

Comments on the Law “On Mandatory Holding of Pre-Election Debates during Pre-Election Campaigning During Presidential and Parliamentary Elections in Ukraine”

ARTICLE 19

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Introduction

This commentary provides a brief analysis of the Law “On Mandatory Holding of Pre-Election Debates during Pre-Election Campaigning During Presidential and Parliamentary Elections in Ukraine” (the Election Law) in the light of international guarantees of the right to freedom of expression. It is based on an unofficial English translation of the Election Law. These comments have been prepared solely in response to the Law on Mandatory TV and Radio Debates; they do not address wider issues of freedom of expression in the Ukraine.¹

International and Domestic Standards

Under international law, political parties and candidates have a right to express their views freely through the mass media, the public has a right to hear those views and citizens have a right to adequate and balanced information to enable them to participate fully in voting to choose the future government. These 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 the Ukrainian Constitution.

Two documents in particular are of relevance in encapsulating international standards in this area. The first is Recommendation No. R(99)15 of the Committee of Ministers of the Council of Europe on Measures Concerning Media Coverage of Election Campaigns (COE Recommendation)² and the second is ARTICLE 19’s *Guidelines for Election Broadcasting in Transitional Democracies* (ARTICLE 19 Guidelines).³ While these documents lack the formal status of international law, they are widely regarded as authoritative interpretations of international standards in this area.

¹ For this, see, among other publications, ARTICLE 19’s ‘Memorandum on Ukrainian Laws Governing Broadcasting, March 2001: <http://www.article19.org/docimages/1003.htm>.

² Adopted September 1999.

³ London: August 1994.

Freedom of Expression

Under international law, freedom of expression, a fundamental human right, is protected by Article 19 of the Universal Declaration of Human Rights (UDHR),⁴ binding on all States as a matter of customary law. It is also guaranteed by a number of legally binding international human rights treaties, including the European Convention on Human Rights (ECHR),⁵ Article 10(1) of which 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.

International law does permit limited restrictions on the right to freedom of expression and information in order to protect various private and public interests. For example, Article 10(2) of the ECHR states:

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.

This Article subjects any restriction on the right to freedom of expression to 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.⁶

The third part of this test means that even measures which seek to protect a legitimate interest must meet the requisite standard established by the term “necessity”. Although absolute necessity is not required, a “pressing social need” must be demonstrated, the restriction must be proportionate to the legitimate aim pursued, and the reasons given to justify the restriction must be relevant and sufficient.⁷

Freedom of expression is protected, subject to certain restrictions, in Article 34 of the Ukrainian Constitution which states:

Everyone is guaranteed the right to freedom of thought and speech, and to the free expression of his or her views and beliefs.

...

⁴ UN General Assembly Resolution 217A(III), 10 December 1948.

⁵ ETS No. 5, in force 3 September 1953.

⁶ For a general elaboration of this test, see, for example, *The Observer and Guardian v. the United Kingdom*, 24 October 1991, Application No. 13585/88 (European Court of Human Rights).

⁷ See *The Sunday Times v. The United Kingdom*, 26 April 1979, Application No. 6538/74 (European Court of Human Rights), para. 62. These standards have become established jurisprudence of the European Court of Human Rights.

The exercise of these rights may be restricted by law in the interests of national security, territorial indivisibility or public order, with the purpose of preventing disturbances or crimes, protecting the health of the population, the reputation or rights of other persons, preventing the publication of information received confidentially, or supporting the authority and impartiality of justice.

Freedom of political debate has been recognized as an essential foundation of a democratic society by institutions and governments around the world. The European Court has stated: “[F]reedom of political debate is at the very core of the concept of a democratic society.”⁸ The fundamental importance of freedom of political expression rests in part on the importance of an informed electorate to the functioning of a genuine democracy. The European Court has recognized that media freedom is one of the most important mechanisms for developing an informed citizenry:⁹

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.

Governments are obliged to ensure media pluralism and to encourage a diversity of sources of information, including in relation to elections. The European Court has emphasised that “the State is the ultimate guarantor... of the principle of pluralism,” and that pluralism is necessary if the media is successfully to accomplish its public functions: “This observation is especially valid in relation to audio-visual media, whose programmes are often broadcast very widely.”¹⁰ The State’s obligation to ensure pluralism in the media during election periods has been addressed in the COE Recommendation, which notes: “During election campaigns, regulatory frameworks should encourage and facilitate the pluralistic expression of opinions via the broadcast media.”¹¹

International law recognises that, during elections as well as during the pre-election period, States should “encourage and facilitate the pluralistic expression of opinions via the broadcast media.” Furthermore, they 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...”¹² The obligation applies in particular to news and current affairs programmes as well as other programmes that may have an influence on the attitude of voters. Finally, international law recognises that it may be legitimate to require the broadcast media to provide free access to airtime for political candidates. Where this is done, such access must be allocated in a fair and non-discriminatory manner and on the basis of clear and objective criteria.¹³

⁸ *Lingens v. Austria*, Judgment of 8 July 1986, Application No. 9815/82, para. 42.

