



ARTICLE 19 ASSESSMENT of the Ukrainian Election Law and its implementation in the 2004 Presidential Election

27 October 2004

I. INTRODUCTION

The Law on the Election of the President (the Law) was amended through the Law “On the Introduction of Amendments to the Law of Ukraine ‘On Elections of the President of Ukraine’ ” No. 1630-IV of April 2004. The amended version of the Law is being applied for the first time for the presidential elections of 31 October 2004.

The main presidential candidates are the current Prime Minister and incumbent’s favourite, Viktor Yanukovich, and the opposition leader, Viktor Yuschenko. Other candidates include Socialist leader Oleskandr Moroz, and Communist leader Petro Symonenko, as well as ‘marginal’ candidates Roman Kozak and Oleksandr Yakovenko.¹ According to local polls, only Yanukovich and Yuschenko have real chances of winning the elections.² A second round of elections, already scheduled for 21 November, is likely to follow the 31 October elections.³

Thus far, the campaign has seen a number of violations of the Law. Although the provisions for direct access⁴ to the media were, in general, respected, in practice access has been unequal. Yanukovich, as Prime Minister, has benefited from immense and positive exposure. His main opponent, Yuschenko, has, instead, been in many cases

¹ Kozak and Yakovenko are self-declared opposition candidates widely believed actually to be in the Yanukovich camp and to be running mainly to discredit the opposition, so as to indirectly favour Yanukovich.

² According to a SOCIS sociological survey, Yuschenko enjoyed the highest electoral support at the beginning of September: 31% of respondents stated that they would vote in favour of Yuschenko during the first round of presidential elections. According to the survey, Yanukovych had the support of 24% of those polled, Petro Symonenko 7% and Oleksandr Moroz 6.5%. None of the other candidates (including Kozak and Yakovenko) are expected to gain even 1% of votes.

³ According to Ukrainian law, if no candidate gains 50 percent of votes, a second round of elections has to be held.

⁴ So-called ‘direct access’ programmes refer to small blocks of free airtime granted to all political parties and/or candidates to use as they see fit.

vilified in the mainstream media, with limited chances to respond to criticism and to get his message across.

This statement analyses the provisions and application of the Law in relation to the 2004 presidential election campaign. It aims to inform both the Ukrainian public and the international community about shortcomings in the current electoral process in Ukraine regarding the role of the media. It also provides recommendations for the Ukrainian authorities to make future electoral processes more fair, open and transparent.

Should a second round of the elections be necessary after this weekend's poll, ARTICLE 19 calls on the Ukrainian authorities to guarantee, as a matter of utmost urgency, equitable access to the media by both candidates, in order to ensure that the public is able to make informed and free choices on election day.

II. INTERNATIONAL STANDARDS

Under international law, political parties and candidates have a right to express their views freely through the media, and the public has a corresponding right to hear those views. These principles are based on the rights to freedom of expression and non-discrimination, as well as the right to political participation. Guarantees of these rights are found both in international law and in Ukraine's Constitution.⁵

Of particular relevance in encapsulating international standards in this area is Recommendation No. R(99)15 of the Committee of Ministers of the Council of Europe on Measures Concerning Media Coverage of Election Campaigns (Recommendation R(99)15),⁶ which states that "... the fundamental principle of editorial independence of the mass media gains special significance during elections".⁷

States have a positive obligation – at all times, but particularly during elections – to ensure media pluralism and to encourage a diversity of sources of information. As Recommendation R(99)15 states, "during election campaigns, regulatory frameworks should encourage and facilitate the pluralistic expression of opinions via the broadcast media."⁸ Furthermore, States should "provide for the obligation to cover electoral campaigns in a fair, balanced and impartial manner in the overall programme services of broadcasters...".⁹

⁵ Article 34 of the Constitution states that "everyone is guaranteed the right to freedom of thought and speech, and to the free expression of his or her views and beliefs"; Article 24 establishes that "citizens have equal constitutional rights and freedoms and are equal before the law"; Article 38 states that "citizens have the right to participate in the administration of state affairs, in All-Ukrainian and local referendums, to freely elect and to be elected to bodies of state power and bodies of local self-government."

⁶ Adopted in September 1999. Available at <http://www.coe.fr/cm/ta/rec/1999/99r15.htm>.

⁷ *Ibid*, Principle III.

⁸ *Ibid*, Appendix, Principle II.2.

⁹ *Ibid*.

In addition to providing fair and balanced reporting, the media should be in a position to fulfil the socially significant function of ‘public watchdog’,¹⁰ by exposing possible wrongdoing, corruption and maladministration on the part of elected representatives and, by extension, holding both the incumbent and other candidates accountable during the pre-election period. The media should also play a role in ensuring the transparency of the electoral system; provide different candidates with a platform to present their political agendas; disseminate information on the rules of voting; and expose any irregularities on election day and in the following periods, which may involve the formation of a new government and new political developments.

The balance between the State’s obligation to ensure that the public receive sufficient information to cast an informed vote and, at the same time, to refrain from unnecessarily interfering with the media’s right to freedom of expression is a delicate one. Measures taken should not go beyond what is necessary to achieve the aim of ensuring that the public is adequately informed and receives information from a variety of sources; the media should be free to provide comment and analysis on any issue related to the elections.¹¹ Although political broadcasts or reports may be subject to post-publication sanctions,¹² any such measures should be enforced through the regular judicial processes, in accordance with international human rights standards.

