MEMORANDUM

On the

Draft Constitution of the Republic of Montenegro

May 2007

ARTICLE 19 · 6-8 Amwell Street · London EC1R 1UQ · United Kingdom
Tel +44 20 7278 9292 · Fax +44 20 7278 7660 · info@article19.org · http://www.article19.org

TABLE OF CONTENTS

Summary of Recommendations

- The main guarantee of freedom of expression, in Article 45 of the draft Constitution, should make it clear that the rights to seek and receive, as well as the right to impart, information and ideas are protected.
- Article 45 should incorporate a clear test for restrictions on freedom of expression which requires them to be prescribed by law, and to be necessary in a democratic society, to protect a narrow but comprehensive set of overriding interests.
- Consideration should be given to amending Article 47 to ensure the "unconditional entry" of newspapers onto the register. At the same time, the right of establishment should be limited to the print media sector. Consideration should also be given to inserting a new clause into Article 47 to prohibit licensing of journalists.
- The right of reply should either be removed from Article 47 or subjected to stringent conditions to prevent its abuse.
- There should be no constitutional protection for the right to indemnity for damages. If this is retained it should, at the very minimum, be subjected to the three-part test applicable to all restrictions on freedom of expression.
- The constitution should permit prior censorship where this is necessary to prevent a serious risk of immediate and significant harm to children or in the form of violence, which could not be remedied through the subsequent imposition of sanctions.
- Consideration should be given to adding an explicit and general guarantee of the right to information into the draft Constitution.

1. Introduction

This Memorandum provides ARTICLE 19's main comments and recommendations on the draft Constitution of the Republic of Montenegro (draft Constitution), inasmuch as it affects the right to freedom of expression and information.[1] The draft Constitution is a progressive and carefully detailed framework of rights and obligations, which seeks to embody the Republic of Montenegro's prospective international obligations in both letter and spirit. Our comments and recommendations are made with a view to helping to ensure that this objective is achieved.

We recognise that the status of the Republic of Montenegro as a member of the international community is in a state of some flux. At the same time, we note that Montenegro has already assumed a seat at the UN and is soon likely to become a full member of the Council of Europe with all of the related obligations. The comments in this Memorandum, accordingly, are based on recognised international and regional European standards and, in particular, the International Covenant on Civil and Political Rights (ICCPR) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention).

The provisions on freedom of expression have a number of positive aspects. They provide strong protection for free speech, rule out censorship and provide specific protection to media freedom. At the same time, we have some concerns with these provisions. In particular, the exceptions, both to the general guarantee of freedom of expression as well as the prohibition on censorship are too broad. Other concerns relate to the remedies provided for – right of reply and correction, and damages – and we also make some proposals to extend the scope of the protections.

2. International Standards

Freedom of expression is a human right of fundamental importance, in particular because of its critical role in underpinning democracy and the realisation of all other human rights. As the UN Human Rights Committee has stated, "the right of freedom of expression is of paramount importance in any democratic society".[2] Article 19 of the *Universal Declaration on Human Rights* (UDHR)[3] 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.

The UDHR, as a UN General Assembly resolution, is not directly binding on States. However, parts of it, including Article 19, are widely regarded as having acquired legal force as customary international law since its adoption in 1948.[4]

[1] ARTICLE 19 was invited by the Montenegrin Helsinki Committee for Human Rights to provide comments on the draft Constitution, promulgated by the Montenegrin Parliament on 2 April 2007. This Memorandum is based on an unofficial English translation of the draft Constitution provided by the Montenegrin Helsinki Committee for Human Rights. We take no responsibility for errors based on translation.
[2] *Tae-Hoon Park v. Republic of Korea*, 20 October 1998, Communication No. 628/1995, para. 10.3.
[3] UN General Assembly Resolution 217A(III), adopted 10 December 1948.
[4] See, for example, *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd Circuit).

