenian. Comparing the two pieces of information, Fatullayev asserted: “Apparently, the PFA battalions were not so much striving to save the civilians of Khojali as to shed even more blood in their plan to have [the then President of Azerbaijan] Mutalibov overthrown.”¹⁶

B. COMMENTS ON *AZERITRIColor*

More than a year after the publication of “The Karabakh Diary” (in December 2006 and in January 2007) a person registered under the username “Eynulla Fatullayev” posted a number of comments on a popular Internet forum *AzeriTriColor* (<http://www.atc.az>). They were posted in a forum thread dedicated to controversies in the content of “The Karabakh

¹⁴ Father of his successor, current President Ilham Aliyev.

¹⁵ “О геноциде азербайджанцев” (“On genocide of Azeris”), Decree of the President of Azerbaijani Republic (Mar. 26, 1998), https://genocide.preslib.az/ru_s13.html.

¹⁶ Карабахский дневник (The Karabakh Diary), (text in Russian: <http://nv.am/karabahskij-dnevnik-azerbajdzhanskogo-zhurnalista/>).

Diary.” In several responses to questions from the forum participants, this person (“Eynulla Fatullayev”) wrote, in particular, the following:

I have visited this town [Naftalan] where I have spoken to hundreds (I repeat, hundreds) of refugees who insisted that there had been a corridor and that they had remained alive owing to this corridor . . .

You see, it was wartime and there was a front line... Of course, Armenians were killing [the civilians], but part of the Khojali inhabitants had been fired upon by our own [troops]... Whether it was done intentionally or not is to be determined by investigators . . .

[They were killed] not by [some] mysterious [shooters], but by provocateurs from the NFA battalions . . . [The corpses] had been mutilated by our own . . .¹⁷

In response came a campaign against Eynulla Fatullayev in a number of Azerbaijani media outlets, peaked with the demands for him to disclose his ties with Armenia and be stripped of his citizenship.

Next, a civil defamation lawsuit was filed by the head of the “Center for the Protection of Refugees and Displaced Persons” against “Realny Azerbaijan” weekly and Fatullayev in connection with the dissemination of information discrediting the relatives of the victims of the tragedy, veterans, soldiers of the National Army of Azerbaijan and the entire Azerbaijani people. In court, Fatullayev unsuccessfully denied his ownership of the statements on the *AzeriTriColor* forum. The district court redressed the claims, namely the publication of a refutation in the weekly and on the *AzeriTriColor*, as well as compensation for moral damages in the amount of approximately 17,000 Euros, which were supposed to be spent on improving the conditions for the refugees residing in Naftalan.

Somewhat later, a group of refugees and former soldiers who participated in the battle of Khojali, and whose interests were represented by the same head of the Refugees Protection Center, filed an application to open a criminal case against Fatullayev to

¹⁷ Fatullayev v. Azerbaijan, *supra* note 6 at 13.

the same district court in accordance with the private prosecution procedure. They demanded that he be found guilty of insulting and slandering Azerbaijani soldiers. The same judge, who had considered the civil lawsuit, found Fatullayev guilty of criminal defamation, aggravated by the accusations of individuals of a grave or extremely grievous offense, and sentenced him to two and a half years imprisonment.

C. “THE ALIYEVs GO TO WAR”

A month before the two and a half year imprisonment verdict, under a pseudonym, “Realny Azerbaijan” published Fatullayev’s analytical article, “The Aliyevs Go to War” with a completely different topic than Nagorno-Karabakh.

In it, the author expressed the opinion that in order to retain power, the national government was seeking support from the U.S. in exchange for facilitating a likely American aggression against Iran. The author believed that by openly supporting the anti-Iranian campaign, Azerbaijan should prepare for a long war that would lead to widespread destruction and human casualties. He wrote that according to the information from sources “close to official Paris”, the Iranian Air Force and hundreds of missiles would strike targets in Azerbaijan. A long list of such targets was published as well, which included, oil platforms and terminals, governmental buildings and a number of large business centers that housed offices of foreign companies. The author said that it would be better for Azerbaijan to remain neutral in the brewing conflict, also because its Talysh minority, which is ethnically, geographically and linguistically close to the Iranians, would not support the war.¹⁸

The Ministry of National Security opened a criminal investigation for the creation of a terrorist threat into this publication.