III. THE LAW AND ITS IMPLEMENTATION

III.1 Right to Freedom of Expression and Transparency

A general right to freedom of expression during the election period is provided for at Article 58(2) of the Law, establishing that:

Ukrainian citizens have the right to freely and comprehensively discuss the election programmes of candidates to the post of President of Ukraine, the political, professional and personal merits of the candidates ...

In addition, Article 13(1), on ‘Publicity and Openness of the Election Process’, states that “the elections ... shall be prepared and conducted in a public and open manner”.

With regard to the media’s access to information, Article 13(4) states that media representatives “shall be guaranteed unrestricted access to all public election-related events and to sessions of elections commissions and to the polling stations on the day of elections...”. More details are set out in Article 28(9), stating that media representatives, among others,¹³ “shall have the right to attend sessions of the election commission,

¹⁰ See for example *The Sunday Times v. United Kingdom (II)*, 26 November 1991, Application No. 13166/87 (European Court of Human Rights), para. 50.

¹¹ The ARTICLE 19 guidelines recommend that broadcasters should in fact be encouraged to provide election-related programming. *Guidelines for Election Broadcasting in Transitional Democracy* (London: ARTICLE 19, August 1994), Guideline 5.1.

¹² For example, if they are found to have been defamatory or likely to incite violence.

¹³ Others are “members of higher-level election commissions, candidates to the post of President of Ukraine, their proxies, official observers from the candidates for the post of the President of Ukraine and

including during the counting of votes ..., as well as to be present at the polling station on the day of the elections ..., in the premises where the voting is held”. In turn, election commissions and other State bodies “shall be obliged ... to provide [media representatives] with the necessary information regarding the preparation and conduct of the elections” (Article 13(4)).

Articles 13(4) and 28(9) are very positive in relation to the media’s ability to report on election-related events. We note that meetings held by public bodies should generally be open, unless adequate reasons for closure exist, and any closure should take place in accordance with established procedures.¹⁴ Notice of meetings is also necessary if the public is to have a real opportunity to participate. In addition, the authorities, and particularly in this case the Central Election Commission (CEC), should proactively provide the general public with as much information as possible regarding its activities and developments in the election processes, given the clear public interest in this sphere.

Recommendations:

- Article 13(4) should be amended to ensure that the general public, like the media, may request and obtain information concerning election processes from the CEC.
- Meetings of the CEC should generally be open to the public and should be closed only in accordance with established procedures and where adequate reasons for closure exist.

III.2 Independence of the CEC

According to the Law on the Central Election Commission No. 1932-IV of 30 June 2004, the CEC “shall have the competence to provide for the organisation of the preparation and conduct of elections and referenda in Ukraine and to ensure the implementation and protection of the electoral rights of citizens of Ukraine and their rights to take part in referenda, as well as the sovereign right of the people of Ukraine to express its will.”

Article 3(1) establishes the independence of the CEC, stating that “the Commission is a collegial state body, which shall exercise its authority autonomously, independently from other bodies of state power, bodies of local self-government, their officers and officials.” Article 4(1) also crystallises the fact that the CEC shall “act in an open and public manner”.

Pursuant to Articles 6(1) and (2) of the Law and Article 85(21) of the Constitution, CEC representatives are appointed by the parliament following nominations by the president. The Verhovna Rada (the Rada)¹⁵ vote on the list of nominees in their entirety. This is

parties (blocs) – subjects of the election process (altogether not more than two persons from one candidate to the post of President and the party (bloc) that nominated him/her), as well as official observers from foreign countries and international organizations.”

¹⁴ *The Public’s Right To Know: Principles on Freedom of Information Legislation* (London: ARTICLE 19, June 1999), Principle 7. Reasons for closure might, in appropriate circumstances, include public health and safety, law enforcement or investigation, employee or personnel matters, privacy, commercial matters and national security. Any decision to close a meeting should itself be open to the public.

¹⁵ The Ukrainian Parliament.

very restrictive as it virtually nullifies the freedom to choose candidates by the Rada. The lists that have been proposed by President Kuchma, despite a self-declared objective to nominate CEC members who are representative of a wide political spectrum, have included primarily loyal followers of his policies. In addition, according to information provided to ARTICLE 19, the CEC has not operated in an independent manner and cases of partisanship (favouring Yanukovich and disfavouring Yushenko) have been recorded.

This is a matter of some concern. The Central Election Commission (or, as generally defined, the election management body¹⁶) fulfils important functions, including regulating media coverage of the election, through the allocation of direct access programming and in dealing with complaints. It is, therefore, extremely important that the CEC operates free from political or other interference and that it is fully impartial vis-à-vis candidates, in order to ensure their non-discriminatory access to the media. Its institutional autonomy and independence should be guaranteed and protected by law, including in the following ways:

- specifically and explicitly in the legislation which establishes the body and, if possible, also in the constitution;
- by a clear legislative statement of overall broadcast policy, as well as of the powers and responsibilities of the regulatory body;
- through the rules relating to membership;
- by formal accountability to the public through a multi-party body; and
- in funding arrangements.

In particular, in relation to the rules of appointment, the members should be appointed by an all-party body, such as the parliament, with nomination from a wide range of stakeholders (rather than by one individual, as is the case in Ukraine). The process for appointing members should be open and democratic, should not be dominated by any particular political party or commercial interest, and should allow for public participation and consultation.