⁹ *Castells v. Spain*, Judgment of 23 April 1992, Application No. 11798/85, para. 43.

¹⁰ *Informationsverein Lentia and Others v. Austria*, Judgment of 24 November 1993, Application Nos. 13914/88, 15041/89, 15717/89, 15779/89 and 17207/90, para. 38.

¹¹ COE Recommendation R(99)15, Appendix, Part II, Principle 1.

¹² *Ibid.*

¹³ *Ibid.*, Principle 4.

Analysis of the Election Law

Mandatory debates: the broadcast media

The Election Law envisages that all broadcast media should be required to organise and air pre-election debates involving all candidates for elective office. All licensed broadcasters that cover at least 30% of the national territory are required to organise and air debates involving all registered candidates for Presidential elections as well as the leaders, deputy leaders or authorised representatives of all parties running in the parliamentary elections; regional broadcasters are required to organise and air debates involving the relevant registered candidates in each of the individual constituencies. Broadcasters are required to cover their own costs for the debates, are not allowed to interrupt the programmes (for example by advertising) and are required to broadcast debates between 7pm and 9pm, including on weekends and holidays. In the presidential and parliamentary debates, no more than two candidates shall participate at a time. In debates involving individual constituency candidates, no more than four candidates may participate at a time.

While it is clear that the objective is an important one,¹⁴ ARTICLE 19 is concerned that the Election Law imposes excessively onerous obligations on the media and that it may not in practice achieve its aim of informing the electorate. If the Act is to be implemented in its present form, and because only a small number (usually 2) of candidates may participate in each of the debates, there would need to be a huge number of TV debates, each lasting for 2 hours. This would pose serious practical problems (with debates extending over weeks) and would alienate voters. It is extremely likely that the same issues will be discussed repeatedly for weeks on end. Such undifferentiated exposure of all candidates and parties, regardless of size or importance, is likely to confuse rather than inform the electorate. For these reasons, it is difficult to justify the Act as ‘necessary in a democratic society’. An interference of this sort cannot be justified if it is unlikely in practice to achieve its aims. Furthermore, requiring broadcasters to provide such an enormous amount of prime time TV or radio without advertising would be extremely costly for them.

ARTICLE 19 questions whether mandatory TV debates are necessary to inform the public. It is not the practice in most democracies and there are other, more effective, ways of ensuring an informed electorate. In particular, free direct access to airtime for political parties and candidates, at least in the public media but potentially also in the private media, can help ensure that voters are properly informed. This approach is recommended by the COE Recommendation, which states:

Member States may examine the advisability of including in their regulatory frameworks provisions whereby free airtime is made available to political parties/candidates on public broadcasting services in electoral time.

Wherever such airtime is granted, this should be done in a fair and non-discriminatory manner, on the basis of transparent and objective criteria.¹⁵

¹⁴ In any democracy, it is crucial that the electorate is able to make an informed decision: see, for example, Article 25 ICCPR.

¹⁵ COE Recommendation R(99)15, Appendix, Part II.4. See also the ARTICLE Guidelines, No. 9.

Free access is a form of direct communication from the candidates to the public, without any intermediary role by the media. It can play an important role in informing the public and in compensating the risk of unfair and biased coverage of the elections by the media. Furthermore, if such access is free, it helps redress financial inequalities between different parties and/or candidates.

If, however, the Ukrainian authorities decide to require mandatory TV debates, the regime set out in the Election Law should be amended to ensure that the system is more effective, and at the same time less restrictive on freedom of expression and less onerous for the media. For example, in regional elections it may be more effective to have only one debate involving all candidates. In national debates some formula for reducing the number of debates may be worked out, as long as the allocation of time to parties and candidates is fair and equitable. The COE Recommendation notes: "Giving equitable treatment to all parties involved in the election does not necessarily mean devoting equal time to all of them, but rather means ensuring that all significant viewpoints and political parties are heard from."¹⁶ Some reasonably objective formula, applied by an independent body, might be devised for allocation of time. For example, airtime may be divided on the past performance of a political party or the number of seats it currently holds in a parliament, or a minimum amount could be allotted to all candidates with supplementary time distributed on a proportional basis.

Recommendations:

- The requirement of mandatory TV debates should be reconsidered, including a consideration of whether feasible alternatives are available.
- If mandatory debates are required, they should be organised in a way that is less onerous on the broadcast media and more informative to the electorate.

Sanctions

As envisaged by Article 7 of the Act, any TV or radio station that refuses its co-operation either by not organising the debates or by breaching the terms of the debates such as prescribed by the Act¹⁷ will lose its licence. Furthermore, broadcasting companies whose licences have been annulled are not eligible to have them reinstated or to receive a new licence.