Three months later, Fatullayev, still imprisoned for defamation and now facing terrorist charges, was further accused of tax evasion on the grounds that he did not properly declare his personal income as the newspaper editor.¹⁹

¹⁸ *Id.* at 27.

¹⁹ Muzaffar Suleymanov, *Azerbaijan: Editor slammed with hefty sentence*, Causasian Knot, (November, 1 2007), <https://eng.kavkaz-uzel.eu/articles/6577>

Testimonies of eight employees of foreign companies were submitted at the trial on charges of intimidating the population with a terrorist threat. They testified that, having received by e-mail and read the article “The Aliyevs Go to War”, they felt disturbed, anxious and frightened. The court concluded that the publication was intended to sow panic among the population. It also found that in the article’s author threatened to destroy public property and bring death to people in order to force the Government to abandon political decisions called for by the national interests.²⁰ In October 2007, it found Fatullayev guilty on all counts and convicted him of creating a terrorist threat, inciting ethnic hatred, and tax evasion.

The cumulative sentence, taking into account the partial absorption of penalties, amounted to eight and a half years imprisonment. When passing the verdict, the court stated, that taking into account a previous conviction on criminal defamation, the journalist was a repeat offender, and this qualified as an aggravating circumstance. The court also seized as material evidence twenty three computers and memory disks, in the editorial office of “Realny Azerbaijan.” By that time, the weekly could no longer be published and subsequently folded.

After losing all possible appeals, Fatullayev filed an application with the European Court of Human Rights (ECtHR) in Strasbourg, to consider if the national authorities had violated his right to freedom of expression. Three years later the Court handed its judgment.

III. EUROPEAN COURT OF HUMAN RIGHTS

The Strasbourg Court carefully studied the articles published in “Realny Azerbaijan” and on the Internet. It acknowledged that Fatullayev’s authorship of the online statements was proven beyond any doubt by the Azerbaijani judiciary.²¹ The ECtHR found that the state interference with the applicant’s (Fatullayev’s) right to freedom of expression was based on the Penal Code. Inevitably, however, the question arose as to whether the restrictive measures taken against him were necessary in a democratic society—an important condition for restricting free speech under European law. Examining this component of

²⁰ Fatullayev v. Azerbaijan, *supra* note 6 at 41.

²¹ *Id.* at 93.

Azerbaijan's possible violation of Article 10 of the ECHR the Strasbourg Court found that Fatullayev's articles and comments in print and online dealt with the "matters of general interest."²²

The Court observed that "The Karabakh Diary" was supposed to make up for the lack of information in society, while the article itself gives the impression that the author was trying to convey various ideas and views of the parties to the conflict in an unbiased manner. The fact that he relayed the allegations of the people he interviewed did not necessarily mean that he did so in order to prove their veracity. However, as this topic developed, the author began to mix his own views with the views of his interlocutors, including, for example, the motives for the actions of the PFA battalions. Thus, relying on a limited amount of information, the applicant was vague in expressing the idea that certain Azerbaijani military formations bore part of the responsibility for the fate of those killed in Khojali.²³

At the same time, the ECtHR noted, since the public discussion on the role and responsibility of the Azerbaijani authorities for the failure to prevent or, on the contrary, for provoking the Khojali events continued, the applicant, as a journalist, had the right, in accordance with Article 10 ("Freedom of Expression") of the European Convention on Human Rights (ECHR),²⁴ to disseminate ideas related to this topic.

The Court noted that seeking historical truth is an integral part of freedom of expression, and "it is essential in a democratic society that a debate on the causes of acts of particular gravity which may amount to war crimes or crimes against humanity should be able to take place freely."²⁵

Wars started to occupy a special place in Soviet history and mentality in the mid-1960s. The censorship, of course, was always on guard to prevent sacrilegious attempts to question the deeds of the Red Army during the Great Patriotic War of 1941-45, as well as in the Civil War that followed, the "glorious armed uprising in the 1917 October Revolution." Interestingly, one of the first cracks in the Soviet media control system happened when *glasnost* allowed for the criticism of the war the USSR waged in Afghanistan.

²² *Id.* at 87.

²³ *Id.* at 91.

²⁴ European Court of Human Rights, *European Convention on Human Rights*, 1950, https://www.echr.coe.int/documents/convention_eng.pdf.