Recommendations:

- Steps should be taken to ensure that the CEC is fully protected against political or other interference, both in law and in practice.
- Ideally, Articles 6(1) and (2) of the Law and Article 85(21) of the Constitution should be amended to allow a wide range of stakeholders to nominate CEC members.

III.3 Equitable Access to the Media

The general right to non-discrimination vis-à-vis candidates during election processes is provided for at Article 3(3), on ‘Equal Suffrage’, stating that “all candidates ... shall enjoy equal rights and opportunities to take part in the election process”. There should also be “impartiality from the side of State executive bodies ... towards candidates ...”

¹⁶ In addition to the Central Election Commission, this may be a committee within the broadcasting regulatory body, separate regulatory body, or a self-regulatory committee. See ACE Project, “Administrative Considerations” <http://www.aceproject.org/main/english/me/me30.htm>.

(Article 11(2)(7)) and a prohibition against candidates employed by State bodies from using the resources of those bodies to their advantages (Article 64(15)).¹⁷

Specifically in relation to the media, Article 11(2)(6) states that that “the election process shall be realised on the ground of ... equal opportunities for candidates ... to access to the media”. Article 60(1) reiterates that “the pre-election campaign in the media of all forms of ownership shall be conducted in compliance with the principles of equal conditions and according to the procedure envisaged by this law”.¹⁸ This is translated, in practice, into an obligation, in relation to State-subsidised direct access programmes, to provide “the same print space in the print media and air time on radio and television” to each candidate (Article 58(5)).

To allow candidates effectively to reach the public, there are also some obligations on the State bodies to provide premises for pre-election campaign events (Article 58(6)): in particular, if a building is made available for a campaign event to one candidate, its owner does not have the right to refuse it to another candidate (Article 58(9)). The CEC shall also ensure the production of posters which contain candidates’ pre-election programmes; the poster “must be of the same format, size and layout” (Article 59(1)).

The statements of equitable opportunities for all candidates mentioned above are welcome and are in line with international standards of freedom of expression and non-discrimination. In addition, it is widely recognised that, in order for political candidates to get their messages across, it is essential that they should have access to the media. There is a strong obligation on States to remove any legal or administrative barriers to access. Paragraph 7.8 of the Copenhagen Document agreed by OSCE member States provides:

To ensure that the will of the people serves as the basis of the authority of government, the participating States will ... provide that no legal or administrative obstacle stands in the way of unimpeded access to the media on a non-discriminatory basis for all political groupings and individuals wishing to participate in the electoral process.¹⁹

However, despite Article 64(15), prohibiting the abuse of State resources by State officials during the campaign, there have been allegations that Yanukovich has illegally benefited from this, including through the appropriation of funds, property and equipment.²⁰

¹⁷ The article states:

Candidates to the post of President of Ukraine who occupy posts ... in State executive bodies ... shall be prohibited from involving in the pre-election campaign or using their subordinates (during working hours), office transport communication, equipment [and other resources] ... for any work connected the conduct of the pre-election campaign...

¹⁸ The expression ‘media of all forms of ownership’ seems to include both the State-owned and private media. However, its exact meaning has never been defined in Ukrainian jurisprudence and in practice only the private *regional* media is subjected to some form of regulation with regard to election coverage.

¹⁹ *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE*, Copenhagen, 29 July 1990.

²⁰ In addition, State employees and students were reportedly obliged to take part in his rallies: they were offered bribes or other advantages in exchange for their participation, or were threatened with dismissal if

Recommendation:

- The authorities and the public media should not allow the party in power, or the incumbent, to unduly exploit their advantaged position vis-à-vis other candidates to get extra exposure or other practical advantages.

a) Direct Access to the Media

According to Article 60(4) of the Law, the CEC “establishes the procedure for providing airtime and print space” to candidates. The CEC also does so in case of ‘repeat elections’ (Article 60(9)).

Direct access is made available during the pre-election campaign between 19.00 and 22.00 (Article 61(2)). Each candidate receives 30 minutes on public television (UT-1) and 45 minutes on public radio, as well as 20 minutes on regional television channels and on regional radio channels (Article 61(4)).²¹ The available time is divided into three equal time slots (Article 60(4)) and, for the State media, is distributed on the basis of lots drawn by the CEC (Article 61(6)). It is prohibited to comment on pre-election materials 20 minutes before and 20 minutes after they are broadcast (Article 61(5)).

Direct access to the public print media is regulated separately in Article 63, which states that a candidate has the right to publish, free of charge, his/her election programme in the official State bulletin, *Golos Ukrainiy*, and in *Uriadovy Courier*, “in a print lay-out that is identical for all candidates” (Article 63(1)). This is also the case for local State-owned newspapers, also “ensuring equal conditions to all candidates” (Article 63(2)).

International law recognises that it is legitimate to require public broadcasters to provide free direct access to airtime for political candidates. As provided for in Ukrainian legislation, access must be allocated in a fair and non-discriminatory manner and on the basis of clear and objective criteria.²² Indeed, as a general principle, the ARTICLE 19 *Broadcasting Principles* state:

Public broadcasters should be required to grant political parties and/or candidates direct access airtime, on a fair, equitable and non-discriminatory basis, for political broadcasts.²³

Yet, although the provisions included in Ukrainian law for equitable access to the media are in line with international standards, and although these are usually observed, in practice they are not sufficient to ensure adequate coverage for all candidates. This is

they refused to comply. There were also reports that some citizens were forced to give their signature in support of Yanukovich’s candidacy.