The *International Covenant on Civil and Political Rights* (ICCPR),[5] a treaty ratified by some 156 States, imposes formal legal obligations on State Parties to respect its provisions and elaborates on many of the rights included in the UDHR. Article 19 of the ICCPR guarantees the right to freedom of expression in terms very similar to those found in Article 19 of the UDHR:

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

Freedom of expression is also protected in all three regional human rights instruments, at Article 10 of the *European Convention on Human Rights* (European Convention),[6] Article 9 of the *African Charter on Human and Peoples' Rights*[7] and Article 13 of the *American Convention on Human Rights*.[8] The right to freedom of expression enjoys a prominent status in each of these regional conventions.

The European Court of Human Rights has often stressed the fundamental status of freedom of expression. In one of its early cases, the Court stated:

> Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man.[9]

It has often repeated this and similar statements since then. The European Court has also made it clear that the right to freedom of expression protects offensive and disturbing speech, frequently noting that the right to freedom of expression,

> … is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society.'[10]

The guarantee of freedom of expression applies with particular force to the media. The Court has consistently emphasised the "pre-eminent role of the press in a State governed by the rule of law".[11] Furthermore:

> 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.[12]

The European Court attaches particular value to political debate and debate on other matters of public concern. Robust debate is part and parcel of democracy and only very limited

[5] UN General Assembly Resolution 2200A(XXI), adopted 16 December 1966, in force 23 March 1976.
[6] Adopted 4 November 1950, in force 3 September 1953.
[7] Adopted 26 June 1981, in force 21 October 1986.
[8] Adopted 22 November 1969, in force 18 July 1978.
[9] *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72, para. 49.
[10] *Ibid.* Statements of this nature abound in the jurisprudence of courts and other judicial bodies around the world.
[11] *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63.
[12] *Castells v. Spain*, 24 April 1992, Application No. 11798/85, para. 43.

restrictions on political statements are acceptable: "There is little scope … for restrictions on political speech or debates on questions of public interest."[13] The Court has clarified that this enhanced protection applies even where the person who is attacked is not a 'public figure;' it is sufficient if the statement is made on a matter of public interest.[14]

2.1. Restrictions on the Right to Freedom of Expression

The right to freedom of expression may, under certain limited conditions, be restricted. Article 10(2) of the European Convention outlines the narrowly prescribed circumstances under which freedom of expression may be limited:

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

This translates into a three-part test, according to which restrictions on freedom of expression are legitimate only if they (a) are provided by law; (b) pursue a legitimate aim; and (c) are "necessary in a democratic society." This is very similar to the test provided in Article 19(3) of the ICCPR.

Each of these elements has specific legal meaning. The first requirement 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 has noted:

> [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.[15]

Laws which grant authorities excessively broad discretionary powers to limit expression also fail the requirement of "provided by law." The European Court has stated that when a grant of discretion is made to a body with regulatory powers over the media, "the scope of the discretion and the manner of its exercise [must be] indicated with sufficient clarity, having regard to the legitimate aim in question, to give the individual adequate protection against arbitrary interference."[16] The UN Human Rights Committee has repeatedly expressed concern about excessive ministerial discretion in relation to the media.[17]

The second requirement relates to the legitimate aims listed in Article 10(2) of the European Convention. To satisfy this part of the test, a restriction must truly pursue one of the legitimate aims; it is not acceptable to invoke a legitimate aim as an excuse to pursue a political or other agenda not included among those aims.[18]

---

[13] See *Dichand and others v. Austria*, 25 February 2002, Application No. 29271/95, para. 38.
[14] See *Bladet Tromsø and Stensaas v. Norway*, 20 May 1999, Application No. 21980/93.
[15] *The Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, para. 49.
[16] *Wingrove v. United Kingdom,* 25 November 1996, Application No. 17419/90, para. 40.
[17] This is particularly so in the context of media regulation. See, for example, 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.
[18] See Article 18 of the ECHR. See also *Benjamin and Others v. Minister of Information and Broadcasting*, 14

The third requirement, that any restrictions should be "necessary" to protect the legitimate interest, is a critically important element of the 3-part test as it is where the balance is struck between competing rights and legitimate interests. As the European Court has explained, the requirement of necessity means that even where restrictions seek to protect a legitimate interest, the government must demonstrate that there is a "pressing social need" for the measures.[19] Furthermore, the restriction must be proportionate to the legitimate aim pursued and the reasons given to justify it must be relevant and sufficient.[20] When limiting the fundamental human right to free expression, the State is required to use the least restrictive means available.

