ARTICLE 19

GLOBAL CAMPAIGN FOR FREE EXPRESSION

MEMORANDUM

on

the Draft 'Law of Georgia on Freedom of Press and Speech'

by

ARTICLE 19
Global Campaign for Free Expression

January 2004

Commissioned by the Representative on Freedom of the Media of the Organisation for Security and Cooperation in Europe

OSCE

I. Introduction

The draft "Law of Georgia on Freedom of Press and Speech" (draft Law), which aims to provide protection for these key rights, was drafted by the Liberty Institute, in cooperation with the Parliamentary Committee on Legal Issues, Legitimacy and Administrative Reform. It passed a first reading in 1999 but was not subsequently submitted for a second Parliamentary hearing. Recent political changes mean that there may well be the political will to reconsider it. Our comments are based on an unofficial English translation of the draft Law.[1]

The draft Law appears to be aimed primarily at developing in more detail the protections of freedom of expression and the press contained in Article 24 of the Georgian Constitution, in the context of relevant international law. In addition to providing a broad and somewhat detailed protective regime, the draft Law provides, at Article 2, that interpretive questions that arise should be carried out "in the light of [the] European Convention on Human Rights and Fundamental Freedoms and the case-law of the European Court of Human Rights".

Despite the admirable goals pursued by this drafting effort, ARTICLE 19 has reservations about whether such a law, which appears to attempt to cover the entire area of freedom of expression, is practicable in its present form. As we detail below with examples drawn from the draft Law itself, freedom of expression is a vast area, with many components that differ considerably one from the other. Our view is that, given this fact, a single overarching freedom of expression law runs the serious risk of being, at once, both underinclusive and overinclusive, and at the same time too detailed in some places and not detailed enough in others. A more tailored approach, involving separate comprehensive laws for separate aspects of freedom of expression – including freedom of information, broadcasting, public service broadcasting and defamation, perhaps under the umbrella of a quite general law setting out the basic right to freedom of expression – is probably preferable.

II. International and Constitutional Standards

A. The Guarantee of Freedom of Expression

Article 19 of the *Universal Declaration on Human Rights* (UDHR),[2] guarantees the right to freedom of expression in the following terms:

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

[1] ARTICLE 19 takes no responsibility for the accuracy of the translation or for comments based on mistaken or misleading translation.

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

The UDHR, as a UN General Assembly resolution, is not directly binding on States. However, parts of it, including Article 19, are widely regarded as having acquired legal force as customary international law since its adoption in 1948.

The *International Covenant on Civil and Political Rights* (ICCPR),[3] a treaty with 148 States Parties, which Georgia acceded to in 1994, imposes formal legal obligations on State Parties to respect its provisions and elaborates on many rights included in the UDHR. Article 19 of the ICCPR guarantees the right to freedom of expression in terms very similar to those found at Article 19 of the UDHR:

> 1. Everyone shall have the right to freedom of opinion.
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice.

Freedom of expression is also protected in Article 10 of the *European Convention on Human Rights* (ECHR),[4] ratified by Georgia in May 1999, which states:

> (1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring licensing of broadcasting, television or cinema enterprises.

Guarantees of freedom of expression are also found in the two other regional human rights systems, at Article 13 of the *American Convention on Human Rights*[5] and Article 9 of the *African Charter on Human and Peoples' Rights*.[6]

Freedom of expression is a key human right, in particular because of its fundamental role in underpinning democracy. For example, the European Court of Human Rights has repeatedly stated:

> Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man … it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'.[7]

[3] UN General Assembly Resolution 2200A(XXI), 16 December 1966, in force 23 March 1976.
[4] Adopted 4 November 1950, in force 3 September 1953.
[5] Adopted 22 November 1969, in force 18 July 1978.
[6] Adopted 26 June 1981, in force 21 October 1986.
[7] *Handyside v. United Kingdom*, 7 December 1976, Application No.5493/72, 1 EHRR 737, para. 49. Statements of this nature abound in the jurisprudence of courts and other judicial bodies around the world.