²¹ In all regions of Ukraine, including all oblasts, the Autonomous Republic of Crimea and the cities of Kyiv and Sevastopol.

²² *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, supra*, Paragraph I.7.8.

²³ *Access to the Airwaves. Principles on Freedom of Expression and Broadcast Regulation*. ARTICLE 19, London, April 2002, Principle 31(1).

primarily due to the fact that the favoured candidate enjoys endless opportunities for extra exposure through news and other programmes (see below).

Direct access to the private media is not envisaged in the Ukrainian legislation, at least for the nation-wide media.²⁴ However, over the past few years, consensus has emerged that if one political party is granted broadcasting time, other parties should also receive that benefit; this rule should apply not only in relation to public media but also in relation to the privately-owned broadcast media. The most recent international statement on the matter can be found in the 2002 Venice Commission Guidelines, which provide unambiguously that “legal provision should be made to ensure that there is a minimum access to privately-owned audiovisual media, with regard to the election campaign and to advertising, for all participants in elections.”²⁵ Similarly, the ARTICLE 19 *Broadcasting Principles* state:

Public broadcasters have a primary obligation [to grant political parties and/or candidates direct access airtime, on a fair, equitable and non-discriminatory basis, for political broadcasts] but obligations may also be placed on commercial and/or community broadcasters... provided that these obligations are not excessively onerous.²⁶

And:

[C]ommercial/community broadcasters may ... be required to provide technical assistance to parties and candidates for purposes of production of direct access political broadcasts.²⁷

The guiding principle in implementation, and in deciding whether or not to require private broadcasters to provide direct access slots, should be to ensure that the public is sufficiently informed in a balanced manner.

Given the relevance to the election campaign discourse of popular private country-wide channels 1+1, Inter and ICTV, it would be auspicious to introduce a framework for access to these channels by the candidates. Indeed, in Ukraine, not only is television the most popular medium but, in practice, the audience share of the non-State media is higher than that of UT-1. Inter, for example, has a 26.2% audience share against UT-1's 4.7%.²⁸

Recommendation:

- The authorities should consider the introduction of guidelines for the provision of direct access programmes on private broadcasters.

²⁴ The legislation is vague in relation to the regional media, and might allow scope for direct access regulation at the regional level.

²⁵ European Commission for Democracy through Law (Venice Commission), *Code of Good Practice in Electoral Matters*, Strasbourg, 30 October 2002, CDL-AD (2002) 23, at 2.3.c.

²⁶ *Access to the Airways*, *op. cit.*, Principle 29.2.

²⁷ *Ibid*, Principle 31.1.

²⁸ 1+1 gets 21.7%, Novyi Canal 7.2%, STB 5.1% and ICTV 2.9%. Data compiled by AGB company, Gabor, N, and Skoropadenko, Z, 'Ukrainian Media Landscape', the European Journalism Centre, October 2002, <http://ejc.nl/jr/emland/Ukraine.html>.

b) *Fair, Balanced and Impartial Reporting*

The principle of non-discrimination in relation to candidates²⁹ should apply to ensure that candidates receive fair, balanced and impartial coverage in the broadcast media. While it is well-established that the private print media have considerable freedom in their reporting of elections, broadcast media, whether private or State-owned, should be required to cover electoral campaigns in a fair, balanced and impartial manner.³⁰ The Council of Europe Recommendation makes this clear:

With due respect for the editorial independence of broadcasters, regulatory frameworks should ... provide for the obligation to cover electoral campaigns in a fair, balanced and impartial manner in the overall programme services of broadcasters. Such an obligation should apply to both public service broadcasters as well as private broadcasters in their relevant transmission areas.

It is important to note the proviso “with due respect for the editorial independence of broadcasters”, meaning that there should be no inappropriate interference with programme content. It should also be noted that the requirements of fairness and balance do not imply that broadcasters should devote equal airtime to all parties and candidates; it means that all parties and significant viewpoints are paid due, or equitable, attention.

The obligation to report in a fair and balanced manner applies to news and current affairs programmes,³¹ as well as to other programmes “which may also have an influence on the attitude of voters”.³² In addition, Recommendation R(99)15 states that, in relation to news and current affairs:

No privileged treatment should be given by broadcasters to public authorities during such programmes.³³

The obligation of fairness and balance extends to State-owned or controlled print media as well as to all broadcast media. Recommendation R(99)15 stipulates:

[P]rint media outlets which are owned by public authorities, when covering electoral campaigns, should do so in a fair, balanced and impartial manner, without discriminating against or supporting a specific political party or candidate.³⁴

This clearly applies to the State-owned print media outlets in Ukraine.³⁵

This principle is not developed in the Law and it is widely ignored in practice. For example, between 1 and 15 September, the coverage of Yanukovich’s direct speeches³⁶ in

²⁹ As provided in the above-mentioned Article 60(1), stating that “the pre-election campaign in the media ... shall be conducted in compliance with the principles of equal conditions.”

³⁰ Recommendation R(99)15, note 6, Appendix, Principle II.1.