²⁵ *Fatullayev v. Azerbaijan*, *supra* note 6 at 87.

With formal censorship gone, post-Soviet states started establishing legal acts of “defamation” to their official national narratives on history, especially on wars, both in criminal and administrative law. For example, since 2022 the Russian Criminal Code provides for liability of public actions aimed at “discrediting the use of the [Russian] Armed Forces in the interest of the protection of interests of the Russian Federation”²⁶ Before 2022, the Administrative Code introduced the ban on public denial (including online) of the “decisive role of the Soviet people in the defeat of Nazi Germany and the humanitarian mission of the USSR in the liberation of European countries.”²⁷ Finally, a law prohibited in public speech “identifying the goals, decisions and actions of the leadership of the USSR . . . with the goals, decisions and actions of the leadership of the Nazi Germany . . . and the Axis.”²⁸

In Russia, the key principles of the official “memory politics” are: “Past events should be portrayed in a way that fuels national pride” and “We cannot allow anyone to impose a sense of guilt on us.”²⁹ These dictums fit well also in the context of Azerbaijan. The State, in Russia, but also in Belarus, Turkmenistan, and Uzbekistan has eventually become the sole arbiter of how recent and not-so-recent historical events are to be interpreted, specifically those that serve as a source of the mandate and legitimacy of the nationalist and populist elites. As they ban opposing views on history, the Governments attempt to establish a monopoly on truth in relation to particular events and their

²⁶ Уголовный кодекс Российской Федерации, (Criminal Code of the Russian Federation), June 13, 1996, 63-FZ at 280-3, <https://rulings.ru/uk/Razdel-X/Glava-29/Statya-280.3/>.

²⁷ Кодекс Российской Федерации об административных правонарушениях (Code of the Russian Federation on Administrative Offences), Dec. 30, 2001, 195-FZ at 13.48, <https://rulings.ru/koap/Razdel-II/Glava-13/Statya-13.48/>.

²⁸ Об увековечении Победы советского народа в Великой Отечественной войне 1941–1945 годов (“On the perpetuation of the Victory of the Soviet people in the Great Patriotic War of 1941-1945”), Federal Statute, Apr. 19, 1995, as amended on July 1, 2021, 80-FZ, at 6-1, <http://www.kremlin.ru/acts/bank/7872>.

²⁹ Igor Torbakov, *Memory Politics à la Russe: Memorial vs. Vladimir Putin's Repressive State*, in *Constructing Memory: Central and Eastern Europe in the New Geopolitical Reality*, Hanna Bazhenova, ed., Lublin: Institute of Central Europe, 2022 at 124.

interpretation.³⁰ Most recently this is observed in the coverage by the Russian media of the aggression in Ukraine.

In this context, the ECtHR, reiterated that journalistic freedom implies the possibility of resorting to a certain degree of exaggeration or even provocation.³¹ At the same time, it rejected the possibility—that was suggested by Azerbaijan—of equating doubts in the official version of the events in Khojali with contesting the genocide of Jews during World War II.

Incidentally, neither Soviet, nor post-Soviet laws, that aim to prevent “defamation” of the history of World War Two, provided for a ban on negation or revision of clearly established historical facts of the Holocaust.

At the same time, laws in post-Soviet countries, such as Armenia (1988),³² Ukraine (2006),³³ and Belarus (2022),³⁴ have provided for a ban of denial or minimization of specific genocides of the population of these particular countries.

With regard to the applicant’s statements on the *AzeriTriColor*, the Strasbourg Court noted the allegations therein differed from those contained in “The Karabakh Diary”: unlike statements in the newspaper article, Fatullayev did not back up his claims on the forum with any evidence, nor did he refer to any specific sources. Again, the ECtHR recalled its previous judgments, which stated that the exercise of freedom of expression imposes duties and responsibilities, including reporting in good faith, in order to provide accurate and reliable information in accordance with the norms of journalistic ethics. Of course, in his website post, the applicant did not publish a journalistic report, he simply expressed his personal opinion during an online discussion. However, it was clear that, having registered under the name of a popular journalist Eynulla Fatullayev, he did not hide his identity and publicly disseminated views by posting them on a public and popular Internet forum.

³⁰ Andrei Richter, *Post-Communist Media Freedom and a New Monopoly on Truth*, JOURNAL OF ROMANIAN STUDIES, Vol. 3, 2, 2021 at 34.

