



Guide to the Law of Georgia on Freedom of Speech and Expression

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1. INTRODUCTION

This Guide provides guidance and commentary on the recently-enacted “Law of Georgia on Freedom of Speech and Expression”.¹ This progressive and forward-looking Law is a significant step forward in terms of promoting respect for freedom of expression in Georgia. It elaborates on the content of the right to freedom of expression, explains its fundamental status in a democracy and provides clear principles on when it may be restricted and the safeguards that need to be in place to prevent abuse of those restrictions. The Law also elaborates on a number of rights and privileges that are implicit in the right to freedom of expression, such as journalists’ right to protect the confidentiality of their sources and the protection of whistleblowers - individuals who release information on wrongdoing. It is unique in the region and, if properly implemented and applied, will provide Georgian journalists and others with guarantees that are fully in line with international standards.

We believe that the Law will achieve its greatest effect if its provisions are well understood by those to whom they apply. An important purpose of this Guide, therefore, is to provide readers with a document that describes the rights granted by the Law in simple and straightforward terms. At the same time, like all laws, this Law will need to be interpreted and applied by legal professionals. The Law clearly draws inspiration from international human rights standards and, pursuant to the Georgian Constitution, it has to be applied in a manner which ensures consistency with the highest such standards. A related purpose of this Guide, therefore, is to provide legal professionals with the international human rights law context within which the Law must be interpreted.

The Guide consists of four sections. Section I, which you are reading now, is the introduction. Section II sets out general international law principles on the right to freedom of expression. The Law draws on international standards and Article 2 of the Law requires that it is interpreted in accordance with the highest of these standards, and this Section therefore elaborates in some detail on the high status in international law of the right to freedom of expression and the narrow circumstances in which it may be limited. In addition, Section II provides some background and discussion on the provisions in Georgia’s Constitution that protect the right to freedom of expression. Sections III and IV go on to discuss the Law. Section III provides a general overview of the Law and Section IV provides guidance and elaboration on the detail of its provisions. Throughout, we provide examples on how the Law will operate in everyday life and we provide legal professionals with links to the international legal standards that underpin the Law.

For comments and feedback on this Guide, please contact the ARTICLE 19 Law Programme, via email: law@article19.org.

¹ In January 2004, ARTICLE 19 published a Memorandum on a draft version of the Law, analysing it against international standards. This is available at <http://www.article19.org/docimages/1891.doc>.

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2. FREEDOM OF EXPRESSION IN INTERNATIONAL LAW

The right to freedom of expression enjoys very strong protection under international law. Article 19 of the *Universal Declaration on Human Rights* (UDHR), the flagship human rights document drawn up under the auspices of the United Nations and adopted in 1948, 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.²

This provision has now passed into what is known as customary international law, the body of law that is considered binding on all States as a matter of international custom.³ Freedom of expression finds further protection in a number of international treaties - legal instruments that States have signed up to and are legally bound to protect. For Georgia, the most important of these are the *International Covenant on Civil and Political Rights* (ICCPR),⁴ an international treaty ratified by over 150 States, and the *European Convention on Human Rights* (ECHR),⁵ a treaty ratified by all Member States of the Council of Europe. Both treaties contain provisions guaranteeing the right to freedom of expression in wording similar to the UDHR. Article 19 of the ICCPR states:

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.

Article 10(1) of the ECHR 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 licensing of broadcasting, television or cinema enterprises.

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

³ For judicial opinions on human rights guarantees in customary international law, see *Barcelona Traction, Light and Power Company Limited Case (Belgium v. Spain) (Second Phase)*, ICJ Rep. 1970 3 (International Court of Justice); *Namibia Opinion*, ICJ Rep. 1971 16, Separate Opinion, Judge Ammoun (International Court of Justice); *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd Circuit). For an academic critique, see M.S. McDougal, H.D. Lasswell and L.C. Chen, *Human Rights and World Public Order*, (Yale University Press: 1980), pp. 273-74, 325-27.

⁴ UN General Assembly Resolution 2200A(XXI), adopted 16 December 1966, in force 23 March 1976. Georgia ratified the ICCPR on 3 May 1994.

⁵ Adopted 4 November 1950, in force 3 September 1953. Georgia ratified the ECHR on 20 May 1999.

This provision and the case law developed under it by the European Court of Human Rights are of particular importance here since the Georgian Law on Freedom of Speech and Expression refers explicitly to them. It is also the only international human rights treaty ratified by Georgia under which individuals can take complaints of violations to an international court, the European Court of Human Rights.⁶

Reflecting its global recognition, the right to freedom of expression is also protected in the two other regional human rights instruments, at Article 13 of the *American Convention on Human Rights*⁷ and at Article 9 of the *African Charter on Human and Peoples' Rights*.⁸ The right to freedom of expression enjoys a prominent status in each of these regional conventions and, although not directly binding on Georgia, judgments and decisions issued by courts under these regional mechanisms offer authoritative interpretations of freedom of expression principles in various different contexts.

2.1. The importance of freedom of expression

Freedom of expression is a key human right. Not only is it a fundamental human value in and of itself, freedom of expression also provides a key underpinning for democracy - there can be no democracy if people are not free to say what they want and do not receive sufficient information to cast an informed vote - and it is key to enforcing other rights. This has been recognised by international courts and bodies worldwide. It is worth recalling that at its very first session, in 1946, the UN General Assembly adopted Resolution 59(I) which states: "Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated."⁹

This has been echoed by other courts and bodies. For example, the UN Human Rights Committee has said:

The right to freedom of expression is of paramount importance in any democratic society.¹⁰

The European Court of Human Rights has also elaborated on the importance of freedom of expression:

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

⁶ For an explanation of how to bring a case before the European Court of Human Rights as well as an application form, see <http://www.echr.coe.int/Eng/General.htm>. Although Georgia is a party to the ICCPR, the UN Human Rights Committee can only hear complaints from individuals if the State Party has also ratified the Option Protocol. Georgia has not yet done this.

⁷ Adopted 22 November 1969, in force 18 July 1978.

⁸ Adopted 26 June 1981, in force 21 October 1986.

⁹ 14 December 1946. "Freedom of information" is referred to in the broad sense of the free circulation of information and ideas.

¹⁰ *Tae-Hoon Park v. Republic of Korea*, 20 October 1998, Communication No. 628/1995, para. 10.3.

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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’.¹¹

The guarantee of freedom of expression applies with particular force to the media. The European Court of Human Rights has consistently emphasised the “pre-eminent role of the press in a State governed by the rule of law.”¹² 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.¹³

And, as the UN Human Rights Committee has stressed, a free media is essential in the political process:

[T]he free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.¹⁴

The Inter-American Court of Human Rights has stated: “It is the mass media that make the exercise of freedom of expression a reality.”¹⁵ The media as a whole merit special protection, 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’.”¹⁶

The European Court of Human Rights has also 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”.¹⁷

¹¹ *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72, para. 49. Statements of this nature abound in the jurisprudence of courts and other judicial bodies around the world.

¹² *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63.

¹³ *Castells v. Spain*, 24 April 1992, Application No. 11798/85, para. 43.

¹⁴ UN Human Rights Committee General Comment 25, issued 12 July 1996.

¹⁵ *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.

¹⁶ *Thorgeirson v. Iceland*, note 12, para. 63.

¹⁷ See *Castells v. Spain*, note 13, para. 43; *The Observer and Guardian v. UK*, 26 November 1991, Application No. 13585/88, para. 59; and *The Sunday Times v. UK (II)*, 26 November 1991, Application No. 13166/87, para. 65.

These are important statements. They illustrate the high value attached to freedom of expression and independence of the media and guide courts and other decision makers in situations where freedom of expression conflicts with other societal values.

The European Court has demanded that freedom of expression be granted strong protection. It has considered several hundred cases in which people complained that their right to freedom of expression had been violated and it has often criticised national authorities for wrongly attaching too high a status to values such as reputation or privacy. For example, in one case, it found a violation of the right to freedom of expression where a Portuguese court had fined a newspaper editor for referring to a political candidate as “grotesque”, “buffoonish” and “coarse”.¹⁸ The Court stressed that in the context of political debate, “political invective often spills over into the personal sphere; such are the hazards of politics and the free debate of ideas, which are the guarantees of a democratic society.”¹⁹ In another case, the Court found a violation where an Austrian journalist had been convicted for referring to a politician as a “Trottel”, an insulting German term that can be translated loosely as ‘idiot’.²⁰ Considering that the journalist had responded to particularly provocative and controversial comments by the politician and that he had provided some objective justification for calling him an ‘idiot’, the Court found that this did not overstep the bounds of what was permissible: “It is true that calling a politician a Trottel in public may offend him. In the instant case, however, the word does not seem disproportionate to the indignation knowingly aroused by [the politician].”²¹

2.2. 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 10(2) of the *European Convention on Human Rights* lays down the conditions under which the right to freedom of expression may be restricted:

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.

¹⁸ *Lopes Gomes da Silva v. Portugal*, 28 September 2000, Application No. 37698/97.

¹⁹ *Ibid.*, para. 34.

²⁰ *Oberschlick v. Austria (No. 2)*, 1 July 1997, Application No. 20834/92.

²¹ *Ibid.*, para. 34.

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Similar formulations can be found in the *International Covenant on Civil and Political Rights* and in the *American Convention on Human Rights*. These have been interpreted as requiring restrictions to meet a strict three-part test:²²

1. the restriction must be prescribed by law;
2. the restriction must pursue a legitimate aim - in the case of the European Convention, those listed in Article 10(2); and
3. the restriction must be “necessary in a democratic society”.

Courts around the world have elaborated on each of the three parts of this test. We will elaborate on them in the following paragraphs.

2.2.1. Prescribed by law

International law and most constitutions only permit restrictions on the right to freedom of expression that are set out in law. This implies not only that the restriction is based in law, but also that the relevant law meets certain standards of clarity and accessibility. The European Court of Human Rights has elaborated on the requirement of “prescribed by law” under the ECHR:

[A] norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given situation may entail.²³

This is akin to the “void for vagueness” doctrine established by the US Supreme Court, which is also found in constitutional doctrine in other countries.²⁴ The US Supreme Court has explained that loosely worded or vague laws may not be used to restrict freedom of expression:

Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute “abut[s] upon sensitive areas of basic First Amendment freedoms,” it “operates to inhibit the exercise of [those] freedoms.” Uncertain meanings inevitably lead citizens to “‘steer far wider of the unlawful zone’ . . . than if the boundaries of the forbidden areas were clearly marked.” (references omitted)²⁵

²² See *The Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, para. 45 (European Court of Human Rights). See also *Mukong v. Cameroon*, 21 July 1994, Communication No. 458/1991, para. 9.7 (UN Human Rights Committee).

²³ *The Sunday Times v. United Kingdom*, note 22, para.49.

²⁴ See, for example, the Canadian Charter of Rights and Freedoms, Section 1; Dutch Constitution, Article 13.

²⁵ *Grayned v. City of Rockford*, 408 U.S. 104, 108-9.