February 2(1), Privy Council Appeal No. 2 of 1999 (Judicial Committee of the Privy Council).
[19] See *Handyside*, note 9, para. 48.
[20] See *Lingens v. Austria*, 24 June 1986, Application No. 9815/82, paras. 39-40.

3. Analysis of the Draft

There are a number of articles in the draft Constitution which provide protection for the right of freedom of expression, including:

- Article 43 (protecting freedom of thought and public expressions of thought);
- Article 45 (the main substantive provision outlining the content of the right to freedom of expression);
- Article 47 (protecting freedom of the press and 'other forms of public information');
- Article 48 (prohibiting censorship); and
- Article 49 (guaranteeing freedom of speech and public expression).

It is commendable that the draft Constitution seeks to provide specific protection for a number of aspects of the right of freedom of expression. In order to give effect to this objective, we would recommend expanding on some of the drafting in these articles, so that it more fully reflects the content and articulation of the right to freedom of expression in international law and practice.

3.1. The scope of freedom of expression

As noted above, Article 45 is the main substantive provision outlining the right of freedom of expression, providing that everyone shall have the right to freedom of expression "by speech, writing, picture or in some other manner." Article 43, which protects freedom of thought and belief, also protects "public expression of thoughts". Article 49, for its part, provides simply that freedom of speech and "public expression" shall be guaranteed.

We note that, at present, Article 45 appears to be limited to the right of the speaker to impart information and ideas. As noted in Section 2 above, the right of freedom of expression under international law is, in fact, multi-dimensional, including the right not only to impart, but also to seek and receive information and ideas without interference. These other aspects of the right are of the greatest importance to its fulsome protection. They protect, for example, the right of individuals to receive information, thereby recognising the social aspect of free speech. Such protection is central, among other things, to protecting diversity in the media, a key aspect of the free flow of information in society. The right to seek and receive information also provides a crucial underpinning of the right to know or freedom of information (the right to access information held by public bodies – see below).

We furthermore note that there is considerable overlap between Article 45 and the part of Article 43 providing for the expression of opinions, noted above, as well as Article 49. It is possible that duplicate provisions expounding the right to freedom of expression will create confusion regarding the scope of the right rather than support its protection and promotion. In particular, unlike Article 45, Articles 43 and 49 do not elaborate on the legitimate scope of restrictions, which may lead to contradictory views on this crucial matter. We therefore recommend that consideration be given to converging these provisions so as to ensure one clear and consistent statement of protection for freedom of expression, whether it be expression of thoughts, public expression or any other form of expression.

Recommendations:

- Article 45 should make it clear that the rights to seek and receive, as well as the right to impart, information and ideas are protected.

- The expression aspect of Article 43, and the whole of Article 49, should be removed and incorporated within the amended Article 45.

3.2. Restrictions on freedom of expression

Article 45 allows for restrictions on the right to freedom of expression as long as these protect the right to dignity, reputation and honour of others, or public morality or national security. This formulation falls short of the established three-part test for restrictions on the right to freedom of expression under international law, as outlined above.

The main problem with Article 45 is that it does not require restrictions on freedom of expression to be necessary in a democratic society. As a result, it fails to strike an appropriate balance between the right to freedom of expression and competing legitimate interests. For example, at present Article 45 would appear to allow for absolute protection of the reputation of the president or of other senior officials, as it does not require restrictions to be necessary, proportionate and so on.

Article 45 also fails to impose the other limitations on restrictions on freedom of expression that are required under the three-part test. There is, for example, no requirement that restrictions be prescribed by law. As a result, executive action to limit rights that did not have a specific legal basis would not be ruled out. There is nothing to prevent the police, for example, from prohibiting protesters from carrying signs criticising the president, on the basis that this was necessary to protect her reputation, even though there was no specific legal basis for such action.