³¹ Fatullayev v. Azerbaijan, *supra* note 6 at 100.

³² Law of Armenian SSR “On condemnation of the genocide of Armenians in 1915 in Ottoman Turkey,” Nov. 22, 1988.

³³ Law of Ukraine “On Holodomor of 1932-1933 in Ukraine,” 376-V, Nov. 28, 2006.

³⁴ Law of Belarus “On the Genocide of the Belarusian Nation,” 146-Z, Jan. 5, 2022.

Therefore, by acting recklessly, he could not know and remember the standards of professional ethics, said the Court.³⁵

Additionally, the Court held that the statements posted on the website were not value judgments, but statements of fact. The direct accusation of specific individuals of particular negative actions requires sufficient factual support. However, in this case, it was not necessary to clarify whether the statements on the site were false or unverified because the Azerbaijani courts concluded there were doubts that these statements harmed the reputation of specific people—four refugees and two former PFA militants.³⁶

The Strasbourg court did not agree with the conclusion of the domestic jurisprudence that the article contained allegations that insulted the dignity of the victims of the tragedy—four refugees from Khojali. Regarding the accusations against unnamed “provocateurs” from the PFA battalions, the ECtHR noted, even assuming these allegations were not sufficiently substantiated, these allegations, firstly, did not imply that *all* the Azerbaijani military or *all* Azerbaijani armed formations took part in the hostilities in this area, or that *all* the defenders of Khojali participated in this battle. Secondly, they did not contain accusations against specific individuals—there were no names or any other clarifying information provided.³⁷

In view of the foregoing, the ECtHR found that while “The Karabakh Diary” might have contained certain exaggerated or provocative statements, the author did not overstep the limits of journalistic freedom in fulfilling his duty to disseminate information on topics of general interest. The statements on the Internet forum may not have had a sufficient factual basis, but they did not defame the specific persons who acted as a private prosecution. Under the circumstances, the ECtHR concluded that the arguments given by the domestic courts in support of their judgments could not be considered relevant and sufficient, and therefore, the recognition of Fatullayev as guilty of criminal defamation did not meet a “pressing social need.”³⁸

But even if the intervention had met such a need, there would be problems with regard to compliance with the requirement that the punishment be proportionate to the offense. In earlier cases, the ECtHR generally found that investigative journalists tend to

³⁵ Fatullayev v. Azerbaijan, *supra* note 6 at 95.

³⁶ *Id.* at 96-97.

³⁷ *Id.* at 99.

³⁸ *Id.* at 100.

refrain from publishing sensitive topics if they risk being sentenced to imprisonment for criminal defamation. Fear of such punishment inevitably has a chilling effect on the freedom of expression of journalists.³⁹

Recalling that Fatullayev was sentenced to imprisonment in addition to the judicial punishment for the same statements in the civil process, the ECtHR did not dispute that sentencing is a principle matter for national courts. But at the same time, it noted that the choice of imprisonment as a penalty for a media offense is compatible with the freedom of expression of journalists only in exceptional circumstances. Namely when other fundamental rights are seriously infringed, as, for example, in cases of inciting hatred or incitement to violence.⁴⁰

The Strasbourg Court considered the circumstances of the criminal case in the “The Karabakh Diary” article and the “*AzeriTriColor*” comments did not give grounds for sentencing the applicant to imprisonment. Regarding the “The Aliyevs go to war”, the ECtHR, in accordance with Article 10 of the European Convention on Human Rights, recalled the scope for the possible restriction of speech on political topics rather narrow. The Court has repeatedly pointed out that the boundaries of “permissible criticism” in relation to public authorities are wider than in relation to ordinary citizens or even individual politicians. Moreover, the dominant position held by the authorities obliges them to exercise restraint in bringing criminal cases, even when they have to deal with unfounded attacks and criticism from opponents, especially when there are other ways to respond to them.⁴¹

Again, if the publication cannot be considered an incitement to violence or an incitement to ethnic hatred, then the authorities may not, on the grounds of maintaining public order and security, restrict the public’s right to receive information on topics of general interest. The mere fact that Fatullayev discussed the social and economic situation in the areas populated by an ethnic minority of Talyshs, and voiced an opinion about possible political tension in those areas cannot be considered as incitement to ethnic hostility.⁴²

³⁹ *Id.* at 101-102.