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Laws that grant authorities excessively broad discretionary powers to limit expression fail the requirement of “prescribed by law”. The UN Human Rights Committee, the body of independent experts appointed under the ICCPR to monitor compliance with that treaty, has repeatedly expressed concern about excessive discretion in the context of media regulation.²⁶ National courts have expressed the same concern. In *Re Ontario Film and Video Appreciation Society v. Ontario Board of Censors*, the Ontario High Court considered a law granting the Board of Censors the power to censor any film it did not approve of. In striking down the law, the Court noted that the evils of vagueness extend to situations in which unfettered discretion is granted to public authorities responsible for enforcing the law:

It is accepted that law cannot be vague, undefined, and totally discretionary; it must be ascertainable and understandable. Any limits placed on the freedom of expression cannot be left to the whim of an official; such limits must be articulated with some precision or they cannot be considered to be law.²⁷

Finally, where a law provides for the imposition of penalties or damages - for example, in the area of defamation - clear guidance must be provided as to the amount. In the United Kingdom, the Court of Appeal applied the “prescribed by law” requirement to a defamation case in which an award of £250,000 had been made against a newspaper. The Court reversed the award, holding that the practice in which a jury was free to award damages without any guidance whatsoever was wholly unpredictable and could amount to a violation of the defendant’s right to freedom of expression.²⁸ Defamation laws should therefore provide clear guidance on the level of damages that may be awarded.

2.2.2. *Legitimate aim*

The *European Convention on Human Rights* provides a full and exhaustive list of the legitimate aims that may justify a restriction on freedom of expression. It is clear from both the wording of Article 10(2) of the ECHR and the views of the European Court of Human Rights that restrictions on freedom of expression that do not serve one of the legitimate aims listed in Article 10(2) constitute a violation of the right to freedom of expression.²⁹ This is also the position under the ICCPR and ACHR.³⁰ To satisfy this part of the test, a restriction must truly pursue one of the legitimate aims; it is illegitimate to invoke a legitimate aim as an excuse to pursue a political or other illegitimate agenda.³¹

²⁶ See its Concluding Observations on Kyrgyzstan, 24 July 2000, UN Doc. CCPR/CO/69/KGZ, para. 21; and its Concluding Observations on Lesotho, 8 April 1999, UN Doc. CCPR/C/79/Add.106, para. 23.

²⁷ (1983) 31 O.R. (2d) 583 (Ont. H.C.), p. 592.

²⁸ *Rantzen v. Mirror Group Newspapers* [1993] 4 All ER 975 (CA).

²⁹ See, for example, *Sunday Times v. the United Kingdom*, note 22, paras. 54-57.

³⁰ See, for example, *Mukong v. Cameroon*, note 22, para. 9.7; and *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 15 (Inter-American Court of Human Rights).

³¹ Article 18, ECHR. See also *Benjamin and Others v. Minister of Information and Broadcasting*, 14 February 2(1), Privy Council Appeal No. 2 of 1999, (Judicial Committee of the Privy Council).

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To satisfy this second part of the test for restrictions on freedom of expression, it is not sufficient that the restriction in question has a merely incidental effect on the legitimate aim. The restriction must be primarily directed at that aim, as the Indian Supreme Court has noted:

So long as the possibility [of a restriction] being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly unconstitutional and void.³²

In assessing the legitimate aim, courts go beyond the general aim the law serves and look at its specific objectives. The Canadian Supreme Court has noted:

Justification ... requires more than the general goal of protection from harm common to all criminal legislation; it requires a specific purpose so pressing and substantial as to be capable of overriding the Charter's guarantees.³³

In assessing whether a restriction on freedom of expression addresses a legitimate aim, regard must be had to both its purpose and its effect. Where the original purpose was to achieve an aim other than one of those listed, the restriction cannot be upheld:

[B]oth purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation.³⁴

2.2.3. Necessary in a Democratic Society

The third part of the test is often the most critical. Different constitutions and treaties use different terms to describe the third part of the test for restrictions on freedom of expression; treaties normally permit only restrictions which are 'necessary' while national constitutions use a range of terms including 'reasonably justifiable in a democratic society', 'reasonably required in a democratic society' and various other related combinations.

Regardless of the precise phrase used, this part of the test presents a high standard to be overcome by the State seeking to justify the restriction. The use of the word "necessary" in international law implies that, when deciding to restrict freedom of expression, the government must be faced with a situation of need, not merely convenience. The European Court has held:

[W]hilst the adjective "necessary", within the meaning of Article 10 (2), is not synonymous with "indispensable", neither has it the flexibility of such expressions as "admissible", "ordinary", "useful", "reasonable" or "desirable".³⁵

The European Court has further elaborated that necessity involves an analysis of whether:

³² *Thappar v. State of Madras*, (1950) SCR 594, p.603.

³³ *R. v. Zundel*, (1992) 2 SCR 731, p.733.

³⁴ *R. v. Big M Drug Mart Ltd.*, (1985) 1 SCR 295, p.331 (Supreme Court of Canada).

³⁵ *Sunday Times v. the United Kingdom*, note 22, para. 59.

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[There is a] “pressing social need” [whether] the inference at issue was “proportionate to the legitimate aim pursued” and whether the reasons adduced...to justify it are “relevant and sufficient.”³⁶

Courts around the world have elaborated on the specific requirements of this test. Three distinct elements can be discerned. First, the measures taken must be carefully designed to meet the objective in question. They should not be arbitrary, unfair or irrational.³⁷ If a government cannot provide any evidence to show that a particular interference with freedom of expression is necessary, that interference will fail on this ground.³⁸ While States may, perhaps even should, protect various public and private interests, in doing so they must carefully design the measures taken so that they focus specifically on the objective. It is a very serious matter to restrict a fundamental right and, when considering imposing such a measure, States are bound to reflect carefully on the various options open to them.³⁹

Second, the interference should be designed to impair “as little as possible” the right to freedom of expression.⁴⁰ If there are various options to achieve a State objective - say, the prevention of crime or disorder - then the one which least restricts the protected right must be selected.⁴¹ In applying this criterion, courts have recognised that there may be practical limits on how finely honed and precise a legal measure may be. But subject only to such practical limits, restrictions must not be overbroad. Constitutional courts such as the US Supreme Court have commented on the important nature of this requirement:

Even though the Government’s purpose be legitimate and substantial, that purpose cannot be pursued by means that stifle fundamental personal liberties when the end can be more narrowly achieved.⁴²

Third, there must be a proportionality between the effects of the measures taken on the right concerned and the objective of the measures.⁴³ The harm to freedom of expression must not outweigh the benefits in terms of the interest protected. A restriction which provided limited protection to reputation but which seriously undermined freedom of expression would not pass muster.⁴⁴ Democratic societies

³⁶ See *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, EHRR 407, paras. 39-40.

³⁷ *Cf. R. v. Oakes* (1986), 1 SCR 103, pp.138-139 (Supreme Court of Canada).

³⁸ See, for example, *Autronic v. Switzerland* (22 May 1990, Application No. 12726/87, European Court of Human Rights) where the respondent State argued it needed to restrict the availability of satellite dishes in order to protect confidential satellite communications, but it could not provide any evidence that these signals could be picked up with ordinary satellite dishes.

³⁹ For example, in *Observer and Guardian v. the United Kingdom*, note 17, the European Court of Human Rights found a violation of the newspapers’ right to freedom of expression because the respondent government could have pursued other, less intrusive options and achieved the same result.

⁴⁰ *R. v. Big M Drug Mart Ltd.*, note 34, p.352 (Supreme Court of Canada).

⁴¹ See the judgment of the Inter-American Court of Human Rights in *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 15, para. 46.

⁴² *Shelton v. Tucker*, 364 US 479 (1960), p. 488.

⁴³ *R. v. Oakes*, note 37, pp.138-139 (Supreme Court of Canada).

⁴⁴ See, for example, *Open Door Counselling and Dublin Woman Well Centre and Others v. Ireland*, 29 October 1992, Application No. 1423/88 and 142335/88 (European Court of Human Rights), para.

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depend on the free flow of information and ideas and it is only when the overall public interest is served by restricting that flow that such a restriction can be justified. This implies that the benefits of any restriction must outweigh the costs for it to be justified.

2.3. Constitutional guarantees

The Constitution of Georgia⁴⁵ includes a number of guarantees for freedom of expression, of the media and of information. These include the following:

Article 19

1. Everyone has the right to freedom of speech, thought, conscience, religion and belief.
2. The persecution of a person on the account of his/her speech, thought, religion or belief as well as the compulsion to express his/her opinion about them shall be impermissible.

Article 23

1. The freedom of intellectual creation shall be guaranteed. The right to intellectual property shall be inviolable.
2. Interference in creative process, censorship in the field of creative activity shall be impermissible.
3. The seizure of creative work and prohibition of its dissemination shall be impermissible unless it infringes upon the legal rights of others.

Article 24

1. Everyone has the right to freely receive and impart information, to express and impart his/her opinion orally, in writing or by in any other means.
2. Mass media shall be free. The censorship shall be impermissible.
3. Neither the state nor particular individuals shall have the right to monopolise mass media or means of dissemination of information.

Article 41

1. Every citizen of Georgia shall have the right to become acquainted, in accordance with a procedure prescribed by law, with the information about him/her stored in state institutions as well as official documents existing there unless they contain state, professional or commercial secret.
2. The information existing on official papers pertaining to individual's health, his/her finances or other private matters, shall not be accessible to any one without the consent of the individual in question except in the cases determined by law, when it is necessary for ensuring the state security or public safety, for the protection of health, rights and freedoms of others.

It may be noted that Articles 19 and 24 appear largely to overlap, providing aggrieved individuals with two potential routes for vindication of the right to freedom of expression.⁴⁶

73.

⁴⁵ Adopted on 24 August 1995, as amended.

⁴⁶ We note that Article 19 makes a link between freedom of thought, conscience, religion and belief and freedom of expression. It may be that in the original Georgian, this link is stronger and Article 19 is concerned only with the expression or manifestation of thought, conscience, religion and belief. This would make it narrower in scope than Article 24 which, on a literal reading, covers both receiving and imparting "information", and expressing "opinions". The distinction would be akin to that between Articles 18 and 19 of the ICCPR: the former recognises the right to freedom of

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These strong guarantees are supplemented by provisions making it clear that the Constitution is the supreme law, that the State and others exercising authority are bound to respect the rights guaranteed by the Constitution, that national laws must conform to both the Constitution and international standards, and that, to the extent of any inconsistency, international treaties take precedence over national laws. The following provisions are particularly relevant in this regard:

Article 6

1. The Constitution of Georgia shall be the supreme law of the state. All other legal acts shall correspond to the Constitution.
2. The legislation of Georgia shall correspond to universally recognised principles and rules of international law. An international treaty or agreement of Georgia unless it contradicts the Constitution of Georgia, the Constitutional Agreement, shall take precedence over domestic normative acts.

Article 7

The state shall recognise and protect universally recognised human rights and freedoms as eternal and supreme human values. While exercising authority, the people and the state shall be bound by these rights and freedoms as directly acting law.

At the same time, the Constitution does provide for restrictions on the right to freedom of expression, freedom of the media and freedom of information. Article 19(3), modifying the general guarantee of freedom of expression, states:

The restriction of the freedoms enumerated in the present Article shall be impermissible unless their manifestation infringes upon the rights of others.

Article 24(4), modifying the guarantees in that provision for freedom to receive and impart information and for freedom of the media, states:

The exercise of the rights enumerated in the first and second paragraphs of the present Article may be restricted by law on such conditions which are necessary in a democratic society in the interests of ensuring state security, territorial integrity or public safety, for preventing of crime, for the protection of the rights and dignity of others, for prevention of the disclosure of information acknowledged as confidential or for ensuring the independence and impartiality of justice.

It is relevant to note here the permissible restrictions on the right to form public associations, found in Article 26, which may also impact in practice on the right to freedom of expression and which are specifically referenced in the Law on Freedom of Speech and Expression. These are found in Article 26(3), which states:

The formation and activity of such public and political associations aiming at overthrowing or forcibly changing the constitutional structure of Georgia, infringing upon the independence and territorial integrity of the country or

thought, conscience and religion and the right to manifest that freedom; the latter protects freedom of expression in its broader form. The distinction is only of limited relevance to the present analysis and we will not dwell on it.

