Free expression, media freedom and 2015 elections in Myanmar
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Freedom of Expression

The right to freedom of expression is a fundamental human right, and the foundation stone for every free and democratic society. It is important for three main reasons:

• It is indispensible to personal development: People who are free to speak their minds feel more secure and respected, and are able to plan their lives much more easily, forge friendships and establish communities.

• It is essential to good governance: All people must be free to ask questions of the government, to ensure that they are acting honestly and to expose the strengths and weaknesses of officials and their policies. In this way, wrongdoings can be exposed, and the people and government can learn about problems and fix them. This is important for developing effective laws and policies that addresses the concerns of the people.

• It is crucial to the protection, promotion and exercise of all other human rights: Without freedom of expression, wrongdoings can be exposed, and the people and government can learn about problems and fix them. This is important to the protection, promotion and exercise of all other human rights: Without freedom of expression, they are acting honestly and to expose the strengths and weaknesses of officials and their policies. In this way, the people and government can learn about problems and fix them. This is important for developing effective laws and policies that addresses the concerns of the people.

International protection of the right to freedom of expression

The right to freedom of expression is guaranteed by Article 19 of the Universal Declaration of Human Rights (UDHR), and in Article 19 of the International Covenant on Civil and Political Rights (ICCPR). At the regional level, the Association of South East Asian Nations (ASEAN) Human Rights Declaration protects the right to freedom of expression at Article 23. Myanmar will chair ASEAN in 2014. All UN Member States have committed to uphold the rights contained in the UDHR.

Although Myanmar has not signed the ICCPR, 167 other States are legally bound respect and ensure the right to freedom of expression at the national level. Due to the sheer volume of States recognising a legal obligation to protect the right to freedom of expression, the right has gained the force of binding custom within international law. Therefore, even without signing the ICCPR Myanmar is still bound by international law to protect and promote the right to freedom of expression. This right is also protected in the Constitution of Myanmar. It is very important that Myanmar sign and ratify the ICCPR, so that it is clear that international human rights laws apply in Myanmar.
The right to freedom of expression is made up of number of important elements:

- It belongs to all people, regardless of their race or ethnicity, nationality, sex, gender identity or sexual orientation, religion, or political opinion;
- It includes the right to seek, to receive, and to impart information.
- It applies to ideas of all kinds, including political discourse, commentaries on public affairs, discussion of human rights, journalism, cultural and artistic expression, teaching, and religious discourse. It even embraces expression that some people find deeply offensive or unpopular.
- It applies regardless of geographic, political, or cultural frontiers or borders.
- It can be exercised through any media of a person’s choice, that is through oral, written or printed communication.
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Elements of the right to freedom of expression

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- It applies regardless of geographic, political, or cultural frontiers or borders.
- It can be exercised through any media of a person’s choice, that is through oral, written or printed communication; artistic expression; and audio-visual, electronic and internet-based modes of communication. It applies online as it does offline.

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Limitations on the right to freedom of expression

The right to freedom of expression is not an absolute right. It can be limited, however, only in narrow circumstances. Any limitations must comply with so called “three part test;” meaning that they must be:

- Provided by law: any limitation must be set out in law that is accessible to the public, is clear and precise. This means that people must be able to find it and understand what it permits and what it prohibits.
- Pursue a legitimate aim: all such aims are listed in the ICCPR as: respect for the rights or reputations of others, the protection of national security or of public order; or the protection of public health or morals. Freedom of expression cannot be restricted purely because it is critical of the government or embarrassing for political leaders.7
- Necessary and proportionate: this means that limitation must be necessary in a democratic society, and it must respond to a pressing social need. The State must show a direct and immediate connection between the expression and protecting the interest at stake. Proportionality means that the restriction should not be too broad, and if less restrictive measures are possible they should be used instead.

International human rights law therefore requires Myanmar to respect, protect, and fulfil the right to freedom of expression. There are two sides to this obligation:

- To avoid interfering with the enjoyment of the right to freedom of expression.
- To proactively remove obstacles to the enjoyment of the right to freedom of expression.