B. Freedom of Expression and the Media

The guarantee of freedom of expression applies with particular force to the media, including the broadcast media and public service broadcasters. The European Court of Human Rights has consistently emphasised the "the pre-eminent role of the press in a State governed by the rule of law". [8] It has further stated:

> Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.[9]

The Inter-American Court of Human Rights has stated: "It is the mass media that make the exercise of freedom of expression a reality".[10] The media as a whole merit special protection under freedom of expression in part because of their role in making public,

> …information and ideas on matters of public interest. Not only does [the press] have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of 'public watchdog'.[11]

The European Court has furthermore stated that it is incumbent on the media to impart information and ideas in all areas of public interest:

> Whilst the press must not overstep the bounds set [for the protection of the interests set forth in Article 10(2)] … it is nevertheless incumbent upon it to impart information and ideas of public interest. Not only does it have the task of imparting such information and ideas; the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog".[12]

The Court has also held that Article 10 applies not only to the content of expression, but also to the means of transmission or reception. [13]

C. Pluralism

Article 2 of the ICCPR places an obligation on States to "adopt such legislative or other measures as may be necessary to give effect to the rights recognised by the Covenant". This means that States are required not only to refrain from interfering with rights but also to take positive steps to ensure that rights, including freedom of expression, are respected. In effect, governments are under an obligation to create an environment in

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[8] *Thorgeirson v. Iceland*, 25 June 1992, Application No.13778/88, 14 EHRR 843, para. 63.
[9] *Castells v. Spain*, 24 April 1992, Application No. 11798/85, 14 EHRR 445, para. 43.
[10] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5, para. 34.
[11] *Castells*, note 9, para. 63.
[12] *Ibid*., para. 43. See also *The Observer and Guardian v. UK*, 26 November 1991, Application No. Application No. 13585/88, 14 EHRR 153, para. 59; and *The Sunday Times v. UK (II)*, 26 November 1991, Application No. Application No. 13166/87, 14 EHRR 229, para. 65.
[13] *Autronic AG v. Switzerland*, 22 May 1990, Application No. Application No. 12726/87, 12 EHRR 485, para. 47.

which a diverse, independent media can flourish, thereby satisfying the public's right to know.

An important aspect of States' positive obligations to promote freedom of expression and of the media is the need to promote pluralism within, and to ensure equal access of all to, the media. As the European Court of Human Rights has stated: "[Imparting] information and ideas of general interest … cannot be successfully accomplished unless it is grounded in the principle of pluralism".[14] The Inter-American Court has held that freedom of expression requires that "the communication media are potentially open to all without discrimination or, more precisely, that there be no individuals or groups that are excluded from access to such media".[15]

One of the rationales behind public service broadcasting is that it makes an important contribution to pluralism. For this reason, a number of international instruments stress the importance of public service broadcasters and their contribution to promoting diversity and pluralism.

D. Freedom of Information

Freedom of information is an important component of the international guarantee of freedom of expression, which includes the right to seek and receive, as well as to impart, information and ideas. There can be little doubt as to the importance of freedom of information. During its first session in 1946, the United Nations General Assembly adopted Resolution 59(1) which stated:

> Freedom of information is a fundamental human right and… the touchstone of all the freedoms to which the UN is consecrated.[16]

Its importance has also been stressed in a number of reports by the UN Special Rapporteur on Freedom of Opinion and Expression, as the following excerpt from his 1999 Report illustrates:

> [T]he Special Rapporteur expresses again his view, and emphasizes, that everyone has the right to seek, receive and impart information and that this imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval systems - including film, microfiche, electronic capacities, video and photographs - subject only to such restrictions as referred to in article 19, paragraph 3, of the International Covenant on Civil and Political Rights.[17]

The Committee of Ministers of the Council of Europe has also recently adopted a Recommendation on Access to Official Documents which states:

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[14] *Informationsverein Lentia and Others v. Austria*, 24 November 1993, Application No. Application Nos. 13914/88, 15041/89, 15717/89, 15779/89, 17207/90, 17 EHRR 93, para. 38.
[15] Note 10, para. 34.
[16] 14 December 1946.
[17] Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1999/64, 29 January 1999, para. 12.

III. General principle on access to official documents

> Member states should guarantee the right of everyone to have access, on request, to official documents held by public authorities. This principle should apply without discrimination on any ground, including national origin.[18]

In recognition of the importance of giving legislative recognition to freedom of information, in the past five years a record number of countries from around the world – including Fiji, Japan, Mexico, Nigeria, South Africa, South Korea, Thailand, Trinidad and Tobago, the United Kingdom and most East and Central European States – have taken steps to enact legislation giving effect to this right. In doing so, they join those countries which enacted such laws some time ago, such as Sweden, the United States, Finland, the Netherlands, Australia, and Canada.