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propagandising war or violence, provoking national, local, religious or social animosity, shall be impermissible.

Article 19(3) requires restrictions to conform to a single legitimate aim recognised under international law, namely protection of the rights of others. This clause thus recognises only very limited grounds as justifying restrictions. On the other hand, it does not meet the other two parts of the test for restrictions, namely that they be provided by law and be necessary in a democratic society. However, as noted above, Article 24 also substantially guarantees freedom of expression and so could effectively be used as an alternative to Article 19 where necessary. It may be noted that Article 24 closely models international provisions on restrictions on freedom of expression, particularly that found in Article 10(2) of the ECHR, imposing all three parts of the test for such restrictions. Although Article 24 recognises a much broader range of aims in pursuit of which expression may be restricted than Article 19, the list is nevertheless in accordance with the requirements of international law.

Article 26(3) is more problematic in that the list of aims in pursuit of which the right to associate may be restricted goes beyond what is permitted under international law. Specifically, the phrases “infringing upon the independence” of the country and “provoking national, local, religious or social animosity” are both subject to a range of interpretation. For example, a group which merely advocates for a closer collaboration between Georgia and certain other States, or which promotes the idea of democratically achieved independence for a particular region, something which is legitimate under the *European Convention on Human Rights*,⁴⁷ might be claimed to be “infringing upon the independence” of the country and consequently be banned. The term ‘animosity’ is similarly potentially subject to overbroad interpretation. This is not compatible with the requirements of international law.⁴⁸ We recommend that any restrictions on the right to associate and the closely connected right to freedom of expression be interpreted in accordance with international law.

In the case of a state of emergency, the Constitution also provides for restrictions on the right guaranteed in Article 24 - but not the expression rights guaranteed in Article 19.⁴⁹ Article 46(1) of the Constitution states:

In case of a state emergency or martial law, the President of Georgia shall be authorised to restrict the rights and freedoms enumerated in Articles 18, 20, 21, 22, 24, 25, 30, 33 and 41 of the Constitution either throughout the whole country or a certain part thereof. The President shall be obliged to submit the decision to the Parliament for approval within 48 hours.

⁴⁷ See, for example, *Sener v. Turkey*, 18 July 2000, Application No. 26680/95 (European Court of Human Rights).

⁴⁸ We made the same criticism in our Memorandum of January 2004 which discussed a draft of the current Law (see note 1).

⁴⁹ This may be because the expression rights in Article 19 can be read to be limited to thought, conscience, religion and belief (see our comments in note 46, above), the expression of which could not conceivably endanger national security (see also Article 4 of the ICCPR, which states that the right to freedom of thought, conscience and religion and its manifestation may not be derogated from, even in emergencies).

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Certain conditions are placed on the power to declare a state of emergency pursuant to Article 73(1)(h) of the Constitution but it may be noted that these do not conform to the conditions required under international law. Article 4 of the ICCPR, for example, places a number of conditions, both substantive and procedural, on the imposition of emergency derogations, as follows:

- derogations may only be entertained in times of emergency which threaten the life of the nation;
- derogations must be officially proclaimed;
- derogations may only limit rights to the extent strictly required and may never lead to discrimination;
- States imposing derogations must inform other States Parties of the rights to be limited and the reasons for such limitation; and
- derogating States must inform other States Parties of the termination of any derogations.

We recommend that, if a state of emergency is declared, the Georgian authorities act in accordance with the strict standards prescribed under the ICCPR to which it is bound under international law.

3. OVERVIEW OF THE LAW

The Georgian Law on Freedom of Speech and Expression was adopted in 2004. Its aim is to elaborate on the freedom of expression provisions found in the Georgian constitution and in the human rights treaties to which Georgia is a party, and explain how they operate in practice. To this end, the Law elaborates on both the content of the right to freedom of expression, detailing what rights and privileges fall under the general rubric of ‘freedom of expression’, and on the narrow circumstances under which freedom of expression may be restricted. In addition, the Law provides access to a court for persons whose right to freedom of expression has been violated or is about to be violated; and it protects ‘whistleblowers’ - persons who release information on wrongdoing that they have come across in the course of their employment.

The Law consists of five Chapters.

Chapter I sets out the various aspects of the right to freedom of expression that it protects, specifying this right is enjoyed by all persons except for administrative agencies. Freedom of expression is defined as including absolute freedom of thought and opinion; freedom of political speech and debate; freedom to search for, receive, create and distribute information; editorial independence and journalistic freedom to make editorial decisions based on their own conscience; academic and artistic freedom; freedom to use the language and alphabet of one’s choice; and the freedom to “expose” official wrong-doing, known as ‘whistleblowing’. Censorship is prohibited. Moreover, the Law makes it clear that *other* “generally accepted rights” related to freedom of expression are also protected, even if they are not explicitly mentioned, as long as they “can be implied from universally accepted general principles of human rights and freedoms”.

In terms of implementation, the Law provides for direct enforcement via court action. Anyone whose rights under the Law have been infringed or are about to be infringed may bring a legal action to prevent such infringement or to bring the infringement to an end and to be awarded compensation for it.

Chapter II sets out the various grounds on which freedom of expression may be restricted. This elaborates substantially on the grounds listed in the Constitution - which, as described above, is itself unclear on this point. The Law permits limited restrictions on the right to freedom of expression but they must serve one of the aims set out in Articles 24(4) and 26(3) of the Constitution. Furthermore, any restrictions must be transparent, narrowly defined in law, “critically necessary for the existence of a democratic society”, non-discriminatory and “proportionally limiting”. Restrictions must also be proportionate in the sense that their benefits outweigh the harm to freedom of expression. The Law provides a closed list of substantive grounds which restrictions must serve, such as restricting defamation and obscenity.

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Several provisions of Chapter II relate to the burden of proof in cases involving restrictions on freedom of expression. These provisions effectively create various presumptions in favour of freedom of expression which the party attempting to impose the restriction must overcome. Such presumptions include a requirement that evidence in cases involving an interference with freedom of expression must be incontrovertible, that doubt as to the applicability of a restriction shall be resolved against such application, that doubt as to whether a person is a public or private person or whether an issue is of public interest shall be decided in favour of the public option, and so on.

Chapter III of the Law deals with the issue of confidentiality from two angles: the protection of journalists sources, which it establishes as a strong privilege, and the disclosure of confidential information such as State or commercial secrets. It establishes that the privilege attached to journalists' confidential can be overcome only by a court decision and if the necessity for disclosure has been convincingly established. Chapter III also establishes that liability for disclosure of confidential information - such as State secrets, or commercially confidential information - may be imposed only where disclosure of that information would result in a direct and substantial danger to a value protected by law (such as the prevention of crime or national security).

Chapter IV of the Law contains a number of very specific rules on defamation. The provisions make a clear distinction between defamation of private person and defamation of a public figure, establishing different standards for each. A qualified privilege is established which protects the publication of false information so long as the publisher took steps to verify its accuracy and publication was in the public interest. The Law protects the publication of fair and accurate reports on events of public interest. It also provides that defamation claims must be made within 100 days of publication and it prohibits the bringing of clearly ill-founded defamation claims, for example those brought purely to harass a newspaper and to subject it to the costs and hassle associated with legal processes.

Chapter V provides two concluding provisions, stating that the Law enters into effect on the date of its promulgation - May 2004 - and that it repeals the earlier, similarly-named "Law of Georgia on Press and other Mass Media Means".

4. DETAILED COMMENTARY ON SPECIFIC PROVISIONS

This section of the Guide provides detailed guidance on the Law on Freedom of Speech and Expression. First, it discusses interpretation of the Law. Article 2, in particular, stipulates that the Law must be interpreted in accordance with international human rights law. Then, it discusses the substantive provisions, providing in-depth analysis of the rules set out in the Law and discussing relevant international human rights law. The Guide follows the structure of the law, but discussion is grouped around eight separate themes:

- interpretation of the law;
- the concept of ‘public interest’;
- general characteristics of freedom of expression;
- the content and nature of expression;
- the protection of confidential information and sources;
- the protection of whistleblowers;
- enforcement of the law;
- general rules on restrictions; and
- defamation.

4.1. Interpretation of the Law

Article 2: Interpretation

This law shall be interpreted in accordance with the Constitution of Georgia and the international commitments undertaken by Georgia, including the European Convention on Human Rights and the case law of the European Court of Human Rights.

Article 2 of the Law gives crucial direction to courts and decision makers on the interpretation of the Law. It builds on the Georgian Constitution, which requires all laws to be interpreted in accordance with the constitution and international treaties, but goes beyond that by expressly naming the European Convention on Human Rights and the case law of the European Court of Human Rights. Thus, the Law is placed in a clear human rights framework and Georgian Parliament has clearly stated its intention that the Law be interpreted in accordance with the progressive standards set by the human rights court in Strasbourg. The European Court of Human Rights has delivered hundreds of judgments on freedom of expression issues, dealing with issues ranging from defamation to broadcast regulation to hate speech, and Article 2 effectively provides each of these judgments with the force of domestic law, thus vastly enriching Georgian law. In court, lawyers may use these European judgments as they do other forms of legal

precedent and judges are required to decide cases before them in accordance with the European judgments.⁵⁰

Two other points are important. First, although the European Convention on Human Rights and the European Court are mentioned specifically, Article 2 requires that the Law is interpreted in accordance with all Georgia's international obligations.⁵¹ This includes not only the freedom of expression provisions found in the *International Covenant on Civil and Political Rights*, but also those included in the *Convention on the Rights of the Child* (CRC), for example, which sets high and specific standards regarding the rights of children to impart and receive information.⁵² Where the standards as established pursuant to authoritative interpretation by the relevant actors vary from one treaty to another, Georgia is bound to apply the highest standard.

Second, the purpose of the Law is to elaborate on the constitutional guarantees of freedom of expression. This point is not made explicitly in the Law but it is implicit in its approach - indeed, since it purports to limit other laws, it is necessary to see it as a constitutional instrument.⁵³ As such, constitutional approaches must be applied when interpreting the Law, including the concept that human rights should be understood expansively and as a living instrument, to be interpreted in the light of present-day conditions, rather than using a narrow, textually-based approach.⁵⁴ In other words, the Law must be interpreted in such a way as to give positive effect to the right to freedom of expression, rather than in a way that would restrict it unnecessarily.

4.2. Definitions: public interest

Article 1: Definitions

g) Public interest – the interest of society as a whole in events related to the exercise of self-government in a democratic state (not the simple

⁵⁰ This is a significant innovation. By including the case law of the European Court of Human Rights in the list of legal norms to be adhered to, the Law goes beyond the approach taken under Georgia's Constitution, which requires that international treaties to which Georgia is party are accorded force of law but which does not mention decisions taken by bodies tasked with interpreting and applying these treaties, such as the European Court. The Law also goes beyond Georgia's international law obligations. Under Article 46 of the European Convention, Georgia is bound only by those decisions of the European Court in cases to which it is a party.

⁵¹ See Article 6(2) of the Georgian Constitution.

⁵² Adopted 20 November 1989, entry into force 2 September 1990. Georgia acceded to the CRC on 2 June 1994.

⁵³ See, in particular, the rules established for restrictions on freedom of expression in Chapter II of the Law, which presumably seek to bind other laws.

⁵⁴ See, for example, *Sigurður A. Sigurjónsson v. Iceland*, 24 June 1993, Application No. 16130/90, para. 35 (European Court of Human rights); *R. v. Big M Drug Mart Ltd.* note 34, pp. 395-6.