³¹ *Ibid.*

³² *Ibid.*, Principle III.

³³ Recommendation R(99)15, note 6, Appendix, Principle II.2.

³⁴ *Ibid.*, Principle I.2.

³⁵ *Golos Ukrainy* and *Uriadovy Courier*.

news items on UT-1, exceeded by nearly 10 times the coverage of the other main candidates and was 818 times that of his main rival, Yuschenko.³⁷ In addition, in the month of August, during the period of signature collection by candidates, the nation-wide channels gave regular updates on the progress made by Yanukovich.³⁸ This extra coverage of favoured candidates is specifically excluded from the regime of election media regulation pursuant to Article 58(3), which states that “official notices during the election process ... about the activities of the candidates to the post of president of Ukraine while they carry out their official functions ... *shall not be considered part of the pre-election campaign*” [italics added]. Although the advantages of the incumbent (or his favoured successor) are a fact in elections in all countries, in some they might give way to particularly blatant and pernicious forms of abuse.

Lots are used to compile the schedule of direct access programmes.³⁹ In stark contrast, news items, political advertising and other programmes showing certain candidates have been juxtaposed against images that may create a negative reaction in the viewers, such as violence, extremist behaviour and crime. Some media reports appear to manipulate their coverage of national and ethnic issues to the clear disadvantage of Yuschenko. For example, country-wide television channels and pro-presidential newspapers vigorously disseminated information on rallies of demonstrators carrying symbols of Nazi Germany, suggesting that these were organized by the opposition.⁴⁰ The main channels have also tended to present Yanukovich in a positive, and Yuschenko in a negative, light. These forms of unequal, unfair and unbalanced coverage have also been observed widely on the public broadcaster.

Partisanship on the part of the public broadcaster is particularly worrisome as public broadcasters have a primary obligation to ensure that the public receive adequate information during an election about the platforms of political parties and candidates, campaign issues and other matters of relevance to the election.

Recommendations:

- Specific guidelines should be established requiring the broadcast media to provide fair and balanced coverage of different parties and political candidates, with due respect for the editorial freedom of broadcasters.
- Special efforts should be made to ensure that the public broadcaster is impartial, at all times but particularly during election periods.
- Broadcasters should not grant public authorities undue coverage in news and current affairs programmes.

³⁶ Live speeches and direct quotations.

³⁷ Data of the media monitoring carried out by the Institute for Mass Information (IMI) and the Kharkiv Group for Human Rights Protection (KHPG). The monitoring has been carried out with logistical support from ARTICLE 19 and financial support from the European Commission Delegation in Ukraine. It started at the beginning of August 2004 and was ongoing in October 2004.

³⁸ *Ibid.*

³⁹ Article 61(7) of the Law.

⁴⁰ It was not proven that there was a link between these demonstrations and the opposition, which has distanced itself from them. The information available indicates that the demonstrations might have been staged.

III.4 Political Advertising

In addition to direct access slots required by law, a candidate can purchase time for political advertising. This is provided for by Article 60(5), stating:

The pre-election campaign in the media ... at the expense of the campaign fund of the candidate ... shall be conducted on the conditions of equal payment per unit of air time and ... of print space and shall only be restricted by the expenditure limits of the campaign fund.

Political advertising can also be bought in the private print media (Article 63(5)).

Media outlets must, not later than 130 days prior to election day, calculate the cost of a unit of air time and print space. In turn, the National Broadcasting Council of Ukraine and the State Committee for Television and Broadcasting are to determine the average cost indicator of a unit (Article 60(6)). The prices must be published and disseminated through the media no later than 120 days prior to election day (Article 61(2)).

The Law also provides that no medium can favour a certain candidate by allowing discounts (Article 60(6)). Furthermore, “a medium that has provided a candidate ... with airtime or print space shall not have the right to refuse to provide airtime or print space on the same conditions to another candidate”, with the exception of media owned by political parties (Article 60(8)).⁴¹

ARTICLE 19 welcomes the provisions of Article 60(5), establishing that political advertising is to be provided on a non-discriminatory basis, which is in line with international standards in this area. For example, Recommendation R(99)15 states that if State-owned or controlled print media outlets accept political advertising, they should do so in a fair and equitable manner.⁴² It also recommends that,

regulatory frameworks should ensure that ... the possibility of buying advertising space should be available to all contending parties, and on equal conditions and rates of payment.⁴³

The rule of non-discrimination in Article 60(8)⁴⁴ has resulted in an improvement over the 2002 parliamentary elections, when some candidates were denied the possibility of purchasing time for political advertising on certain channels. However, although there have been fewer such refusals, a number of techniques have been used to reduce the positive impact of the opposition candidate’s ads, including negative campaigning directed towards him prior to or immediately following his ads. Although Yanukovich has mostly refrained from using this form of negative campaigning, it has been widely practiced by pseudo-candidates Roman Kozak and Oleksandr Yakovenko.⁴⁵ For example,

⁴¹ This, in practice, applies only to the print media since, according to Ukrainian law, broadcast outlets cannot be owned by political parties or religious institutions.

⁴² Recommendation R(99)15, note 6, Appendix, Principle I.2.

⁴³ *Ibid*, Principle II.5.

⁴⁴ Introduced through the 2004 amendments.