ARTICLE 19 considers that these extreme sanctions are disproportionate to the aim pursued. Licence withdrawal without the possibility for reinstatement or reapplying is an extremely serious interference with the right to freedom of expression that should only be applied, if at all, in the most extreme cases, after repeated and gross breach of the law. We recommend a graduated sanctions regime, providing for reprimands and fines and reserving licence withdrawal as a sanction of last resort.

¹⁶ COE Recommendation R(99)1, Appendix, paragraph 28.

¹⁷ For example, the Act states that debates should be aired at prime-time, should last one or two hours, and should include a 'phone-in' element.

Furthermore, we are concerned that the current regime of summary licence withdrawal may constitute a violation of the right to a fair trial guaranteed under Article 6 of the ECHR. This Article states:

In the determination of his civil rights ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

It is well-established that to run a broadcasting business is a 'civil right' within the meaning of this Article.¹⁸ Licence withdrawal without any form of process is in clear contravention of this Article. ARTICLE 19 recommends that a process compatible with Article 6 be built into the Election Law.¹⁹

Recommendations:

- The Election Law should be amended to provide a graduated sanctions regime, incorporating sanctions such as reprimands and fines.
- The Election Law should provide for a fair and public hearing within a reasonable time by an independent and impartial tribunal as part of the sanctions process.

Content Restrictions

During elections, it is essential that political parties and candidates be given wide scope to present their views and programmes to the public. The TV debates envisaged in the Election Law will probably lead to some heated discussion, and in direct access programmes political parties and candidates may likewise use strong language. At the same time, laws of general application, for example relating to defamation, remain in force during election periods and these laws often provide for liability not only of the author of statements but also of those who publish or broadcast them. In accordance with the above, and to prevent the media from being required to screen election programmes for actionable or illegal content,²⁰ it is recommended that the media be granted some form of immunity for statements made by parties and candidates, particularly during direct access programmes.²¹ ARTICLE 19 recommends that parties and speakers should be solely responsible for any unlawful statements they make, other than those which constitute clear and direct incitement to violence.

Recommendation:

- The media should be protected against indirect liability for statements made in direct access programmes outside of limited circumstances explicitly provided for in the Election Law.

¹⁸ See, *mutatis mutandi*, *König v. Germany*, 28 June 1978, Application No. 6232/73 (European Court of Human Rights).

¹⁹ See, for example, *Bryan v. the United Kingdom*, 22 November 1995, Application No. 19178/91.

²⁰ We note that under the Law as currently drafted, broadcast media are required to air TV debates live and uninterrupted.

²¹ See the ARTICLE 19 Guidelines, No. 6.

Mandatory participation for all candidates

Article 4(1) of the Election Law states that “participation in the pre-election debates is mandatory for all subjects of the respective election process.” Furthermore, Article 7(2) states: “A candidate for President of Ukraine, party/bloc’s leader or his or her deputy or proxy, and a candidate in single-member constituency do not have the right to refuse participation in TV/radio debates without a good/justifiable reason.”

While the objective of these provisions, to ensure that the electorate is well-informed about each of the candidates’ and parties’ viewpoints, is an important one, ARTICLE 19 is concerned that requiring candidates to appear is a breach of their right to choose when and how to express themselves. First, it is well-established that the right to freedom of expression includes the freedom to choose how to use that right, including the freedom to choose not to express oneself.²² Second, it should be borne in mind that most candidates and parties need no compulsion to appear on TV or radio; it is in their own interest to get as much exposure as possible. If they do not, they will see their chances of getting elected diminish. This in itself is enough to encourage candidates to appear. For these reasons, ARTICLE 19 recommends that obligation on candidates to appear in debate be removed from the Election Law.

Recommendation:

- The requirement of mandatory appearance for all candidates should be removed from the Election Law.

Other restrictions

Article 6(2) of the Election Law provides that “within 24 hours prior to and post TV-debates, it is prohibited to anyhow comment on and evaluate the content of the TV debates, or to present any information concerning the TV-debate participants.” This means that any reference to the debates, other than its announcement, is forbidden. This constitutes a severe restriction on the right to freedom of expression which cannot be justified by an existing ‘pressing social need’, with reference to ‘relevant and sufficient’ reasons as required by the European Convention on Human Rights.²³ ARTICLE 19 recommends that this restriction be removed from the Act.

Recommendation:

- The restriction in the Election Law on commenting on the debates should be removed.

²² E.g. *K. v. Austria*, 13 October 1992, Application No. 16002/90 (European Commission of Human Rights), para. 45; and, *mutatis mutandi*, *Young, James and Webster v. United Kingdom*, 13 August 1989, Application No. 7806/77, para. 52. See also the US Supreme Court in *West Virginia State Board of Education v. Barnette* (1943) 319 US 624.

²³ Most recently in *Perna v. Italy*, 25 July 2001, Application No. 48898/99, para. 38.