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curiosity of individuals).

Article 1 of the Law sets out 23 definitions of key terms. These definitions are important: clarity of terms, always important in law, is of particular importance in a law relating to fundamental human rights. In general, and for reasons of clarity, we will elaborate on these definitions alongside the provisions they appear in in the following paragraphs. However, due to its general importance, the concept of “public interest” will be elaborated here. This concept is used in relation to the disclosure of secrets, where it serves to preclude liability for a disclosure which is aimed at protecting a public interest, and in relation to defamation, where again it serves to limit liability where the public interest in the statement outweighs the harm to reputation.

It is well established that there is a difference between the “public interest” and ‘what the public is interested in’, or “simple curiosity”, as the Law puts it.⁵⁵ At the same time, there is considerable scope as to what is included in the term public interest and, for fear of unduly limiting this concept, courts in many countries have been very reluctant to provide a concrete definition, tending instead to treat each case on its own merits. Courts have stressed that the concept is to be given a very wide reading and that where there is doubt, decisions should come down on the side of freedom of expression.⁵⁶ It is clear that, at a minimum, the ‘public interest’ includes discussion of matters that relate to the government and public bodies more generally. By extension, discussion of the functioning of individual officials - both elected and hired/appointed - is also of public interest. The US Supreme Court has indicated that the public interest extends to virtually all activities of these individuals, including those that fall in the private sphere:

[A]nything which might touch on an official’s fitness for office is relevant. Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these [401 U.S. 265, 274] characteristics may also affect the official’s private character.⁵⁷

The European Court of Human Rights has ruled that the ‘public interest’ extends to all matters of public concern and, in particular, that “there is no warrant ... for distinguishing ... between political discussion and discussion of other matters of public concern.”⁵⁸

Further indication of the scope of public interest may be gained from the way in which professional media bodies define it. The professional body for journalists in the United Kingdom, the National Union of Journalists, for example, formally defines it as including the detection or exposure of crime, the protection of public

⁵⁵ See, for example, *Fund for Constitutional Government v. National Archives & Records Service*, 656 F.2d 856, p. 866 (1981) (US, D.C. Circuit Court).

⁵⁶ See, for example, *A v. B (a company) and C*, [2002] EWCA Civ 337, 11 March 2002, Court of Appeal (United Kingdom).

⁵⁷ *Garrison v. Louisiana*, 401 U.S. 265, pp. 273-4.

⁵⁸ *Thorgeir Thorgeirson v. Iceland*, note 12, para. 64.

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health and safety, preventing the public from being misled by some statement of action of an individual or organisation, exposing of the misuse of public funds or corruption in public bodies, revealing conflicts of interest by those in positions of power and influence, exposing corporate greed and exposing hypocritical behaviour by those holding high office.⁵⁹

In light of this, Article 1(g) of the Law which defines the public interest as relating to “public self-governance in the democratic state” must be read as broadly as possible and at least include the elements discussed above. Examples of publications that the European Court of Human Rights has found to relate to issues of legitimate ‘public interest’ include the following:

- information about the activities of a country’s security services;⁶⁰
- health risks associated with medical drugs;⁶¹
- criticism of the functioning of a police department;⁶² and
- allegations of lack of independence in the judiciary.⁶³

4.3. General characteristics of freedom of expression

Article 3: Freedom of speech and expression

1. The State recognises and protects the right to freedom of expression as an inherent and supreme human value. The authority of people and of the State shall be circumscribed by the limits set by the right to freedom of expression.

2. Every person, except for administrative agencies, shall have the right to freedom of expression. This implies the following:

- a) absolute freedom of opinion;
- b) freedom of political speech and debate;
- c) freedom to obtain, receive, create, keep, process or disseminate any kind of information and ideas;
- d) prohibition of censorship, upholding the principles of editorial independence and pluralism of the media, and the right of journalists to retain confidentiality of the sources of information and to make editorial decisions based on his own conscience;
- e) freedom of academic learning, teaching and research;

⁵⁹ Their definition is available at: <http://www.nuj.org.uk/inner.php?docid=224>. The UK Press Complaints Commission, which is formally charged with entertaining public complaints from the media, employs a substantially similar definition of public interest in assessing such complaints. Available at: <http://www.pcc.org.uk/cop/cop.asp>. See also the Australian Public Interest Disclosure Act, Section 3 and the UK Public Interest Disclosure Act, Section 1.

⁶⁰ *Observer and Guardian v. the United Kingdom*, note 17.

⁶¹ *Sunday Times v. the United Kingdom*, note 22.

⁶² *Thorgeir Thorgeirson v. Iceland*, note 12.

⁶³ *Barfod v. Denmark*, 22 February 1989, Application No. 11508/85.

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- f) freedom of art, mastery and inventions;
- g) the right to speak any language and use any alphabet;
- h) the right to spend money on political campaigns;
- i) the right to release information on wrongdoing in the public interest and the protection of the whistleblowers;
- j) freedom from coercion, and freedom to express opinions on religion, belief, conscience, ethnical, cultural and social belonging, origin, family, property and social position as well as all the facts that may become a ground for restriction of a person's rights and freedoms.

3. This law does not affect the enjoyment of other rights, freedoms and guarantees provided for by the Constitution of Georgia and other universally recognized rights, freedoms and guarantees related to the freedom of expression, which are not reflected in this law but that are derived from universally recognised rights and freedoms.

Article 4: Freedom of thought and advocacy

1. Freedom of thought shall enjoy absolute protection.
2. Advocacy shall enjoy qualified protection. Incitement shall attract legal liability only in cases provided for by law when a person commits an intentional action that creates a direct and substantial danger of an illegal consequence.

Articles 3 and 4 set out the general characteristics of freedom of expression, elaborating on the content of the right to freedom of expression. These provisions emphasise that the right to freedom of expression belongs to everyone, not just citizens, and distinguish between advocacy, incitement and other forms of expression.

4.3.1. The content and nature of expression

Article 3(2) sets out a long list of the attributes of freedom of expression which everyone, apart from administrative agencies,⁶⁴ shall possess. These include absolute freedom of opinion (reiterated at Article 4(1)), freedom of political speech, a prohibition on censorship, freedom of editorial independence, academic and creative freedom, the right to spend money on political campaigns⁶⁵ and the right to use the language of one's choice. Article 3(3) provides that the Law also applies to rights related to the right to freedom of expression which may be implied from accepted human rights principles, even if such rights are not explicitly spelt out in the Law. This makes it clear that commercial expression, for

⁶⁴ As defined in the General Administrative Code of Georgia.

⁶⁵ A literal translation of the Georgian text refers to this as the 'right to charity'. In general this operates along the lines set out by the US Supreme Court decision in *Buckley v. Valeo*, 424 US 1 (1976).

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example, and other forms of expression, including the right to assemble and demonstrate, that are recognised internationally and are strongly linked to the right to freedom of expression but not explicitly mentioned still enjoy protection under the Law.

It is important to understand that some of the rights on the list enjoy absolute protection - meaning that they can never be limited - while others may be restricted under certain, narrowly described, conditions.

The right to freedom of thought and opinion, as set out in Articles 3(2)(a) and 4(1), explicitly belongs in the first category, as shown by the term ‘absolute’ in the Law. Under international law, “freedom from coercion about belief, faith, ...”, protected in Article 3(2)(j) of the Law, should also be absolute. International law makes it clear that individuals are free to hold whatever thoughts and opinions they wish to. Article 19(1) of the ICCPR states:

Everyone shall have the right to hold opinions *without interference*. [emphasis added]

It is only the public expression of thoughts and opinions that may be restricted, under certain conditions. This applies to the other rights listed in Article 3 of the Law.

It should also be noted that while international law emphasises the importance of all forms of expression, particular importance is attached to freedom of political debate, protected under Article 3(2)(b).⁶⁶ International law also recognises prior censorship as posing a particular threat to freedom of expression;⁶⁷ indeed, it is completely prohibited in the Inter-American human rights system outside of the need to protect children.⁶⁸ Article 3(2)(d) of the Law accordingly prohibits all forms of censorship.

4.3.2. Everyone enjoys the right to freedom of expression

Article 3(1) of the Law states that “everyone” enjoys the right to freedom of expression, “except for administrative agencies”. In accordance with international law, this means that everyone within the territory of Georgia or subject to its jurisdiction⁶⁹ enjoys the right to freedom of expression, whether they are Georgian citizens, foreigners, refugees or stateless persons. International law makes it clear

⁶⁶ See, for example, *Dichand and others v. Austria*, 26 February 2002, Application No. 29271/95, para. 38.

⁶⁷ See, for example, *Ekin Association v. France*, 17 July 2(1), Application No. 39288/98, para. 56 (European Court of Human Rights).

⁶⁸ *Olmedo Bustos et al. v. Chile (The Last Temptation of Christ case)*, 5 February 2(1), Series C No. 73 (Inter-American Court of Human Rights)

⁶⁹ See Article 2 of the ICCPR and Article 1 of the ECHR. This means that people who find themselves under the control of Georgia’s armed forces outside Georgia’s territory- for example in Iraq or other international missions - should have their human rights respected. See *Loizidou v. Turkey*, 18 December 1996, Application No. 15318/89, para. 52 (European Court of Human Rights).

that this includes corporate entities, such as newspapers or publishers, as well as private individuals.⁷⁰

An “administrative agency” is defined in Article 1(h) as any body covered by Article 2(1)(a) of the General Administrative Code of Georgia, but excluding public broadcasters. The exclusion of public broadcasters from this definition has the result that these broadcasters are still ensured the protection of Article 3(2) of the Law, which is of clear importance to their functioning and their independence. The points should also be made that, as publicly funded entities, public broadcasters are directly bound by the international guarantee of freedom of expression. In addition, publicly-funded broadcasters are in a special position to satisfy the public’s right to know and to guarantee pluralism in broadcasting, and it is therefore important that they promote these rights.

4.3.3. Advocacy and incitement

Article 4 creates a separate category of expression entitled “advocacy”, defined as a statement that “aims at or obviously assumes provoking certain actions”.⁷¹ Article 4(2) affords high protection to such statements, making it clear that advocacy will lead to liability only where this is provided for by law and where the author acts intentionally to create a “direct and substantial danger of an illegal consequence”. This means that ‘advocacy’ enjoys stronger protection than other forms of expression. We note that this is a higher standard than that traditionally applied under international law, more akin to the standard of protection provided for under the First Amendment to the US Constitution, pursuant to which advocacy may be restricted only if two conditions are satisfied:

1. the advocacy is “directed to inciting or producing imminent lawless action”;
and
2. the advocacy is “likely to incite or produce such action.”⁷²

The US Supreme Court has produced a wealth of case law on this matter is of direct relevance to the interpretation of Article 4(2).⁷³

4.4. Protection of confidential information and sources

Article 11: Protection of professional confidences and sources of information

1. The source of a professional secret shall enjoy absolute protection and no one shall be entitled to demand its disclosure. No person shall be required to disclose the source of confidential information during court

⁷⁰ See, for example, *Autronic AG v. Switzerland*, note 38.

⁷¹ Article 1(d) of the Law.

⁷² *Brandenburg v. Ohio*, 395 US 444 (1969).

⁷³ See, for example, *Brandenburg v. Ohio*, note 72 and *RAV v. City of St. Paul*, 112 S. Ct. 2538 (1992).

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proceedings on the restriction of the right to freedom of speech and expression.

2. No person may be required to disclose confidential information except with the consent of its owner or pursuant to a reasoned court decision in cases prescribed by law.

3. A court may order disclosure only of that part of confidential information the disclosure of which has been proved to be necessary.