E. Restrictions on Freedom of Expression

The right to freedom of expression is not absolute. Both international law and most national constitutions recognise that freedom of expression may be restricted. However, any limitations must remain within strictly defined parameters. Article 19(3) of the ICCPR lays down the conditions which any restriction on freedom of expression must meet. It states:

> The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
> (a) For respect of the rights or reputations of others;
> (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

Article 10(2) of the ECHR also recognises that freedom of expression may, in certain prescribed circumstances, be limited:

> 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 or impartiality of the judiciary.

Restrictions must meet a strict three-part test.[19] International jurisprudence makes it clear that this test presents a high standard which any interference must overcome in the strictest sense. The European Court of Human Rights has stated:

> Freedom of expression, as enshrined in Article 10, is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.[20]

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[18] Recommendation R (2002) 2, adopted on 21 February 2002.
[19] See, *Mukong v. Cameroon*, views adopted by the UN Human Rights Committee on 21 July 1994, No. 458/1991, para. 9.7.
[20] See, for example, *Thorgeirson*, note 8, para. 63.

First, the interference must be provided for by law. The European Court of Human Rights has stated that this requirement will be fulfilled only where the law is accessible and "formulated with sufficient precision to enable the citizen to regulate his conduct".[21] Second, the interference must pursue a legitimate aim. These are the aims listed in Article 19(3) of the ICCPR and Article 10(2) of the ECHR. Third, the restriction must be necessary to secure one of those aims. The word "necessary" means that there must be a "pressing social need" for the restriction. The reasons given by the State to justify the restriction must be "relevant and sufficient" and the restriction must be "proportionate to the aim pursued".[22]

F. The Constitution of Georgia

Georgia is a member of the United Nations and a State Party to the ICCPR and ECHR. As such, Georgia is legally bound to protect freedom of expression in accordance with international law. Article 2(2) of the ICCPR states:

> Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

Freedom of expression and freedom of information are affected by a number of Articles in the Constitution of Georgia. Article 17(1) provides: "A person's honour and dignity are inviolable". Article 19(1) guarantees freedom of speech, thought, religion and so on, and allows for restrictions on these rights only where their exercise infringes upon the rights of others. Article 23 protects "intellectual creativity and intellectual property rights", interference with or censorship of creative activity, and seizure of creative work unless it violates the legal rights of others.

Article 24 is the main provision on freedom of expression, providing:

> 1. Every individual has the right to freely receive and disseminate information, to express and disseminate his opinion orally, in writing or in any other form.
> 2. The mass media is free. Censorship is prohibited.
> 3. Monopolisation of the mass media or the means of dissemination of information by the state or natural persons is prohibited.
> 4. Clauses 1 and 2 of this Article can be restricted by law when conditions make it necessary to do so in order to guarantee and by the conditions necessary in a democratic society for the guarantee of state and public security, territorial integrity, prevention of crime, and the defence of rights and dignities of others, to avoid the revelation of confidentially received information or to guarantee the independence and impartiality of justice in a democratic society.

The relationship between these various provision, and between Articles 19 and 24, in particular, is unclear. Article 19 clearly provides for considerably less scope for

[21] *The Sunday Times v. United Kingdom*, 26 April 1979, Application No.13166/87, 2 EHRR 245, para. 49.
[22] *Lingens v. Austria*, 8 July 1986, Application No.9815/82, 8 EHRR 407, paras. 39-40.

restriction on freedom of speech than Article 24 permits in relationship to freedom of expression. At the same time, the restrictions envisaged by Article 24(4) are largely in line with international standards. The reference to confidentially received information, however, may go beyond what is permitted under international law, pursuant to which, restrictions on disclosure of public information, at least, are permitted only where there is a clear risk of harm to a legitimate interest. This provision, for example, does not take into account the possibility of excessive classification of information. In any case, the protection of the rights of others is sufficient to deal with this aim, to the extent that it is legitimate.