Finally, the list of protected interests is also at odds with international standards. First, it provides for protection of reputation using three different terms – namely dignity, reputation and honour – which is not only unnecessary but signals an unhealthy pre-occupation with this particular interest. Second, other important interests are not listed, such as the rights of others, or public order or health.

Recommendation:

- Article 45 should incorporate a clear test for restrictions on freedom of expression which requires them to be prescribed by law, to be necessary in a democratic society, and to protect a narrow but comprehensive set of overriding interests.

3.3. Specific protection for freedom of the press

Article 47 provides specific protection for media freedom, along with explicit recognition of the right to establish newspapers and other public media, without the need for prior approval. This is a positive and powerful constitutional acknowledgement of freedom of the media. To make it absolutely clear that no impediment to establishing a newspaper is envisaged, we recommend that the term “unconditional entry into the register with the competent authority” be used. The purpose of registration of a newspaper – which can be achieved by means other than a central registry – is to ensure a known place of business and address for accountability for what is printed in the newspaper, including for allegations of defamation or other incorrect

statements of fact. Accordingly, registration should be a purely administrative purpose, the recording of data, which does entail any discretion or contingencies.

At the same time, we note that a provision of this sort is not appropriate in relation to the broadcast media. The airwaves are a limited public resource and, for this reason, as well as the need to prevent interference and to promote order in the airwaves, licensing systems are universally recognised as legitimate, indeed necessary. We therefore recommend that the right to establish media without approval be limited to the print sector.

We would, however, recommend the addition of further protection through the insertion of a new paragraph into Article 47 prohibiting the licensing of journalists or other media workers. This is an important aspect of freedom of the media, arguably as important as the freedom to establish a newspaper.

Article 47 also provides for a right of reply or correction for untrue, incomplete or 'incorrectly stated' information that infringes an individual's right or interest, as well as a right to indemnity for damages caused by the publication of untruthful information.

We note that a right of reply is very different from a right of correction – the former being a right to have one's own response carried by a newspaper and the latter being the right to point out and have erroneous information corrected – although the two are often referred to together. A right of correction is minimally intrusive to freedom of expression and yet provides a good remedy where the problem is simply incorrect information.

The right of reply represents a far greater infringement on editorial independence and, as a result, presents a much higher risk of political or other illegitimate interference in the media. For these reasons, a right of reply is a contentious one which has not received wide-ranging support. The UN Special Rapporteur on Freedom of Opinion and Expression has strongly cautioned against a legal right of reply, and has advised that the right should be limited to allegedly false facts.[21] On the other hand, the American Convention on Human Rights requires State parties to provide for a right of reply.[22] Similarly, the Council of Europe Committee of Ministers has adopted a Resolution calling for a right of reply, but also providing some guidance as to its appropriate scope.[23] In particular, it states that the right should be recognised, but suggests that exceptions be made in the following cases:

i. if the request for publication of the reply is not addressed to the medium within a reasonably short time;
ii. if the length of the reply exceeds what is necessary to correct the information containing the facts claimed to be inaccurate;
iii. if the reply is not limited to a correction of the facts challenged;
iv. if it constitutes a punishable offence;
v. if it is considered contrary to the legally protected interests of a third party;
vi. if the individual concerned cannot show the existence of a legitimate interest.

[21] Report of the Special Rapporteur on the protection and promotion of the right to freedom of opinion and expression, Report of the mission to Hungary, 29 January 1999, E/CN.4/1999/64/Add.2, para. 35.
[22] Note 8, Article 14.
[23] Resolution (74)26 on the right of reply – position of the individual in relation to the press, 2 July 1974. The continuing relevance and applicability of Resolution (74)26 was affirmed when the Committee of Ministers suggested using the same principles to apply to internet-based regulation in 2004: Committee of Ministers of the Council of Europe, Recommendation No. Rec(2004)16 on the Right of Reply in the New Media Environment, adopted 15 December 2004.