4. Confidential information received through disclosure proceedings may be used only for the purpose for which it was disclosed.

Article 11 of the Law protects confidential information as well as the sources of such information. It is important to understand that different rules apply to the protection of a source of confidential information - for example, a person who may have passed information on to a journalist in confidence - and the information itself. Article 11(1) provides that the *source* of confidential information may never be disclosed, while paragraphs (2)-(4) provide that the information itself may sometimes be disclosed, under special circumstances.

Article 11(1) of the Law provides *absolute* protection for all sources of “professional secrets:” information disclosed in confidence to journalists, members of parliament, doctors, public defenders (Ombudsmen) or lawyers, as well as all information that has become known to a person in the performance of his or her professional duty and disclosure of which would cause damage to the professional reputation of that person.⁷⁴ Information which is not a State, private or commercial secret, however, is not regarded as a professional secret.⁷⁵

The absolute protection conferred means that no person may ever be compelled to disclose the source of such information, no matter how important the countervailing interest.⁷⁶ A good example of this is provided by the *Goodwin* case at the European Court of Human Rights, which concerned a journalist who had received information indicating that a company was in bad shape financially. Wanting to write an article about this, he phoned the company for comment. The company declined to comment and instead sought to stop publication of the story

⁷⁴ Article 1(n).

⁷⁵ *Ibid.*

⁷⁶ It should be noted that this goes beyond the privilege established under Article 10 of the European Convention on Human Rights in *Goodwin v. United Kingdom*, 27 March 1996, Application No. 17488/90, and as recommended by the Committee of Ministers of the Council of Europe (see Recommendation (2000)7, 8 March 2000). In certain cases, conferring absolute protection may come into conflict with the protection of other rights, such as the right to a fair trial, also protected under Georgia’s constitution as well as international law. For example, a journalist might hold information disclosed to them in confidence that is crucial to proving a person’s innocence. It will be for the Georgian courts to assess such cases on their merits and in accordance with Georgia’s international obligations.

and also obtained a court order requiring the journalist to reveal his source. The journalist refused and was fined. He appealed to the European Court of Human Rights, which held that requiring a journalist to reveal his sources constituted a violation of his right to freedom of expression. The European Court held:

Protection of journalistic sources is one of the basic conditions for press freedom ... Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result, the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected.⁷⁷

Articles 11(2)-(4) provide *qualified* protection to all other forms of confidential information. The Law does not define confidential information but this can be assumed to cover at least that information which is defined as a ‘professional secret’, outlined above. Under Article 11(2), disclosure of this information can be compelled only with consent or by a court order in cases prescribed by law. Article 11(3) and (4) states that such a court order should be limited to information whose disclosure has been shown to be necessary and that the information so disclosed may only be used for the purpose pursuant to which it was ordered to be disclosed.

Article 1(n) makes it clear that information concerning administrative agencies can never be considered confidential. Its disclosure can therefore never be refused on the basis that it was obtained in confidence.

4.5. Protection of whistleblowers

Article 12: Liability for disclosure of a secret

1. A person shall be liable only for the disclosure of secrets to which they are bound by contract or pursuant to his or her official position the disclosure of which creates a direct and substantial danger to values protected by law.
2. No person shall be liable for the disclosure of a secret if that disclosure aimed to protect a lawful societal interest and the public interest in disclosure outweighs the damage done by the disclosure.
3. Privacy interests and the protection of confidential information may not be used to restrict freedom of expression with respect to an event that should be known to a person for the exercise of public self-government in a democratic society.
4. Any persons whose rights under paragraphs 1 and 2 of this provision have been violated may demand compensation of actual and moral damages suffered as a result of that violation.

⁷⁷ *Goodwin v. United Kingdom*, 27 March 1996, Application No. 17488/90, para. 39.

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Article 12 lays down three important general rules:

1. That a person is legally liable only for the disclosure of secrets they which they are themselves bound and the disclosure of which creates a direct and substantial danger to a legally protected value.
2. That no person is legally liable for the disclosure of a secret if the information was disclosed in order to protect a legitimate societal interest, and the interest in disclosure outweighs any harm done by disclosure.
3. That reasons of privacy or the protection of confidential information may never be invoked to withhold information whose disclosure is important in the public interest in democracy.

Article 12(1) limits liability for disclosure to confidential information, defined as information that a person is bound to protect “due to his position or under a civil contract”. This covers information that persons come across in the course of their official duties or information that has been provided under a contractual obligation of confidence. However, liability for the disclosure of such information is permitted only if it results in a “direct and substantial danger to the values protected by law”. Article 12(2) expressly protects disclosure of information where the purpose was to promote a lawful interest and where the overall public good is served by disclosure. In addition, under Article 12(3), information that relates to governance cannot be withheld for reasons of privacy and the protection of personal confidentiality. This allows, for example, for the publication by the media of private information that reveals corruption on the part of public officials.

These provisions follow classic jurisprudence of the European Court of Human Rights. In *Fressoz and and Roire v. France*,⁷⁸ two journalists had been convicted for publishing information regarding the earnings and pay rises of the managing director of Peugeot, a car manufacturer. The information had been published in the context of on-going industrial unrest within Peugeot. The European Court found that their conviction constituted a clear violation of the right to freedom of expression:

[The right to freedom of expression] protects journalists’ rights to divulge information on issues of general interest provided they are acting in good faith and on an accurate factual basis and provide ‘reliable and precise’ information in accordance with the ethics of journalism.⁷⁹

Article 12(2) is in effect a protection for “whistleblowers” clause. Whistleblowers are individuals who disclose confidential information in good faith in order to prevent or expose wrongdoing. This would apply, for example, to a civil servant

⁷⁸ 21 January 1999, Application No. 29183/95.

⁷⁹ *Ibid.*, para. 54.

who discloses confidential information that reveals a substantial threat to the environment. ARTICLE 19 has long advocated that such individuals be granted legal protection⁸⁰ and has been joined in this by the special rapporteurs on freedom of expression of the UN, OSCE and OAS.⁸¹ Whistleblower protection is granted in the laws of several of the US States, as well as in South Africa and the United Kingdom.⁸²

Article 12(4) enables whistleblowers to claim compensation if they do lose their jobs as a result of their whistleblowing. This would apply, for example, if an individual loses their job as a result of revealing confidential information in the public interest. In order for this provision to be effective, various employment law provisions will probably need to be read in accordance with Article 12(2) of the Law - or more likely, be amended in order to provide truly effective protection for whistleblowers. Often, the greatest obstacle standing in the way of would-be whistleblowers is that they may suffer employment-related sanctions, such as dismissal, being demoted or being overlooked for promotion. This can pose a greater deterrent than the threat of a breach of confidence action alone and it may not be able to be remedied properly only by compensation.⁸³

4.6. Enforcement

Article 6: Court guarantees

1. Any person can apply to a court to request that it orders measures to prevent a violation of a right guaranteed and protected under this law, or, if a violation has taken place, to order that it be restored and that measures be taken to eradicate the consequences of the violation.

Under Article 6 of the Law, any person may apply to a court with a request to “avoid or eradicate consequences of violations of the rights guaranteed and protected by this Law as well as a request to restore the right violated as a result of interference.” In response to such a request, a court can provide three different remedies:

- (a) it can issue an order to prevent violations from occurring;
- (b) it can an order to ‘eradicate’ the consequences of a violation; and/or
- (c) it can issue an order to ‘restore’ the right violated.

⁸⁰ See *The Public’s Right to Know: Principles on Freedom of Information Legislation*, ARTICLE 19, London: 1999, Principle 9.

⁸¹ See their Joint Declaration of 6 December 2004. Available at: http://www.osce.org/documents/rfm/2004/12/3945_en.pdf.

⁸² See, for example, the New York Labor Law, section 740(2)(c); the Public Interest Disclosure Act 1998 (UK); and the Protected Disclosures Act No. 26 of 2000 (South Africa).

⁸³ For a compilation of accounts of whistleblowers, see *Whistleblowing Around the World: Law, Culture and Practice*, (London: Public Concern at Work, 2003). Available at: http://www.pcaw.co.uk/policy_pub/book.html.

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Article 6 thus provides a very broad basis on which to go court. Individuals may complain about acts of censorship committed by State bodies; seizure by law enforcement authorities of confidential journalistic materials; or the seizure by customs officials of books or magazines, to name but a few grounds. International law guarantees the right to freedom of expression as the right of an individual against the State and in this sense, the Law mirrors international law.⁸⁴

However, the Law goes further than ‘traditional’ international law and provides a cause of action not just against the State, but against anyone who violates the right to freedom of expression. A number of the rights elaborated in the Law regulate relationships between individuals. For example, the right of a journalist to “make editorial decisions based on his own conscience”⁸⁵ is a right that an individual journalist holds against his editors or publisher. In order for the Law to be effective, Article 6 therefore needs to be read as establishing a cause of action against private individuals or corporations. Thus, if a journalist wishes to complain about a violation of the right to publish according to his conscience, he needs to be able to take legal action against his editors or publishers in an appropriate civil court or tribunal. Similarly, whistleblowers who face employment-related sanctions for their conduct should have access to a relevant court in order prevent such sanctions being imposed or to obtain restitution.⁸⁶

The three remedies that a court can provide are very distinct; in every case, the applicant will need to consider what remedy to ask for. The first remedy, concerning “avoidance” of a violation, allows a court to issue an order to prevent a violation from continuing or recurring. For example, a media outlet that has suffered harassment and intimidation from tax or financial authorities might seek a court order to stop these authorities from entering its premises unless the authorities have an objective and justifiable reason to do so.⁸⁷ Similarly, in a situation where local authorities have illegally prevented local NGOs from handing out leaflets, those NGOs might obtain an order prohibiting future interference.⁸⁸

The second remedy, which stipulates “eradication of the consequences” of a violation, would allow for the recovery of monetary losses in cases where such losses can be established. For example, a media outlet that is forced to shut down in breach of its rights could recover the losses it suffered as a result. The use of the term ‘consequences’ implies that this remedy goes beyond mere monetary losses to include so-called ‘moral’ damages for the violation of rights. This is consistent with European Court practice, where monetary awards are often made even in the absence of specific financial losses. Such awards are necessary to

⁸⁴ The violation of a right by the State or the failure of the State to guarantee a right in practice are grounds on which a complaint may be brought before the European Court of Human Rights in Strasbourg.

⁸⁵ Article 3(2)(d).

⁸⁶ Discussed in Section 4.5, above.

⁸⁷ See the judgment of the European Court of Human Rights in *Roemen and Schmit v. Luxembourg*, 25 February 2003, Application No. 51772/99.

⁸⁸ See the judgment of the UN Human Rights Committee in *Laptsevich v. Belarus*, 20 March 2000, Communication No. 780/1997.

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promote an environment where individuals are prepared to go to court to defend their rights.

The third remedy, requiring ‘restoration’ of a right, would be applicable in similar cases. For example, a radio station whose licence had been unlawfully revoked or suspended could seek reinstatement of the licence. This implies putting the plaintiff in the position he or she would have been had the abuse not occurred.

4.7. General Rules on Restrictions

Article 7: Standard and burden of proof

1. Any restriction of a right guaranteed and protected by this law shall be based on incontrovertible evidence.
2. Any doubt with regard to the legitimacy of a restriction of a right guaranteed and protected by this law that cannot be settled in accordance with the procedure prescribed by law shall be settled by deciding against restricting the right.
3. Any doubt with regard to the status of an individual as a private person or a public person that cannot be settled in accordance with the procedure prescribed by law shall be settled by assigning public person status.
4. Any doubt with regard to the assignment of public interest status to a publication that cannot be settled in accordance with the procedure prescribed by law shall be settled by assigning public interest status.
5. Any doubt with regard to the status of a statement as fact or opinion that cannot be settled in accordance with the procedure prescribed by law shall be settled by assigning status as statement of opinion.
6. The initiator of a restriction shall bear the burden of proving the legitimacy of the restriction. Any doubt with regard to the legitimacy of the restriction that cannot be settled in accordance with the procedure prescribed by law shall be settled by deciding against restricting the right.
7. Refusal to disclose a professional secret or a confidential source of information shall never be the sole grounds for restricting a right guaranteed and protected by this law.