⁴⁵ This supports the conclusion that their main *raison d’etre* is to support Yanukovich by denigrating Yushchenko.

the latter have juxtaposed messages against Yuschenko's ads indicating that, should Yuschenko win, Ukraine would be split into two parts.⁴⁶

Moreover, political ads by certain candidates have included excerpts from Yuschenko's speeches, which have consistently been placed out of context and presented so as to create a negative image of the opposition candidate. Advertising produced by certain candidates⁴⁷ has included (or consisted exclusively of) items that show Yuschenko in a negative light. For example, in the period from 1 to 15 September, one third of political advertising on ICTV (22 out of 60 ads) and almost half on UT-1 (46 out of 98) were directed against Yuschenko.⁴⁸ This phenomenon increased throughout the second half of September, as Yuschenko was reported negatively in 36% of all political ads on Inter, in 48% on 1+1 and in 54% on UT-1. Approximately one quarter of all candidates' direct access materials on UT-1 and Radio 1 were also directed against him.⁴⁹ At times, the originator of the 'negative' political ads was not identified.

The phenomenon of negative political advertising is particularly worrisome in those cases in which the originator is unclear. This suggests a campaign regime that is not fully open and transparent. While negative campaigning is practiced in many countries, and exchanges between candidates do not always comply with ethical norms, a problem arises when there is a sharp imbalance and attacks are routinely directed against a particular candidate.

Recommendation:

- The public should always be aware of the origin of a paid political advertisement.

III.5 Right of Reply

The right of reply is provided for at Article 64(5) of the Law in response to "spread[ing] deliberately false information about the candidate to the post of president of Ukraine" (Article 64(5)). The article states that a media outlet "that published information which the candidate to the post ... considers obviously incorrect, must, within three days after the day such materials have been made public, but no later than two days prior to the day of the elections, give the candidate ... upon ... request, a possibility to refute such materials"⁵⁰

⁴⁶ This is because Yuschenko mainly enjoys support in (mostly Ukrainian-speaking) Western Ukraine, and Yanukovich in (largely Russian-speaking) Eastern Ukraine. However, there is no clear evidence that such a sharp divide exists among the electorate.

⁴⁷ Once again, particularly Kozak and Yakovenko.

⁴⁸ Monitoring by IMI and KHPG, note 37.

⁴⁹ *Ibid.*

⁵⁰ This should be done by,

giving them the same air time on TV or radio accordingly, or by publishing in the print mass medium material provided by the candidate or party (bloc) that must be printed in the same font and be placed under the heading 'Refutation' at the same place in the column and of a volume not less than the volume of the announcement being refuted. The refutation must contain a reference to the respective publication in the printed mass medium or broadcast on the TV or Radio and a reference to the facts being refuted. The refutation must be made public without amendments,

This provision is a positive one since, during the short and intense election period, false accusations can have a significant effect on the overall outcome. While in ordinary circumstances anyone who is libelled can sue for defamation in the courts, during elections the matter would in all likelihood not be resolved until after the vote has been held and thus be of little value in redressing any bias to the electoral process that may have occurred. It is, therefore, recommended that expedited procedures should be available. Recommendation R(99)15 provides:

Given the short duration of an election campaign, any candidate or political party which is entitled to a right of reply under national law or systems should be able to exercise this right during the campaign period.⁵¹

In practice, media monitoring has shown that, despite the rules on the right of reply, some candidates are vilified in the media and do not seem to be able adequately to respond to the dissemination of false and harming information about them.⁵² This is particularly the case with political advertising directed against Yushenko.

III.6 Opinion and Exit Polls

Article 60(7) states:

In case the media publish the results of a public opinion survey related to the election of the President of Ukraine, it must indicate the organisation that conducted the survey, the date the survey was conducted, the number of people interviewed, the method by which the information was collected, the precise formulation of the question, and a statistic evaluation of the possible error.

In addition, Article 64(13) establishes that the results of opinion polls cannot be disseminated by the media during the last 15 days of the election campaign or the day of 'repeat voting'. It is also prohibited to disclose the results of exit polls on election day and throughout the voting process (Article 64(18)).

Article 60(7) is to be welcomed, since opinion polls should always be reported with due care, as they can be used as a partisan tool and can sometimes have an undue impact on voting intentions. If they are used properly, opinion polls can be an important way of measuring what voters think about particular issues, parties and candidates. The Recommendation R(99)15 therefore advises that certain rules should govern their publication:

Regulatory or self-regulatory frameworks should ensure that the media, when disseminating the results of opinion polls, provide the public with sufficient information to make a judgement on the value of the polls. Such information could, in particular:

commentaries or abbreviations, and should be done at the expense of the respective mass medium.

⁵¹ Recommendation R(99)15, note 6, Appendix, Principle III.3.

⁵² Monitoring by IMI and KHPG, note 37.

- name the political party or other organisation or person which commissioned and paid for the poll;
- identify the organisation conducting the poll and the methodology employed;
- indicate the sample and margin of error of the poll;
- indicate the date and/or period when the poll was conducted.⁵³

The provisions at Article 64(13) and 64(18) are useful in limiting the potentially negative effects of opinion polls and exit polls in unduly influencing the public; poll findings can be open to manipulation by unscrupulous pollsters or politicians. At the same time, 15 days is an extremely long time to prohibit such polls. Comparative practice suggests that, at the very most, a week is sufficient. In addition, the main problem with opinion polls in Ukraine is that there have been very few truly independent polls.