Article 26 protects the right to create and join associations and unions. Article 26(3), provides for limitations on that right as follows:

> 3. The creation and activities of such public and political entities whose goal is to overthrow or change the Constitutional order of Georgia by force, or violate the independence of the country or violate the country's territorial integrity or advocate war and violence, or attempt to induce ethnic, racial, social and national unrest is impermissible.[23]

Article 6(2) provides:

> The legislation of Georgia corresponds with universally recognised norms and principles of international law. International treaties or agreements concluded with and by Georgia, if they do not contradict the Constitution of Georgia, take precedence over domestic normative acts.

Read in conjunction with Article 39, which provides that the Constitution "does not deny other universally recognised rights", this effectively incorporates international law as superior to ordinary legislation and possibly even to the constitution.

Article 46 of the Constitution deals with restrictions on rights during emergencies, providing, at paragraph (1):

> During a state of emergency or martial law the President of Georgia is authorised to restrict the exercise of rights and freedoms contained in Articles 18, 20, 21, 22, 24, 25, 30, 33 and 41 of the Constitution either in the whole country or a part of it. The President is obliged to submit a decision on a state of emergency or martial law to Parliament for ratification within 48 hours.

Article 4 of the ICCPR permits States to derogate from their obligations under the ICCPR in "time of public emergency which threatens the life of the nation", the existence of which has been "officially proclaimed". However, any derogation must be strictly limited to meet the demands of the situation. Article 46 of the Constitution of Georgia does not contain such qualified language; the life of the nation need not be at risk prior to suspending a guaranteed right and there is no requirement to limit the derogation as much

[23] This article is quoted here, as it is relied on in the draft Law as a basis for restricted freedom of expression.

as possible. The only condition on this is that Parliament shall ratify the emergency powers within 48 hours.

Recommendations:

- Article 24(4) of the Constitution should be amended to remove the reference to confidentially received information.
- Article 46 should be amended to require that the life of the nation be threatened before any derogation to the exercise of Constitutional rights may be adopted. In addition, if derogations are imposed, the Constitution should require that they be as limited and specific as possible.

III. Analysis of the Draft Law

A. General Provisions

1. The Right to Freedom of Expression

The right to freedom of expression is set out in various provisions of the draft Law. These include the following:

- Article 3, setting out the general right, including the right to possess and express one's beliefs, and the right to "search, receive, create, store, process and disseminate information and ideas";
- Article 4, providing for access to the courts in the event that freedom of expression has been restricted;
- Article 5, setting out appropriate standards and burdens of proof in such court cases;
- Article 7(3), prohibiting any licensing or registration requirements for the "press";[24]
- Article 11, according "absolute privilege" to opinions and "qualified privilege" to "advocacy";
- Article 12, according absolute privilege in certain other contexts;
- Article 14, providing for editorial and journalistic independence; and
- Article 15, ensuring the protection of, inter alia, journalistic sources.

These protections are welcome, and form a critical part of an effective system for the protection of freedom of expression and information. It must be pointed out, however, that any attempt to enumerate the areas of protected expression, as the draft Law implicitly attempts to do, runs the risk of leaving some categories out – with the inference potentially being drawn that the protections of freedom of expression do not extend to the areas not enumerated. For example, Article 3 specifically excludes "public institutions" from its protection of freedom of expression. Yet, it is well established in international law that *public broadcasters* should be accorded a degree of freedom of expression comparable, if not identical, to that accorded to private broadcasters. Moreover, there are other areas and contexts in which public officials need to be accorded at least a limited

[24] We put the term 'press' in quotations because the draft Law does not define it. We assume, based on a number of considerations – including the fact that the draft Law provides that the existing mass media law shall become void – that the term includes broadcast as well as print media.

right to freedom of expression. Similarly, a fully compliant freedom of expression regime must extend protections to commercial expression.[25]

Given the possibility that the unenumerated areas will be thought to fall outside the protections of the draft Law's freedom of expression regime, the draft Law should contain a provision making explicit that areas specifically mentioned in the Law which are accorded freedom of expression protection are not necessarily the only areas enjoying such protection; and that (at least) any area of expression which receives protection under international law is to be protected in Georgia.

Recommendation:

- The draft Law should specify that the enumeration of areas of protected expression is not exhaustive, and that any area of expression protected under international law receives protection under the draft Law.