Article 8: Grounds for restricting freedom of speech and expression

1. Any restriction of a right guaranteed and protected by this law shall be legitimate only if it is introduced by a clear and foreseeable, narrowly tailored law, and the public interest served by the aim of the restriction

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exceeds the damage to freedom of expression caused by the restriction.

2. Any restriction of a right guaranteed and protected by this law shall be:

- a) directly intended at fulfilment of a legitimate aim;
- b) critically necessary in a democratic society;
- c) non-discriminatory; and
- d) proportionate to the aim of the restriction.

Article 9: Content regulation

1. The content of any form of speech or expression may be regulated only in pursuit of the following aims:

- a) restricting defamation;
- b) restricting obscenity;
- c) restricting incitement to violence or grave public disorder;
- d) restricting incitement to commit an offence;
- e) restricting threats;
- f) protecting State, commercial, private or professional secrets;
- g) the regulation of advertising, TV-shopping or sponsorship of media output;
- h) regulating the speech and expression of military servicemen or administrative agencies and their officials, members or employees;
- i) regulating the speech and expression of detained persons or persons whose liberty has been restricted pursuant to law;
- j) regulating the speech and expression of persons with no or limited legal capacity.

2. Content-based regulation must be viewpoint neutral and non-discriminatory.

Article 10: Content neutral regulation

1. Content-neutral regulation may never restrict the object of expression.

2. Content neutral regulation may only provide for non-discriminatory restriction of the time, place and manner of expression and may never affect the content of the information or ideas conveyed or their expressive effect unless it leaves the possibility of their effective expression through other means.

Articles 7-10 of the Law set out the general rules applicable to restrictions on the right to freedom of expression. These provisions reiterate that while freedom of expression is not an absolute right, it may be interfered with only under certain narrow conditions. These provisions have to be read together with the constitutional provisions regarding restrictions on the right to freedom of

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expression and in accordance with the three-part test provided under international law.⁸⁹

As with all restrictions on fundamental rights, the starting point is that the restrictions have to be interpreted narrowly. As the European Court of Human Rights has repeatedly emphasised:

Freedom of expression ... is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.⁹⁰

The primary rules constraining restrictions on freedom of expression are reflected in Article 8 of the Law. This states the various elements that have been elaborated under international law for restrictions on rights. It requires that any restriction is:

- (a) introduced in a clear and foreseeable and narrowly tailored law;
- (b) directly aimed at a legitimate aim the public interest in which outweighs the damage done to freedom of expression;
- (c)

, which requires that any restrictions on freedom of expression are provided by a clear and foreseeable and narrowly tailored law; that they are proportionate to the legitimate aim pursued; and that they are critically necessary” states:

1. Any restriction of the rights recognised and protected by this Law can be established only if it is introduced by a clear and foreseeable, narrowly tailored law, and good protected by the restriction exceeds the damage caused by the restriction.
2. Restrictions recognized and protected by this Law shall be: a) directly intended at fulfilment of a legitimate aim; b) critically necessary in a democratic society; c) non-discriminative; d) proportionally restricted.

This reflects a robust interpretation of the three-part test provided under international law. The first two of the three components of that test are reflected in the term “clear and foreseeable, narrowly tailored law”, defined in Article 1 as follows:

[A] norm worded with due accuracy, which does not have general ambiguous and unclear provisions enabling a person to regulate his activity and anticipate its legal consequences [and which establishes] a direct requirement, specific criteria and an exhaustive list of restrictions, containing guarantees against inexpedient use of this norm.

This is in accordance with Article 10 of the ECHR as elaborated by the European Court on Human Rights, as well as general international and comparative standards

⁸⁹ Described in some detail in Section 2.2, above.

⁹⁰ See, for example, *Observer and Guardian v. the United Kingdom*, note 17, para. 59 and *Thorgeir Thorgeirson v. Iceland*, note 12, para. 63.

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in this area.⁹¹ The last element, which requires that all laws that impinge on freedom of expression must have safeguards to prevent abuse, incorporates elements of European Court jurisprudence under Articles 8 and 13 of the ECHR.⁹² For example, this means that broadcasting laws must provide for a regulatory environment that cannot be dominated by political or commercial interests, and that both broadcasters and members of the general public should have access to a court or tribunal to assert their rights. This latter element can also be understood as elaborating on the requirement that laws not provide excessive scope for discretionary restrictions on freedom of expression, which may lead to abuse (or ‘inexpedient use’).

Article 1 defines as “legitimate aims” those aims set out in Article 24(4) and Article 26(3) of the Constitution. As elaborated above, we are concerned that while Article 24(4) fully accords with international standards, certain of the aims listed in Article 26(3) are not recognised under international law. We believe, therefore, that courts and other courts and other bodies interpreting the Law should be encouraged to read the aims set forth in Article 26(3) as being limited by the aims in Article 24(4). For instance, it should be made clear that a person or group’s expression may be restricted under the rubric “violating the independence of the country” only if the expression could be said to endanger “state and public security”. Similarly, it should be made clear that an expression said to be inducing “ethnic unrest” may be restricted only if it could be said to be in the service of preventing crime, or defending the rights of others.⁹³

Article 8, in conjunction with Article 1, requires restrictions to directly target the protection of a legitimate aim, ruling out aims which are incidental to the main thrust of the law, consistent with international requirements.

Article 8(2) of the Law incorporates various elements of the “necessary in a democratic society” part of the test, as elaborated in Section II.2.3, and strengthens that test by adding that any restrictions must be “critically” necessary in a democratic society. In addition, Article 8(2) requires restrictions to be proportionate to the aim pursued, again consistently with international jurisprudence. Finally, Article 8(2) rules out restrictions which are discriminatory. This is also explicit in the ECHR, which prohibits discrimination in the protection of rights.⁹⁴

Article 7 provides further protection for the right to freedom of expression by setting out a number of standard of proof rules constraining the practical application of restrictions. Perhaps the most important of these is that restrictions may not be imposed unless there is “incontrovertible evidence” that the restriction is “strictly necessary”.⁹⁵ Several provisions establish that, where there is any doubt

⁹¹ See Section 2.2.1, above.

⁹² E.g. *Klass v. FRG*, 6 September 1978, Application no. 5029/71.

⁹³ In both these cases the first phrase is from Article 26(3) while the latter phrase is from Article 24(4).

⁹⁴ See Article 14 of the ECHR.

⁹⁵ Read together with Article 8(2).

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in the mind of the decision maker, it is required to err on the side of protecting freedom of expression.⁹⁶ This is consistent with the fundamental nature of this right; only in the clearest cases should it be subject to restriction. For example, if in a defamation case there is doubt as to whether the claimant is a public figure, the court is required to rule that he or she is a public figure.⁹⁷ This is consistent with the practice of some other courts, which in practice, if not explicitly in law, err on the side of freedom of expression.⁹⁸

Article 7(6) also provides that the burden of demonstrating that a restriction is necessary lies with the party trying to impose the restriction. If that party - for example the police or a local authority - cannot produce “incontrovertible evidence” that the restriction is “strictly necessary”, then the restriction is deemed to be in breach of the Law. It is clear from much human rights jurisprudence that the burden is on the party seeking to uphold a restriction to show that this is justified.⁹⁹

Articles 9 and 10 draw on US Supreme Court jurisprudence and distinguish between “content regulation” on the one hand and “content neutral regulation” on the other. “Content regulation” is the regulation of expression because of its content, and is limited under Article 9 to regulation of the following categories of expression:

- defamatory expression;
- obscene expression;
- “fighting words” (direct incitement to unlawful action)
- incitement to commit a criminal offence;
- threatening expression;
- the disclosure of State, commercial, private or professional secrets;
- advertising, tele-shopping or sponsorship;
- the expression of military servicemen and civil servants;
- the expression of prisoners; and
- the expression of persons without or with limited legal capacity.

Article 9 makes it clear that such restrictions must be non-discriminatory and “viewpoint-neutral”, meaning that regulation should not be aimed at restricting particular points of view or strands of opinion that are unpopular.¹⁰⁰ Any restrictions under Article 9 must also comply with the general requirements on restrictions established under Articles 7 and 8. The US Supreme Court has established that where the government regulates content, it “must show that its regulation is necessary to serve a compelling [governmental] interest and is narrowly drawn to achieve that end”.¹⁰¹ This test is reflected in Articles 7 and 8 of the Law. The “compelling interest” corresponds with the requirement of critical necessity in Article 8 and corresponds roughly with the European Court’s

⁹⁶ See Articles 7(2), (3), (4), (5) and (6).

⁹⁷ Article 7(3). For more on defamation, see Section 4.8.

⁹⁸ For example, the scope of public figure for purposes of defamation law in the US has continually been extended. See *Monitor Patriot Co. v. Roy* (1971) 401 US 265 and *Curtis Publishing Co. v. Butts* (1967) 388 US 130.

⁹⁹ See, for example, *R. v. Oakes*, note 37 (Supreme Court of Canada).

¹⁰⁰ *Arkansas Writers Project, Inc. v. Ragland*, 481 U.S. 221 (1987), p. 230.

¹⁰¹ *Ibid.*, p. 231.

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requirement that States that restrict expression must demonstrate the existence of a “pressing social need”¹⁰² or an “overriding requirement in the public interest”.¹⁰³

Article 10 deals with content-neutral regulation, which is limited to restrictions on the place, time and form in which people choose to express themselves. A classic example of this is the regulation of demonstrations or mass gatherings, which may be regulated under certain circumstances for public order reasons. However, any such regulation must not impinge on the content of the speech or its expressive effect, and regulation should be aimed at promoting the exercise of the right rather than limiting or restricting it. The European Court has made it clear that even where there are dangers that public disorder could break out in connection with a public demonstration, this in itself is not sufficient reason for it to be banned, limited or diverted to another location. An important duty of the State is to take positive measures in order to enable the exercise of human rights and in such a situation police and local authorities should first and foremost attempt to take measures that would allow the demonstration to go ahead without disruption, for example by providing additional police to protect the demonstrators. The Court has stated:

A demonstration may annoy or give offence to persons opposed to the ideas or claims that it is seeking to promote. The participants must, however, be able to hold the demonstration without having to fear that they will be subjected to physical violence by their opponents; such a fear would be liable to deter associations or other groups supporting common ideas or interests from openly expressing their opinions on highly controversial issues affecting the community. In a democracy the right to counter-demonstrate cannot extend to inhibiting the exercise of the right to demonstrate.

Genuine, effective freedom of peaceful assembly cannot, therefore, be reduced to a mere duty on the part of the State not to interfere: a purely negative conception would not be compatible with the object and purpose of [the right to freedom of assembly which] sometimes requires positive measures to be taken, even in the sphere of relations between individuals, if need be.¹⁰⁴

4.8. Defamation

Article 5: Freedom of political and court speech

1. A statement shall not attract liability for defamation if it is made:
 - a) during political debates or by a member of Parliament or a local assembly in the course of the performance of their official duties;
 - b) during court proceedings or at a pre-trial hearing, before a public defender, or at a meeting of Parliament, a local assembly or one of their committees by a person acting in their official capacity;

¹⁰² See, for example, *Plon (Société) v. France*, 18 May 2004, Application No. 58148/00, para. 42.