Recommendation

- Article 64(13) should be amended to reduce the period of time prohibiting the dissemination of opinion polls results to *one week* prior to the elections.

III.7 Voter Education

Article 13(2) states that, in order for the election process to be open and public, the election commissions are to provide voter education. This involves:

- (1) Informing the public about [the] composition [of election commissions], location and working hours, about the formation of territorial election districts and polling stations, about the voting hours and place, and about the voters' fundamental rights
- (2) Ensur[ing] opportunities for citizens to get acquainted with the lists of votes, with information about candidates ... and with pre-election programmes, and with the procedure for filling out signature sheets and marking election ballots.

The public is also to be informed on the results of the elections (Article 13(2)(3)). Decisions of the elections commission shall be disseminated through the media (Article 13(3)).

The provisions for voter education are welcome as, in addition to the requirements relating to neutrality and fairness, State-owned media (including private media that receive substantial financial backing from public sources) are also under an obligation to provide the public with general information about the political parties, candidates, campaign issues, voting processes and other matters relevant to the election.⁵⁴ This follows from the international law obligation on States to "hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."⁵⁵ This implies

⁵³ Recommendation R(99)15, note 6, Appendix, Principle III.2. See also the ARTICLE 19 *Guidelines for Election Broadcasting in Transitional Democracy*, note 11, Guideline 12.

⁵⁴ *Ibid*, Guideline 1.

⁵⁵ Protocol to the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Article 3. See also Article 25, *International Covenant on Civil and Political Rights*, adopted 16 December 1966, entry into force 23 March 1976, ratified by Ukraine on 12 November 1973.

that citizens should have the necessary information to register and vote, and to make informed choices regarding matters that are the subject of elections.

III.8 Other Matters

a) *Restrictions on the Right of Freedom of Expression during the Campaign Period*
'Pre-election campaign restrictions' are listed in Article 64. Article 64(3), in particular, states:

It shall be prohibited to disseminate in any form materials which contain calls for the liquidation of the independence of Ukraine, the change of the constitutional order by violent means, the violation of the sovereignty and territorial indivisibility of the State, the undermining of its security, the unlawful seizure of State power, the propaganda of war and of violence, the incitement of inter-ethnic, racial, or regional enmity, and the encroachments on human rights and freedoms and the health of the population.

In addition, the State and municipal media are forbidden from campaigning for or against a certain candidate. The activity of these media outlets can be suspended temporarily in case of violation of this provision (Article 64(4)).

There is no need to include Article 64(3) in the legislation, as these provisions should, to the extent that they are legitimate, be included in a law of general application rather than an election-specific law. Their inclusion here can be interpreted as a double-warning to candidates and/or the media in the exercise of their right to freedom of expression during the election campaign.

In addition, any restrictions to the right to freedom of expression during the pre-election period, as at all times, should satisfy a strict three-part test. This test requires that any restriction must a) be provided by law; b) be for the purpose of safeguarding a legitimate public interest; and c) be necessary to secure this interest.⁵⁶

To be 'provided by law' implies not only that the restriction is based in law but also that the relevant law meets certain standards of clarity and accessibility. The third part of the test, the requirement of necessity, means that even where measures seek to protect a legitimate interest, the government must demonstrate that there is a 'pressing social need' for the measures. Furthermore, the restriction must be proportionate to the legitimate aim pursued and the reasons given to justify the restriction must be relevant and sufficient.⁵⁷

With regard to the question of liability, the ARTICLE 19 *Guidelines for Election Broadcasting in Transitional Democracy* recommend that media who merely republish messages made by others should enjoy protection:

⁵⁶ For an elaboration of this test, see *Mukong v. Cameroon*, 21 July 1994, Communication No. 458/1991 (UN Human Rights Committee), para. 9.7.

⁵⁷ *Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, para. 62 (European Court of Human Rights). These standards have been reiterated in a large number of cases.

It is strongly recommended that the media be exempted from legal liability for unlawful statements made by candidates or party representatives and broadcast during the course of election campaigns, other than those which constitute clear and direct incitement to violence. The parties and speakers should be held solely responsible for any unlawful statements they make.⁵⁸

The media should not bear responsibility for unlawful statements made by political candidates in reports or broadcasts, unless the media outlet concerned has either taken specific steps to adopt the statements or where the statements are quite clearly illegal and the media outlet had an adequate opportunity to prevent their being disseminated. The media should also bear reduced responsibility for the content of direct access broadcasts. If the media were responsible for the contents of direct access broadcasts, this would put them in the position of being potential censors. This departure from the normal rules of liability is justified by the short duration of campaign periods and the fundamental importance to free and fair elections of unfettered political debate. This limitation of liability does not, however, relieve political parties and other speakers themselves from liability for their statements.

In addition, violation of Article 64(4) may involve the suspension of a media outlet. Although, as stressed above, it is of paramount importance that the public media maintain strict impartiality during election periods, sanctions should always be strictly proportionate to the harm caused and should be applied in a graduated fashion. Normally, the sanction for an initial breach will be a warning stating the nature of the breach and not to repeat it. Fines may be imposed in more serious cases, but only after other measures have failed to redress the problem, and suspension and/or revocation of a licence should not be imposed unless the broadcaster has repeatedly been found to have committed gross abuses and other sanctions have proved inadequate to redress the problem.