2. Restrictions on Freedom of Expression

Article 7 is the draft Law's general provision providing for when the rights recognised in Article 3 and elsewhere in the Law may be restricted. Article 7(1) requires that a limitation may only be imposed by law, and that any such law must be "clear and predictable and narrowly tailored", as well as general in application. Moreover, the "public good protected by [the limitation imposed by the law must be] … greater than the damage caused by the limitation". Finally, Article 7(2) provides that any such law "should be":

> a) compatible with legitimate aims
> b) critically essential for existence of a democratic society;
> c) non-discriminatory;
> d) proportional.[26]

Subject to some reservations noted below, this articulation of the conditions that a restrictive law must satisfy complies reasonably well with international standards, and represents an advance over – or, perhaps better, an elaboration of – the Constitutional protection of freedom of expression, according to which any restriction must be "necessary in a democratic society for the guarantee of" a set of enumerated aims that are themselves generally legitimate. In effect, Article 7 may be understood in general terms as a development of the meaning of 'prescribed by law' and 'necessary'.

First, we note a difficulty, at least in principle, with the idea of trying to make an "ordinary" law of this sort impose conditions on further and, in particular, future laws in

[25] The reference in Article 8(f) to permissible content restrictions on "advertisement, TV shopping or sponsorship" may be particularly problematic, as potentially implying that commercial expression may enjoy little or no protection.

[26] Article 1 defines the critical terms that appear in Article 7, including 'narrowly tailored', 'generally applicable law', 'proportional limitation', 'critically necessary limitation in a democratic society', and 'nondiscrimination'. Given the general nature of this commentary, we do not analyse most of these definitions in detail. We do, however, note and discuss the definition of 'legitimate aim' below in the text.

the same area. We assume that Georgia, like most jurisdictions, accepts the principle that a later law inconsistent with an earlier law takes precedence over the earlier law. Thus, a later legislature need only pass a law restricting freedom of expression which, for example, is not "narrowly tailored", to effectively "overrule" the Article 7 requirement that any such expression-restrictive law be narrowly tailored.

However, if the draft Law were presented as a law *interpreting the Constitution* – perhaps, specifically interpreting the Article 24 requirement that any restriction on freedom of expression must be necessary in a democratic society for the guarantee of the legitimate aims therein enumerated – its status might be enhanced and this would help avoid this problem. This is because, as we assume to be the case, a constitutional provision in Georgia "trumps" any ordinary legislation. There would be, therefore, some chance that a piece of admittedly ordinary legislation that claimed as its purpose the interpretation of a constitutional text might be accorded a certain authority that other ordinary legislation might not have.

There might well be a very useful place, in Georgia's particular context, for a law which at least set out such an authoritative interpretation of the meaning of the Constitutional concept of 'necessary'. Accordingly, we would recommend that the draft Law's Preamble contain language indicating that this is precisely its intent and effect.

Were this to be the role of the draft Law, certain changes would need to be made in Article 7. First, as it presently stands, Article 7 provides that a law restricting freedom of expression need only be *compatible with* one of the aims enumerated in the Constitution. However, as noted in Section II above, the three-part test for restrictions on freedom of expression requires something more precise: it requires that any restriction be "in the interests of" (Article 10 of the European Convention) or "for the protection of" (Article 19 of the ICCPR) legitimate aims (that is, the aims deemed legitimate by the respective instruments). In other words, the restriction must actually advance the interest it serves. By contrast, Article 7 effectively permits a restriction as long as it doesn't *clash with* one of the Constitution's aims. This provides much more leeway for abusive restrictions. We recommend, therefore, that Article 7 provide that any restriction on freedom of expression be "in the interests of" or "for the protection of" one or another of the Constitution's legitimate aims.

Furthermore, Article 1 of the draft Law specifies as "legitimate aims" those set out in Articles 24(4) and 26(3) of the Constitution. While the Article 24(4) aims are closely modelled on the aims enumerated in Article 10(2) of the European Convention, the "aims" provided for in Article 26(3) of the Constitution are somewhat problematic. As already noted above, the latter involve ensuring the elimination of "public and political entities whose goal is to overthrow or change the Constitutional order of Georgia by force, or violate the independence of the country or violate the country's territorial integrity or advocate war and violence, or attempt to induce ethnic, racial, social and national unrest …". These aims are drafted in terms which tend to be overbroad and therefore subject to abuse, and they are in any event arguably duplicative of the Article 24(4) aim of the protection of "state and public security". In any case, Article 26(3) of the

Constitution does not purport to limit freedom of expression. It would, therefore, be better to restrict the legitimate aims recognised by the draft Law to those aims enumerated in Article 24(4) of the Constitution.