⁴⁰ *Id.* at 103-104.

⁴¹ *Id.* at 116.

⁴² *Id.* at 116, 126.

Incitement to ethnic hostility is a grave crime in all post-Soviet states. Following the terrorist attack of 9/11, a number of governments in the region pushed for anti-extremism legislation. Their logic is that extremism inevitably leads to terrorism. Incitement to ethnic hostility was included as an element of the crime of extremism, although the element of violence has alas ceased to be a condition of the crime.⁴³

In Belarus, Moldova, Russia, and some Central Asian states, anti-extremism laws curb media freedom, including through direct out-of-court bans on media activity, shutdowns, and imprisonment of journalists.

The circumstances of this case convinced the ECtHR that there were no grounds for the domestic courts to issue a sentence of imprisonment. The applicant's conviction did not meet a pressing social need, was blatantly disproportionate to the legitimate aims put forward, and the interference was not necessary in a democratic society.⁴⁴

Analyzing the content of the article "The Aliyevs Go to War," the ECtHR noted that the publication of a list of possible targets on the territory of Azerbaijan did not in itself increase or decrease the chances of hypothetical aggression from Iran. Moreover, the authorities never made any allegations that, by publishing this list, the applicant disclosed any State secrets or harmed the country's defense capability. In the context of the article, the discussion of targets could only be perceived as an attempt to portray a dramatic picture of the consequences of the country's possible involvement in a future war. In this sense, the ECtHR did not agree with the opinion of the Azerbaijani courts that the journalist had to confirm the authenticity of the list as a factual statement. It stated that the list is an expression of opinion, and any opinion about future events inherently involves a high degree of uncertainty. The feasibility or impracticability of the scenarios proposed by the applicant to the Court was the subject of public discussion, and every reasonable reader could be expected to understand that the words about the possible course of a future war were hypothetical.⁴⁵

Taking into account the circumstances of the case, the ECtHR recognized the domestic court's assessment that Fatullayev

⁴³ See also: Andrei Richter, *Post-Soviet Perspective on Censorship and Freedom of the Media*, Moscow: IKAR, 2007, at 224-235.

⁴⁴ Fatullayev v. Azerbaijan, *supra* note 6 at 102-105, 128-131.

⁴⁵ *Id.* at 117-120.

threatened the state with terrorist acts as completely unfounded. It pointed out that the applicant, as a journalist and a private individual, clearly had no ability to influence any of the hypothetical events discussed in the article, and could not control any decision of the Iranian authorities to attack objects on the territory of Azerbaijan. Further, he did not endorse or incite a possible attack. The purpose of writing the article was to inform the public on possible consequences of the country's foreign policy, and more specifically, to question the decision to support the "anti-Iranian" resolution of the UN Security Council. However, the ECtHR found nothing in the article to suggest that the applicant's allegations were aimed at intimidating or pressuring the Azerbaijani Government by illegal means. In its opinion, in this case the domestic courts had arbitrarily applied the rules of criminal law on terrorism.⁴⁶

As a result, the European Court of Human Rights found in *Fatullayev v. Azerbaijan* that the domestic courts had overstepped the existing margin of appreciation in applying restrictions on discussions of topics of public interest, and that his criminal conviction violated Article 10 of the ECHR. It held that the respondent State had an obligation to secure the applicant's immediate release. The court also awarded Fatullayev 25,000 Euros in compensation for non-pecuniary damages.⁴⁷

IV. EPILOGUE: AFTER THE JUDGMENT

The judgment in Strasbourg was made public on April 22, 2010. It was welcomed by a number of international NGOs, such as Reporters without Frontiers, PEN International, and the Committee to Protect Journalists (CPJ).⁴⁸

However, Fatullayev was not released from prison. Shortly before the judgment a new charge of illegal drug possession was brought against the journalist. A new criminal case was opened, ending in July 2010 with a new prison sentence of two and a half years. The journalist claimed that the drugs had been planted, but

⁴⁶ *Id.* at 121-124.