ARTICLE 19 favours a voluntary or self-regulatory approach to the right of correction and reply. At a minimum, we suggest that the right be limited to cases where reporting has infringed a right of the claimant, along with the other protections noted above.

Finally, we question whether it is appropriate to include the right to indemnity for damages caused by the publication of untruthful information through the media at a constitutional level. Although all States do provide in law for some sort of indemnity of this sort in certain circumstances, almost none have felt the need to include it at the level of constitutional protection and there is no international treaty that has done so. The right to compensation for such damages is not a recognised human right and does not deserve equal treatment to such rights. At a very minimum, the right would need to be subject to the same limitations as apply to all restrictions on freedom of expression, namely the three-part test outlined above. Therefore, if it is deemed necessary to retain this provision, it should either be integrated into the provision on restrictions in Article 45 or subject to the same conditions as the restrictions as we recommend be set out in that Article.

Recommendations:

- Consideration should be given to amending Article 47 to ensure the "unconditional entry" of newspapers onto the register. At the same time, the right of establishment should be limited to the print media sector.
- Consideration should also be given to inserting a new clause into Article 47 to prohibit licensing of journalists.
- The right of reply should either be removed from Article 47 or be subjected to the conditions outlined above. In the latter case, the conditions for the application of the right of correction should be clearly distinguished from those applicable to the right of reply, and the right of reply available only where the matter cannot be resolved through a right of correction.
- The right to indemnity for damages should be removed from Article 47. At the very minimum, it should be subjected to the three-part test applicable to all restrictions on freedom of expression.

3.4. Censorship

Article 48 establishes a general presumption against censorship, which we understand to mean prior censorship, and also provides for exceptions to this presumption where a court orders it in relation to the media on the basis that this is necessary to prevent incitement to forcible overthrow of the constitutional order, to preserve territorial integrity, or to prevent incitement to war, violence or racial hatred.

International law does not entirely rule out all prior censorship but it is permitted only in the very most limited circumstances, for example in light of an imminent and very serious threat to a key interest. The European Court of Human Rights, for example, has stated:

> The dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest.[24]

[24] *The Observer and Guardian v. the United Kingdom*, 26 November 1991, Application No. 13585/88, para. 60.

Other international bodies, including the UN Human Rights Committee, have taken a similar position. Indeed, the American Convention on Human Rights rules out prior censorship entirely, except as necessary to protect children.[25]

There are a number of problems with the exceptions to the prohibition on prior censorship in Article 48. First, they particularly target the media without justification, providing a reminder, at least, of a time when general prior censorship of the media was practiced, which practice represents a clear breach of the right to freedom of expression. Second, they do not set the barrier for imposition of prior censorship nearly high enough. While necessity is an appropriate standard for post-publication restrictions, prior censorship is legitimate only where much more stringent standards are met. These include an imminent risk of a very serious harm to a small range of interests, which could not be addressed satisfactorily through post-publication sanction. Prior censorship may be needed to prevent someone from whipping up an angry crowd about to storm the Bastille, so to speak, but mere incitement to future violence or hatred cannot justify prior censorship. Third, and closely related, the list of interests which would justify prior censorship is too extensive. It is hard to envisage a situation where prior censorship could be legitimate outside of a serious risk of imminent violence or perhaps for protection of children.

Recommendation:

- Article 48 should permit prior censorship only where this is necessary to prevent a serious risk of immediate and significant harm to children or in the form of violence, which could not be remedied through the subsequent imposition of sanctions.

3.5. Freedom of information

Article 20 of the draft Constitution contains an excellent provision on access to environmental information, effectively implementing an important element of the *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (the Aarhus Convention).[26]

At the same time, the draft Constitution does not include a more general guarantee of the right to information. Redrafting Article 45 as recommended above would provide a basis for a constitutional claim of a right to information but this is not, of course, the same thing as a clear guarantee.

Recommendation:

- Consideration should be given to adding an explicit and general guarantee of the right to information into the draft Constitution.

[25] Note 8, Article 13(2) and (4).
[26] *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* Aarhus, Denmark, 25 June 1998, accessible at: http://www.unece.org/env/pp/treatytext.htm