Second, we note that certain necessary protections of freedom of expression cannot be in the form of laws of *general application*. For example, as the drafters are well aware, special protections are necessary for journalists and mass media editors, such as the right to protect confidential sources of information. In the freedom of information context, certain duties must devolve upon public officials and perhaps officials of certain private bodies. Provisions relating to these matters necessarily would not be of general application. And, broadcast regulation is a very specific area of law governing only broadcasting. Consequently, a general provision of the sort set out in Article 7, which would establish the conditions that a freedom of expression law must satisfy, should not and cannot require that *all* such laws must be of general application.[27]

Third, while Article 4, which provides for access to the courts in cases where one's freedom of expression has been improperly restricted, is welcome, it requires somewhat more detail. This is because different "fields" within the freedom of expression context may well require different means by which restrictions on the freedom are to be appealed. For example, a restriction on the right to receive official information requires a highly expedited system – because, in the typical case, the information is needed in a timely fashion and delays in receiving it can seriously undermine its usefulness. The best solution is to provide an efficient and swift appeals mechanism to an independent administrative body which has the power to render binding decisions, along with a right to appeal from there to the courts.

Recommendations:

- The draft Law should contain language in a Preamble specifying that it serves, in whole or in part, as an interpretation of the freedom of expression protections provided for in Article 24 of the Georgian Constitution.
- Article 7 should provide that any restriction on freedom of expression must be "in the interests of" or "for the protection of" the legitimate aims recognised (by reference) by the draft Law.
- The requirement in Article 7 that any law restricting freedom of expression must be a law of general application should be removed, or modified to take into account the need for certain specifically-directed laws.
- Article 4 should be redrafted to acknowledge the need, in certain freedom of expression contexts, for appeals to independent administrative bodies.

B. Specific Provisions of the Draft Law

We turn now to three substantive areas which the draft Law addresses in more or less detail, which merit particular comment in this Memorandum.

[27] On the other hand, it is very clear that many such laws *must* be of general application. This, perhaps, is another reason for adopting a somewhat more "topical" approach to a freedom of expression regime, consisting of a set of specialized laws addressing particular aspects of the right to expression.

1. Defamation

The draft Law devotes considerable space to defamation – six articles out of 25 are specifically related to defamation, in addition to the definition in Article 1.[28] The number of such articles would seem to be disproportionate in a law that is supposed to cover the entire field (as compared, for example, to the few provisions relating to freedom of information, freedom of the press and so on) and yet, on the other hand, they are not sufficiently defined and precise to function as a full defamation regime. To take just a single example, a fully adequate defamation law must unambiguously provide that damages for defamation must (almost) never include a punitive component; and more generally, that such damages should be proportionate to the damage caused to the plaintiff's reputation.

We refrain from further detailed commentary of the defamation provisions, because ARTICLE 19, as part of its mandate for this project, has prepared a full analysis of Georgia's current civil and defamation provisions, and is also in the process of consulting with local partners on a new defamation law. We reiterate our view, however, that defamation merits treatment in a separate law, replacing the existing provisions.

2. Freedom of Information

Some elements which we understand as being included in the right to information appear to be provided for in the draft Law, for example, in Article 13, which limits liability for disclosure of secret information. We recommend that this provision be transferred to a comprehensive law on freedom of information, along the lines of ARTICLE 19's *Model Freedom of Information Law.*[29]

3. Broadcasting

Broadcast regulation is complex and multi-faceted and requires detailed separate in a specific broadcasting law (or two laws dealing, respectively, with public and private broadcasting).[30]

Recommendations:

- The specific, detailed provisions relating to defamation, and those relating to freedom of information, should be removed from the draft Law.
- We note the need for detailed, freedom of expression complaint laws on defamation, freedom of information and broadcasting (public and private) to replace or update the existing regimes for these sectors.