⁴⁷ *Id.*

⁴⁸ See COMMITTEE TO PROTECT JOURNALISTS, Eynulla Fatullayev, Azerbaijan, Realny Azerbaijan, <https://cpj.org/awards/eynulla-fatullayev-editor-realny-azerbaijan/> (While still in prison, in 2009, Fatullayev won the International Press Freedom Award from the Committee to Protect Journalists (CPJ) in New York).

in November 2010 the court of appeal upheld the verdict. He appealed again, in the European Court of Human Rights and would formally win the case in Strasbourg only in 2022.⁴⁹

In turn, the Government challenged the decision of the European Court on Human Rights in its Grand Chamber. On October 4, 2010, the Grand Chamber again demanded the release of Fatullayev. Only then, on November 11, 2010, the Plenum of the Supreme Court of Azerbaijan, in view of the Strasbourg judgment, overturned Fatullayev's sentences for his comments and articles.⁵⁰

However, the journalist remained behind bars for the illegal possession of drugs. In March 2011, the Council of Europe's Committee of Ministers urged Azerbaijan to respect the judgment of the ECtHR. In early May 2011, the Representative of the Organization for Security and Co-operation in Europe (OSCE) on Freedom of the Media, Dunja Mijatovic, during her visit to Baku asked and was granted by President Aliyev a meeting with Fatullayev in prison.⁵¹

On 26 May 2011, after four years behind bars, Fatullayev was pardoned by President Ilham Aliyev, as part of an annual amnesty for Republic's Day, which commemorates Azerbaijan's independence.⁵² Some expected the journalist to immediately flee the country, but he stayed.

Then came another big turn. By the end of 2012, Fatullayev started a new media company and became an ardent critic of the West. In particular, he equaled the human rights situation in Germany with that in his own country. He blamed his colleagues and supporters for being on the payroll of the enemy—Armenia. Soon thereafter, his ties with the international NGOs, as well as with other journalists and human right defenders who were oppressed by the regime, broke down.⁵³ He earned the title of

⁴⁹ See Fatullayev v. Azerbaijan (no. 2), *supra* note 7.

⁵⁰ Statement of the Supreme Court of the Republic of Azerbaijan, Dec. 8, 2010, <https://supremecourt.gov.az/ru/post/view/381>.

⁵¹ Press Release, "OSCE media freedom representative offers assistance to improve media freedom in Azerbaijan," Press release (May 13, 2011), <https://www.osce.org/fom/77525>.

⁵² Khadija Ismayilova, *Azerbaijan: Jailed Journalist Released from Prison*, Eurasianet, (May 26, 2011), <https://eurasianet.org/azerbaijan-jailed-journalist-released-from-prison>.

⁵³ Antoine Blua, Rikard Jozwiak, *Amnesty International Cuts Ties With Former Azerbaijani Prisoner of Conscience*, Radio Free Europe / Radio Liberty, (Jan.

“Distinguished Journalist of Azerbaijan” by a decree of the same President that had made his imprisonment possible.⁵⁴

Today Eynulla Fatullayev edits a popular Russian-language news website haqqin.az,⁵⁵ he runs a YouTube channel with fifteen thousand subscribers, where he posts interviews on various armed conflicts, mostly on Nagorno-Karabakh.⁵⁶

In August 2022, he again visited Armenian settlements in Karabakh. This time his visit was accompanied by the Russian peacekeepers to interview locals in English, under the guise of the “international press.”⁵⁷

In 2022, he also traveled to Ukraine, where he interviewed the local officials on the Russian aggression, and to Moldova, where he reported on the “frozen conflict” in Transnistria. In both conflicts, Azerbaijan criticizes separatists, in line with its Nagorno-Karabakh conflict’s logic of separatists raising against the central power.

Fatullayev’s knowledge and memory of the standards of professional ethics, questioned by the ECtHR in 2010⁵⁸, resurfaced in 2017, when he and his website were scrutinized by the Advisory Commission on Counteracting the Propaganda (further on – Commission). This *ad hoc* Commission, a *de facto* supranational press council in the region, was set up by the media councils of Armenia, Azerbaijan, Belarus, Georgia, Moldova, Russia and Ukraine. Each of them delegated a representative tasked to deal with trans-border complaints in the region, mostly on propaganda-driven disinformation. In its peer review, the Commission found a story by Fatullayev, published on haqqin.az – unethical and unprofessional from an international standards viewpoint. The story had reported on the Azerbaijani opposition’s

23, 2013), <https://www.rferl.org/a/amnesty-azerbaijan-fatullayev/24881428.html>.