¹⁰³ See, for example, *Goodwin v. the United Kingdom*, note 77, para. 39.

¹⁰⁴ *Platform Ärtze fur das Leben v. Austria*, 25 May 1988, Application No. 10126/82, para. 32.

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c) on the request of an authorised body.

2. In any proceedings for defamation the court shall verify the matters specified in the first paragraph of this provision at a pre-trial session with the parties. If it finds that one of the circumstances in the first provision applies the court shall make a ruling provided for by Articles 209 and 273 of the Civil Procedures Code of Georgia that does not cause the consequences specified in Article 18 of this law.

Article 6: Court guarantees

2. In any dispute relating to allegedly defamatory matter published by a journalist in the media, the owner of the media outlet concerned shall be the sole respondent.

3. Statements relating to an unidentifiable group of persons or from which no single person can be identified shall never lead to court proceedings for defamation.

4. The private non-property rights of a deceased person, the state or its administrative bodies do not enjoy any protection for the purpose of defamation proceedings.

5. A person who is not the author of a statement or whose role in disseminating a statement is limited to providing the technical capacity shall never be the respondent in defamation proceedings, unless he or she openly supports the statement.

6. During court proceedings relating to defamation, the court shall take steps to affect a settlement of the dispute between the parties. A court may postpone judicial proceedings in a case and set aside a period of time not exceeding one month in which a settlement should be attempted.

Article 13: Defamation of a private person

A person shall be liable under civil law for defamation of a private person if the plaintiff proves in court that the statement of the respondent contained an essentially false fact related directly to the claimant and that publication of this false fact has caused damage to the claimant.

Article 14: Defamation of a public person

A person shall be liable under civil law for defamation of a public person if the claimant proves in court that the statement of the respondent contained an essentially false fact related directly to the claimant, that publication of this false fact has caused damage to the claimant, and that publication was made with advance knowledge of the falsity of the

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statement or that the respondent acted with reckless disregard leading to publication of the false fact.

Article 15: Defences

It shall be a defence for any person who has disseminated defamatory information to establish that:

- a) he or she took reasonable steps to verify the accuracy of the information but was unable to prevent the mistake and he or she took active measures in order to restore the reputation of the defamed person;
- b) the purpose of the publication was to protect a legitimate societal interest that outweighed the damage done by the defamatory publication;
- c) the publication was made with the claimant's consent;
- d) the publication represented a proportionate response to an earlier statement made by the claimant with regard to the respondent;
- e) the publication constituted a fair and accurate report of an event of public interest.

Article 16: Limitation of liability

No person shall be liable for defamation if he or she was not aware and could not have been aware that they disseminated a defamatory statement.

Article 17: Compensation of damage caused by defamation

1. The defendant in a defamation case may be compelled by the court to publish information about the court verdict in such a manner as may be prescribed by the court.
2. No person shall be forced to apologise for publishing a defamatory statement.
3. If a person makes a correction or retraction within the term established by law but the correction or denial is not sufficient to compensate the damage caused to the claimant by publication of the defamatory statement, the court may impose compensation of actual and/or moral damages.

Article 18: Ill-founded claims

If a court finds that a defamation claim is clearly ill-founded and was lodged with the purpose of restricting freedom of expression unlawfully, the respondent may be awarded such monetary compensation as the court deems reasonable.

Article 19: Statutory time limitations

A legal action for defamation must be filed with the court within 100 days

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after the person got acquainted or could have got acquainted with the statement.

Chapter IV of the Law is concerned with civil defamation. At the same day the Law was introduced, criminal defamation was abolished,¹⁰⁵ meaning that persons can no longer be prosecuted in the criminal courts for defamation.

Chapter IV lays down a number of crucial principles on defamation law. Articles 13 and 14 lay distinguish between defamation of public and of private figures and make it clear that, because of their elevated position in society, public figures should tolerate much higher degrees of criticisms than ordinary persons. Article 15 provides for a number defences to defamation charges, such as that the defendant took sufficient steps to verify the accuracy of the information, and Article 16 limits liability for innocent disseminators such as booksellers. Article 17 deals with remedies, Article 18 allows defendants to claim compensation for manifestly ill-founded defamation suits, and Article 19 imposes a 100-day time limit for the initiation of a defamation action. A number of additional rules are provided for in Article 5, which limits liability for certain statements, and Article 6, which lays down certain procedural rules.

These various rules have to be read against the background of the general principles on restrictions set out in Articles 7-10 of the Law and must, therefore, be interpreted so as to maximise freedom of expression. Any doubt should be resolved in favour of the right to freedom of expression.

The following paragraphs discuss each of these provisions in some further detail.

4.8.1. Definition of defamation

“Defamation” is defined in Article 1 as “a statement containing an essentially substantially false facts causing damage to a person or his reputation.” There are two key elements to this definition:

- a) that the statement has to contain “substantially false facts”; and
- b) that the effect of the dissemination of the statement must be that a person suffers damage, either to his or her person or reputation.

Both elements must be proven by the claimant.

It should be noted that the first element requires that in order for a statement to be defamatory, it has to contain “substantially” false statements. Minor factual errors will not suffice to render a statement defamatory. Although the European Court has not entirely limited defamation cases to allegations of fact, it has made it clear that opinions should benefit from substantially greater protection.¹⁰⁶ In the United States, the Supreme Court has stressed that only the publication of false

¹⁰⁵ Article 184 of the Criminal Code was repealed.

¹⁰⁶ See, for example, *Dichand and others v. Austria*, 26 February 2002, Application No. 29271/95.

facts may attract liability for defamation¹⁰⁷ and this is also the position taken by ARTICLE 19.¹⁰⁸

The second element requires that a person has to suffer objectively identifiable damage to their reputation or to other, legitimate interests. This, again, should be read narrowly. A person should not be allowed to succeed in a claim for defamation merely because he or she ‘feels’ insulted; the statement must have resulted in their reputation suffering harm in the eyes of other, ordinary-thinking persons. It must always be borne in mind that the right to freedom of expression extends particular protection to offensive forms of expression. As the European Court has stressed:

Freedom of expression ... is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no ‘democratic society’.¹⁰⁹

4.8.2. Protection from liability

The Law extends absolute protection to a number of forms of expression. Article 5 provides that liability for defamation cannot be incurred for the following:

- statements made in the course of political debates as well as those made by a member of parliament or local assembly;
- statements made at a pre-trial or court hearing, before a public defender (Ombudsman), at a meeting of Parliament, local assembly or at their committees if that statement is made by a person in the performance of their official duties;
- statements made on the request of an authorised body.

A person making a statement at these occasions cannot, as a result, ever be sued for defamation, regardless of whether the statement is false and has caused damage to another person’s reputation. This is because of the public interest in the free circulation of information within parliament, courts and similar bodies; within such fora, people should be able to say what they want without fear of being sued. The European Court of Human Rights has held:

[The] aim of the immunity accorded to members of the ... legislature [is] to allow such members to engage in meaningful debate and to represent their constituents on matters of public interest without having to restrict their observations or edit their opinions because of the danger of being amenable to a court or other such authority.”¹¹⁰

¹⁰⁷ *Milkovich v. Lorain Journal Co*, 497 US 1 (1990) at 19-20.

¹⁰⁸ See *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation* (London: ARTICLE 19, 2000).

¹⁰⁹ *Handyside v. United Kingdom*, note 11, para. 49. Statements of this nature abound in the jurisprudence of courts and other judicial bodies around the world.

¹¹⁰ *A. v. the United Kingdom*, 17 December 2002, Application No. 35373/97, quoting with approval the admissibility decision of the European Commission of Human Rights in *Young v. Ireland*, 17 January 1996, Application No. 25646/94.

The Court has held that statements made in the course of judicial proceedings should enjoy a similarly high degree of protection.¹¹¹ It follows that fair and accurate reports of such statements should also attract protection.¹¹²

Article 16 adds to this list by stating: “A person shall not be imposed a liability if he did not and could not know that he disseminated defamation.” This extends protection to bodies such as those who may deliver newspapers and newspaper kiosks, who cannot be held liable for the content of the newspapers they distribute or sell, as well as to Internet Service Providers (ISPs) who merely provide the technical means for transmission of information.

Article 6(2) makes it clear that in the case of defamatory matter published in the media, only the owner of the media outlet can be held liable in court. A journalist or editor can never bear individual responsibility as the author of a defamatory statement - unless they are also the owner. This provides important protection to individual journalists and means that they will not need to hire expensive lawyers to defend themselves in court, or pay out damages that they may not be able to afford. The Law aims to protect journalists against ownership pressure that might result from this provision through Article 3(d), which provides that journalists are entitled to make editorial decisions in line with their own conscience. The Law does not define further how far this ‘conscience clause’ stretches. In some countries, it has been interpreted as granting a right for journalists to leave a publication when it changes political direction and be paid compensation;¹¹³ in others, a right for a journalist to refuse assignments that contradict commonly accepted professional and ethical standards. The International Federation of Journalists recommends that both elements should be included.¹¹⁴

4.8.3. *Public and private persons*

The distinction in the Law between public figures and private persons is crucial and implements the well-established principle that public figures, because of their function and status in society, must tolerate a far greater degree of criticism than ordinary persons.¹¹⁵ Public figures are defined as including all public officials as well as “[persons] whose decisions or opinion [have] a substantial influence over the public life” and “[persons] attracting public attention in relation to certain issues due to his specific actions.”¹¹⁶

¹¹¹ *Nikula v. Finland*, 21 March 2002, Application No. 31611/96, para. 55.

¹¹² See *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*, note 108. Fair and accurate reporting of public interest events receives separate protection in Article 15(e) of the Law.

¹¹³ There have been several cases concerning this in France. For a discussion, see A. Azurmendi, ‘On the European Precedent for the Conscience Clause’, *Comparative Media Law Journal*, No. 1 2003: <http://www.juridicas.unam.mx/publica/rev/comlawj/cont/1/cts/cts1.htm>.

¹¹⁴ IFJ Principles on the Status of Journalists and Journalism Ethics, May 2003: <http://www.ifj-europe.org/default.asp?index=1627&Language=EN>. See section 4.6 for further discussion of the enforcement of this clause against employers.

¹¹⁵ See, for example, *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, para. 44 (European Court of Human Rights).

¹¹⁶ Article 1(i) of the Law.

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Article 14 significantly raises the bar for public figures suing for defamation. In order for a claim launched by a public figure to be successful, he or she must prove the following:

- that the statement was published and contains substantially wrong facts related directly to him or her;
- that her or she suffered damage as a result; and
- that the person making the statement knew it was false or acted with “reckless disregard” for the truth.

The last element of this test is identical to that laid down by the US Supreme Court in the seminal case of *New York Times v. Sullivan*. In that case, which concerned criticism of police action, the Supreme Court explained:

Cases which impose liability for erroneous reports of the political conduct of officials reflect the obsolete doctrine that the governed must not criticize their governors ... The interest of the public here outweighs the interest of appellant or any other individual ... [Freedom of speech requires prohibiting] a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’ -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not.¹¹⁷

The scope of who qualifies as a public figure has continually been expanded under US law, to the point where it is almost as broad as the definition in Georgian law,¹¹⁸ albeit that the definition contained in the present Law is very wide.