Recommendations:

- Any restrictions on the right to freedom of expression during the pre-election period should, as at all times, be in full conformity with the three-part test for such restrictions, outlined above.
- The media should not bear responsibility for unlawful statements made by political candidates in reports or broadcasts, unless the media outlet concerned has either taken specific steps to adopt the statements, or where the statements are clearly illegal and the media outlet had an adequate opportunity to prevent their being disseminated.
- Sanctions should always be proportionate to the harm caused, and suspension of a media outlet should not be imposed unless the broadcaster has repeatedly been found to have committed gross abuses and other sanctions have proved inadequate to redress the problem.

b) Requirement of Objectivity

Article 13(4) states that “the media shall be obliged to cover the pace of the election process in an objective manner”.

⁵⁸ ARTICLE 19 *Guidelines for Election Broadcasting in Transitional Democracy*, note 11, Guideline 6.

This provision does not take into consideration the fundamental distinction between print media, on the one hand, and broadcast media, on the other. While all broadcast media should report in a fair, balanced and impartial manner, it is generally recognised that print and Internet-based media should be free to express a political preference for one or other candidate. Hence, Article 13(4) runs counter to Principle I.1 of Recommendation R(99)15, which states:

Regulatory frameworks on media coverage of elections should not interfere with the editorial independence of newspapers or magazines nor with their right to express any political preference.⁵⁹

Generally, it would be preferable to provide for fair, balanced and impartial reporting through self-regulatory measures. For example, Recommendation R(99)15 stresses, in its preambular statement, “the important role of self-regulatory measures by media professionals themselves - for example, in the form of codes of conduct - which set out guidelines of good practice for responsible, accurate and fair coverage of electoral campaigns”. It adds that member States should adopt measures for fair, balanced and impartial reporting for the broadcasters “[w]here self-regulation does not provide for this” [italics added]. However, regrettably, an effective regulatory system is not in place in Ukraine.

It is important to note that the requirement of fair, balanced and impartial reporting should not be understood as being applicable to every item taken individually; rather, it imposes an overall obligation to pay due attention to all parties and significant viewpoints throughout the electoral campaign.

Recommendation:

- Article 13(4) should be limited in scope to the broadcast media.

IV. CONCLUSIONS

The law contains some positive features, such as a general guarantee for freedom of expression during the electoral campaign, provisions for non-discrimination in relation to candidates and their access to the media – including through direct access and the purchase of political advertising – and rules for a prompt right of reply. At the same time, ARTICLE 19 concludes that the legal framework for the election of the president of Ukraine, and particularly its implementation, could be significantly improved.

Overall, an effective system for fair and balanced reporting is absent in Ukraine. The effective implementation of the legislation is severely hindered by the control of the main media outlets by candidates or their supporters. In particular, the main critics of Yuschenko appear to be the channels that are close to the Head of the Presidential Administration, Viktor Medvedchuk, (UT1, Inter and 1+1), whilst those owned by Viktor

⁵⁹ Recommendation R(99)15, note 6, Appendix, Principle I.1.

Pinchuk⁶⁰ (ICTV and Noviy Kanal) have shown greater balance in their reporting of Yushchenko and less favouritism for Yanukovich. This state of affairs reflects divides in the journalistic community according to political affiliation, as well as a high level of media manipulation. Of concern is also the evidence of an increased use of temnyky (instructions to the media by the Presidential Administration) during the pre-election period: news items are virtually identical on all main television channels, which points to the conclusion that media outlets follow the same guidelines. Reportedly, a temnyk issued on the occasion of Yushchenko's first election rally, held on 4 July, instructed journalists: "[W]hen covering the event, do not give long shots of the rally and shots of the crowd; show only groups of drunk people with socially inappropriate deviant behaviour".⁶¹

To improve the implementation of the legislation, in March 2004, the Rada issued an appeal to various State structures calling for fairness during the electoral campaign.⁶² The appeal urges State bodies "to use every means to promote citizens' conscious choice and uninhibited expression of their civic position during voting" and asks them to avoid "using official powers and resources in favour of any presidential candidate". Another recent appeal, also by the Rada, calls on the media and government agencies to provide unbiased coverage of the elections, so as to prevent the "distortion of facts and manipulation techniques". In addition, it urges full compliance with Ukrainian legislation by the Central Election Commission and the National Council for Television and Radio Broadcasting, adding that political interference in the work of the media is utterly unacceptable. It also notes that the Rada intends to monitor the election process to ensure equal access to the media for all candidates.

Although the above appeals are applauded, the Ukrainian authorities should, as a matter of utmost urgency, adopt more robust measures for the creation of an effective regime for election reporting and equitable access to the media by candidates. Such measures should, as a priority, aim to ensure that the public is adequately informed about election processes, candidates and the overall political context so as to be able to make informed and free choices on election day. These are clear prerequisites for free and fair elections in accordance with democratic standards.



This statement was produced with funding from the European Union. Its contents are the sole responsibility of ARTICLE 19, and can under no circumstance be regarded as reflecting the position of the European Union.

⁶⁰ The President's son-in-law, an MP for Labour Ukraine and, according to estimates, Ukraine's second wealthiest man.

⁶¹ *Zerkalo Nedely*, 10-16 July 2004.

⁶² This was voted by 390 out of 444 MPs.