⁵⁴ “On awarding honorary titles to the mass media workers of the Republic of Azerbaijan”, Ordinance of the President of the Republic of Azerbaijan, July 22, 2020, <https://azertag.az/ru/xeber/1543835>.

⁵⁵ See <https://haqqin.az/>.

⁵⁶ See Youtube, <https://www.youtube.com/channel/UCKeYDENiNPGDR9e0KLuDKAg>.

⁵⁷ Naira Nalbandyan, *Житель Агавно: Азербайджанский журналист представился представителем международных СМИ и искажил беседу* (Settler in Agavno: Azerbaijani journalist pretended he represented international media and distorted the interview), Radio Azatutyun, (Aug. 18, 2022), <https://rus.azatutyun.am/a/31994718.html>.

⁵⁸ See footnote 36.

subversive activity in Tbilisi. The Commission considered it “a product of propaganda, not journalism, as it contains [seven] elements of propaganda bordering ‘hate speech.’”⁵⁹

V. CONCLUSION

The fate of Fatullayev—including his brutal imprisonment and his complicated release—is emblematic of several trends in media control by authoritarian regimes in the post-Soviet world. These regimes are enforced by the new elites, who still have been brought up and trained by the Soviet-times institutions (like security services) and/or emerge as a natural continuation of the old *nomenklatura*.

These authoritarian regimes are capable and willing to attack critical journalists and the media with all the force available to them. Criminal defamation, accusations of extremist and terrorist speech, and betrayal of State values and traditions are their popular tools. But other crimes, such as tax evasion, spying, disclosure of personal secrets, clandestine collaboration with an enemy, or drug trafficking are also often used.

International human rights mechanisms are capable of making change, but their capability is quite limited, especially when such a regime has a veto power, like the OSCE or the United Nations Security Council.⁶⁰

Over the years, the independent media in Azerbaijan, as well as in Belarus, Russia, and several Central Asian states, have been put under strict state control or extinguished. Therein state-run media dominates the “markets.”

⁵⁹ Advisory Commission on Counteracting the Propaganda, Opinion of the Advisory Commission on Counteracting the Propaganda of the Network of Media Self-Regulation Bodies (NMSB) on the complaint of the Council of Charter of Journalists' Ethics of Georgia as to the story published on website <https://haqqin.az> (Мнение Консультативной Комиссии по противодействию пропаганде Сети организаций медийного саморегулирования (СОМС) относительно жалобы Совета Хартии журналистской этики Грузии на публикацию сайта <https://haqqin.az>), 14 September 2017, <https://presscouncil.ru/praktika/kejsy-partnerov/dela-soms/5943-material-soms-1>.

⁶⁰ See Andrei Richter, *The Influence of the Council of Europe and Other European Institutions on the Media Law System in Post-Soviet States*, CENTRAL EUROPEAN JOURNAL OF COMMUNICATION (Wroclaw) 1, 2, 15-26 (2009). <https://wuwr.pl/cejc/article/view/6684>.

Shutdowns of online and traditional media though, do not seem to remain an effective or a useful means of their control in the world of global modern technologies. The effect of the once popular tool of blocking the Internet gradually becomes weaker and weaker. To control the civil society—or whatever is left of it—and promote their own populist messages, the authoritarian regimes must be present online, in the social media. The biggest challenge for them is how to become popular in a plethora of voices.

To be successful online, authoritarian Governments need to win over, coerce, or buy popular voices to assist with propaganda. If they fail to follow the line, these popular journalists and bloggers are deemed to be labeled unpatriotic, foreign agents, or simply enemies of the people. They will be portrayed as morally dishonest and be embroiled in various scandals: drugs, sex, and bribes.

Ongoing armed conflicts and the recent COVID-19 pandemic raise worries and issues of national security and public health protection, which increasingly explain and enable governments to introduce their monopoly on information, at least in relation to storytelling on critical for their survival areas, such as historical narratives, elections, and opposition. Whenever this monopoly is broken by the international or local voices, regimes introduce the rule that resembles a monopoly on truth. That means facts that were not explicitly confirmed by the State are not true and cannot be proven in the court of law.⁶¹

⁶¹ See Andrei Richter, *The Legal Death of Media Freedom in Russia*, in: *Global Perspectives on Press Regulation*, Vol. 1: Europe, Paul Wragg, András Koltay (eds.), 181, Bloomsbury Publishing, 2023).