The test has been affirmed in subsequent cases and now stands as a landmark of defamation law, allowing vibrant discussion on all matters concerning public figures. The conduct of official duties by public officials is subject to the widest scrutiny and criticism;¹¹⁹ and criticism that that reflects generally upon a public official’s integrity and honesty is also protected.¹²⁰ The Supreme Court has also explained that “reckless disregard” sets a high standard, requiring more than negligence or a mere lack of ordinary care.¹²¹ This test has also been adopted in a number of other jurisdictions.¹²²

4.8.4. Defences

Article 15 of the Law provides the following defences to a charge of defamation:

- the disseminator of the false statement took reasonable steps to verify the accuracy of the information but failed to avoid a mistake and took efficient measures for the restoration of the reputation damaged due to defamation;

¹¹⁷ *New York Times Co. v. Sullivan* 376 US 254 (1964), pp. 279-80.

¹¹⁸ See note 98.

¹¹⁹ *Rosenblatt v. Baer*, 383 US 75 (1966).

¹²⁰ *Garrison v. Louisiana*, 379 US 64 (1964).

¹²¹ *Ibid.*, p. 77.

¹²² See, for example, *Rajagopal & Anor v. State of Tamil Nadu*, [1994] 6 SCC 632 (Supreme Court of India) and *Lange v Atkinson*, [2000] 1 NZLR 257 (New Zealand Court of Appeal).

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- the purpose of the publication was to protect legitimate societal interests and the public interest in publication was greater than the harm done by it;
- the statement was made with the consent of the claimant;
- the statement was in response to an earlier and similarly offensive statement made by the respondent against him; or
- the statement constituted fair and accurate reporting relating to an event of public interest.

These defences are of crucial importance to journalists. It is now widely recognised that in certain circumstances even false, defamatory statements of fact should be protected against liability. A rule of strict liability for all false statements is particularly unfair for the media, which are under a duty to satisfy the public's right to know where matters of public concern are involved and often cannot wait until they are sure that every fact alleged is true before they publish or broadcast a story. Even the best journalists make honest mistakes and to leave them open to punishment for every false allegation would be to undermine the public interest in receiving timely information. The nature of the news media is such that stories have to be published when they are topical, particularly when they concern matters of public interest. As the European Court of Human Rights has noted:

[N]ews is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest.¹²³

A more appropriate balance between the right to freedom of expression and reputations is to protect those who have acted reasonably in publishing a statement on a matter of public concern, while allowing plaintiffs to sue those who have not. For the media, acting in accordance with accepted professional standards should normally satisfy the reasonableness test. This has been confirmed by the European Court of Human Rights, which has stated that the press should be allowed to publish stories that are in the public interest subject to the proviso that “they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism.”¹²⁴ An analogous defence has been recognised in a number of other national jurisdictions.¹²⁵

The defences provided in Article 15 of the Law broadly fulfil this aim. The defences provided under paragraphs (a) and (b) are of particular relevance, although it should be noted that it is a requirement for the defence under (a) that the media outlet concerned has taken steps to restore the reputation of the claimant. Publication of a retraction or allowing a right of reply should normally fulfil this requirement. We note that, while this is not necessarily required in other jurisdictions, it represents a good compromise between the need to protect reputations and the right to freedom of expression.

¹²³ *The Sunday Times v. the United Kingdom (No. 2)*, note 17, para. 51.

¹²⁴ *Bladet Tromsø and Stensaas v. Norway*, 20 May 1999, Application No. 21980/93, para 65.

¹²⁵ See, for example, *National Media Ltd v. Bogoshi*, 1998 (4) SA 1196 (South African Supreme Court of Appeal); *Lange v. Australian Broadcasting Corporation*, (1997) 71 ALJR 818 (Australian High Court); and *Reynolds v. Times Newspapers Ltd and others*, [1999] 4 All ER 609 (House of Lords).

4.8.5. *Compensation*

Article 17 provides that if liability for defamation is established, a court can provide three different remedies:

1. publication of the court decision, or a summary thereof;
2. publication of a correction or retraction; and/or
3. compensation of actual and moral damages.

Article 17(2) states that a person cannot be compelled to apologise. Compensation of moral or actual damages can be imposed only where a court is satisfied that the first two remedies are not sufficient to repair the harm done by the defamation.

While the Law does not provide any detail on the level of moral or actual damages that may be awarded, there is important case law of the European Court that needs to be taken into account. First, unduly harsh sanctions, even for statements found to be defamatory, breach the guarantee of freedom of expression. As the European Court of Human Rights has explained, “the award of damages and the injunction clearly constitute an interference with the exercise [of the] right to freedom of expression.”¹²⁶ Therefore, any sanction imposed for defamation must bear a “reasonable relationship of proportionality to the injury to reputation suffered” and this should be specified in national defamation laws.¹²⁷ Where actual damages are imposed, these should be objectively established.

Second, in the case of *Steel and Morris v. the United Kingdom*, popularly known as the *McLibel* case, the Court suggested that an award for actual damages must not be so high as to be beyond the means of what the defendant can pay.¹²⁸ In that case, an award of around five times the average annual salary in the country was found to be disproportionate as it was far beyond the means of the applicants to pay, who were on state income support.

4.8.6. *Ill-founded claims*

It is not unknown for powerful figures in society to silence critical voices in the media by launching multiple defamation suits against the publications concerned, regardless of their merit. If such claims are allowed to proceed unchecked, media outlets can be effectively silenced by the significant legal burden and other costs associated with having to defend themselves in court, even if costs are eventually awarded against the claimant. Article 18 of the Law aims to prevent such situations by allowing courts to award damages to the media outlet in cases where a defamation claim is found to be “manifestly ill-founded”.

Such remedies have been put in place in other jurisdictions, including the United States, where they are popularly known as anti-SLAPP laws, designed to help defendants defeat “Strategic Lawsuits Against Public Participation”.¹²⁹

¹²⁶ *Tolstoy Miloslavsky v. the United Kingdom*, 13 July 1995, Application No. 18139/91, para. 35.

¹²⁷ *Ibid.*, para. 49.

¹²⁸ 15 February 2005, Application No. 68416/01.

¹²⁹ See, for example, Arkansas Code §§ 16-63-501 - 16-63-508 and Code of Georgia § 9-11-11.1.

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While the Law provides that compensation under this rule should remain within reasonable limits, we suggest it should not be limited merely to compensating legal costs. In order for this provision to be successful in limiting claims that brought purely to harass a media outlet, there needs to be a deterrent, and sometimes even punitive, element.

In addition, we recommend that all defamation suits, and particularly those that are manifestly ill-founded, be brought to a conclusion within the shortest period of time possible. Both the European Court of Human Rights and the UN Human Rights Committee have held that lengthy defamation proceedings can have a serious chilling effect on the defendant's right to freedom of expression.¹³⁰

4.8.7. Time limits

Article 19 of the Law provides that defamation actions must be started within 100 days after the claimant reasonably could have been expected to acquaint himself or herself with the allegedly defamatory statement. In the case of newspaper or book publications, this will usually be the time of publication.

This follows the approach taken in numerous other jurisdictions where special time limits, shorter than for civil litigation generally, are set for the initiation of defamation cases. ARTICLE 19 suggests that the period be set at no longer than one year.¹³¹

In the case of Internet publications, it may be harder to determine when a claimant can be expected to have acquainted themselves with the contents, particularly if the impugned information was published first on an obscure website or email discussion forum but was gradually circulated to a higher number of people (for example, because other websites copied the information). A possible remedy here would be for courts to constructively apply an overall time limit, for example of one year after the publication was uploaded, after which defamation cases would be absolutely barred.

¹³⁰ *Alithia Publishing Company v. Cyprus*, 11 July 2002, Application No. 53594/99 (European Court of Human Rights) and *Kankanamge v. Sri Lanka*, 26 August 2004, Communication No. 909/2000 (Human Rights Committee).

¹³¹ *Defining Defamation*, note 108, Principle 5. We note that 100 days is on the short end of the spectrum and may cause injustice in some cases.

APPENDIX 1: FREEDOM OF EXPRESSION IN INTERNATIONAL LAW

Universal Declaration of Human Rights, Article 19

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

International Covenant on Civil and Political Rights, Article 19

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. 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.

European Convention on Human Rights, Article 10

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

2 The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

APPENDIX 2: FURTHER READING AND USEFUL WEBSITES

Further reading

European Convention on Human Rights:

- *Case-law concerning Article 10 of the European Convention on Human Rights*, Directorate General of Human Rights, Council of Europe 2001:
<http://www.humanrights.coe.int/media/documents/dh-mm/HRF%2018%20def.pdf>

in Georgian:

http://www.coe.int/t/e/human_rights/media/5_Documentary_Resources/3_Translations/Georgian/PDF_Georgian%20Case%20law%20Art%2010.pdf

- S. Greer, *The exceptions to Articles 8 to 11 of the European Convention on Human Rights*, Directorate General of Human Rights, Council of Europe 1997:
[http://www.coe.int/T/E/Human_rights/h-inf\(2002\)10eng.pdf](http://www.coe.int/T/E/Human_rights/h-inf(2002)10eng.pdf)

- Council of Europe Committee of Ministers Declaration on freedom of political debate in the media:

<https://wcm.coe.int/ViewDoc.jsp?id=118995&Lang=en>

in Georgian:

http://www.coe.int/t/e/human_rights/media/5_Documentary_Resources/3_Translations/Georgian/PDF_Dec_political_debate_Georg.pdf

- Council of Europe Committee of Ministers Recommendation No. R (2000) 7 on the right of journalists not to disclose their sources of information and its Explanatory Memorandum:

[http://www.coe.int/t/e/human_rights/media/5_Documentary_Resources/1_Basic_Texts/2_Committee_of_Ministers'_texts/Rec\(2000\)007%20E%20&_Exp_Mem.asp#TopOfPage](http://www.coe.int/t/e/human_rights/media/5_Documentary_Resources/1_Basic_Texts/2_Committee_of_Ministers'_texts/Rec(2000)007%20E%20&_Exp_Mem.asp#TopOfPage)

- Council of Europe Committee of Ministers Recommendation No. R (97) 21 on the media and the promotion of a culture of tolerance and its Explanatory Memorandum:

[http://www.coe.int/t/e/human_rights/media/5_Documentary_Resources/1_Basic_Texts/2_Committee_of_Ministers'_texts/Rec\(1997\)021%20E%20&_Exp_Mem.asp#TopOfPage](http://www.coe.int/t/e/human_rights/media/5_Documentary_Resources/1_Basic_Texts/2_Committee_of_Ministers'_texts/Rec(1997)021%20E%20&_Exp_Mem.asp#TopOfPage)

- Council of Europe Committee of Ministers Recommendation No. R (97) 20 on "hate speech" and its Explanatory Memorandum:

[http://www.coe.int/t/e/human_rights/media/5_Documentary_Resources/1_Basic_Texts/2_Committee_of_Ministers'_texts/Rec\(1997\)020%20E%20&_Exp_Mem.asp#TopOfPage](http://www.coe.int/t/e/human_rights/media/5_Documentary_Resources/1_Basic_Texts/2_Committee_of_Ministers'_texts/Rec(1997)020%20E%20&_Exp_Mem.asp#TopOfPage)

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US First Amendment Literature:

- Annotated text of First Amendment provided by findlaw.com:
<http://supreme.lp.findlaw.com/constitution/amendment01/>
- Reporters Committee for Freedom of the Press, *The First Amendment Handbook*, 2003:
<http://www.rcfp.org/handbook/>

Useful websites

ARTICLE 19:

<http://www.article19.org>

Council of Europe Media Division:

<http://www.coe.int/media>

Liberty Institute:

<http://www.liberty.ge>

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

Article 19 of the Universal Declaration of Human Rights

Guide to the Law of Georgia on Freedom of Speech and Expression



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