[28] The definition of 'defamation' presents substantive problems of its own. 'Defamation' is defined as any "statement, which contains substantially false facts and faultily damaged the plaintiff". This definition reaches far beyond false statements that harm the *reputation* of a person; for example, under the definition, a false statement that simply shocks, or offends a person might be reasonably held to "damage" the person. A great many such statements should be fully protected by a freedom of expression regime.

[29] Existing provisions, for example in the General Administrative Code, are positive but, to the extent that they do not provide for the guarantees in Article 13 of the draft Law, and perhaps some other essential elements of a modern freedom of information regime, incomplete.

[30] We are aware that Liberty, in conjunction with other organisations and individuals, is working on draft laws for public and private broadcasters.

C. Certain Restrictive Provisions

Article 8 of the draft Law sanctions "content regulation" in nine areas, including defamation; obscenity; incitement of criminal action; intimidation; state, commercial or personal secrets; advertisement, TV shopping or sponsorship; speech by an administrative body, its official or member; speech by a detained person; and speech by a person without or limited legal capacity.

ARTICLE 19 has serious reservations about this article. In the first place, while the intended effect may be to further limit the field of legitimate restrictions on freedom of expression, the fact that certain categories of content are enumerated may be read as an authorisation to legislate restrictions in these areas – with the always-attendant risk that such legislation will be too broad or in other ways violative of freedom of expression. In this regard, we note again the potential difficulty that Article 7 may not constrain future legislative acts in the way that the drafters have intended. Furthermore, Article 8 does not even limit content regulation to the list of areas provided (in other words, it does not purport to be exclusive).

Second, putting aside the potential for abuse, it is not clear that Article 8 in any way assists the protection of freedom of expression, in light of the principles laid out in Article 7. The latter principles apply "across the board", and therefore already impose appropriate limits on the content restrictions listed in Article 8. Accordingly, Article 8 performs an independent function only to the extent that it defines the areas it lists which, as just noted, is problematical.

Finally, there is always some danger in trying to "pin down" categories of content for potential restriction by means of legislative definition. To take a single example, 'obscenity' is defined in Article 1 (for the purposes of Article 8) as any "statement not containing any political, cultural, educational or scientific value but harshly violating universally recognised ethical norms of society and intended to degrade individual's self-esteem and dignity". This definition is vague and could be subject to overbroad interpretation: at a minimum, the reference to "universally recognised ethical norms of society" is unclear and is no doubt open to a wide range of interpretations. As jurisdictions around the world have learned, it is extremely difficult to provide clear definitions of the terms set out in Article 8; instead, careful elaboration pursuant to a clear test for restrictions on freedom of expression, as provided by Article 7, is the more desirable option.

Recommendation:

- Article 8 should be removed from the draft Law.

D. Other Provisions

The draft Law contains at least two other provisions that we believe should be removed. One of these is Article 6, which provides for the possibility of private arbitration with respect to civil disputes on issues regulated by the draft Law. A provision of this sort should find its place, if anywhere, in a law regulating private arbitration generally. The other is Article 16, which provides that the media may establish their own standards, as

well as an ombudsman or other similar institution for protecting such standards. This article, presumably, is quite unnecessary given the right to create and join any association, guaranteed by Article 26(1) of the Constitution. Singling out the media for special mention in this regard may set up the inference that, absent such provision, and Article 26(1) of the Constitution notwithstanding, they would not enjoy the right to associate freely subject to their own rules and limitations. Such an inference, of course, is to be avoided.

Recommendation:

- Articles 6 and 16 should be removed from the draft Law.

IV. Conclusion

ARTICLE 19 applauds the effort to develop a law that amplifies and clarifies the general protection of freedom of expression contained in the Georgian Constitution. We believe that there may well be a place for such an interpretive law, provided that it remains at a highly general level, perhaps spelling out in detail the three-part test for restrictions on freedom of expression recognised by the European Court in its authoritative interpretation of the European Convention. On the other hand, however, we think that the drafting effort highlights the special problems that arise when a single law attempts to regulate all aspects of the highly complex and substantial terrain of freedom of expression. The effort perhaps provides a particularly useful way of seeing that that terrain needs to be carefully subdivided as a legal matter, and that many such subdivisions, differing importantly one from the other, need to be treated fully and separately in different legislative or regulatory enactments.