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Freedom of Expression and the Media

It is recognised everywhere that the media play a vital role in protecting democracy and its institutions. The media are in the best position to investigate and report on issues of public importance and interest, particularly relating to the political process, the conduct of public officials, the positions taken by government with respect to international issues, corruption, mismanagement or dishonesty in government, and human rights issues, among other things. Indeed, it is fair to say that the vast majority of individuals gain almost all of their knowledge about matters outside of their own day-to-day lives from the media.

This role of the media is just important during elections as at other times. Citizens rely heavily on information imparted by the media to learn about the competing candidates, the leading issues being contested and the platforms of the various parties. Without the media, making the most basic decisions relating to the democratic process – deciding which candidate to vote for is an obvious example – would be immeasurably more difficult.

It is, therefore, of paramount importance that the freedom of expression of the media be ensured and protected. Media actors, such as journalists and editors, should be able to exercise their own right to freedom of expression. Even more important, however, is the right of others to seek and to receive information, a vital component of freedom of expression, which depends upon respect for the freedom of expression of the media.

Regulation and Pluralism

The concept of pluralism is fundamental to both democracy and to the protection of the right to freedom of expression. A society where only a privileged few can exercise their right to freedom of expression effectively is not a free society. Such a situation would breach not only the rights of those who are denied the ability to exercise their right to freedom of expression through the media but also the right of society as a whole to be well-informed and to receive information from a variety of sources. Indeed, the right of the public to receive a diversity of information and ideas is central to the right of freedom of expression.
It is generally recognised that it is not necessary to set up specific regulatory regimes which govern the print media, and that the relatively low cost of setting up print media outlets, including public ownership of the airwaves, the dominant and intrusive nature of broadcasting and the prohibitive costs of establishing a major broadcast outlet. At the same time, it is essential that regulation not be able to be abused to silence those critical of the government or who otherwise attract official censure. This would seriously undermine freedom of expression, as well as free and fair elections.

Broadcasting regulation

The protection of pluralism provides one of the main justifications for media regulation, particularly in relationship to the broadcast media. It is internationally accepted that States should regulate the airwaves to provide for a plurality of voices. State monopolies are incompatible with the right of the public to receive information from a variety of sources. Simply allowing private broadcasters, however, is not enough. States should take steps to avoid excessive concentration of media ownership and to ensure that licensing systems for broadcasters promote a diversity of content on the airwaves. Indeed, contribution to diversity should be an explicit licensing criterion.

It is almost universally accepted that some regulation of broadcasters is necessary. Such regulation is justified on a number of grounds, including the need to ensure order as well as pluralism in the airwaves, the fact that the airwaves are a limited public resource, the dominant and intrusive nature of broadcasting and the prohibitive costs of establishing a major broadcast outlet. At the same time, it is essential that regulation not be able to be abused to silence those critical of the government or who otherwise attract official censure. This would seriously undermine freedom of expression, as well as free and fair elections.

Print media regulation

With regard to the print media, it is internationally accepted that the best way to encourage pluralism is by abolishing legal and administrative measures that inhibit the establishment of newspapers and magazines. In particular, there should be no licensing systems and, where a registration scheme exists, it should not impose onerous obligations on applicants. These differences from broadcast regulation are justified by a number of considerations including public ownership of the airwaves, the dominant and intrusive nature of broadcasting and the relatively low cost of setting up print media outlets.

It is generally recognised that it is not necessary to set up specific regulatory regimes which govern the print media. This is based on the idea that, unlike broadcasters, who make use of a limited and public resource, there are no natural constraints on the number of print media outlets in operation and so no need for particular
regulation. However, media are subject to same laws that apply to everyone – for example, defamation laws – and, if they have been set up as corporations, or as non-profit bodies, then they are subject to the same rules that apply to other corporations or non-profit bodies.

**Regulation of Journalists**

The right to freedom of expression applies to everyone and through any media. As such, it clearly protects the right of everyone to engage in journalism. Licensing systems for journalists, whereby individuals are prohibited from practising journalism unless they are licensed, are, therefore, illegitimate. In this respect journalism is unlike other professions, such as the medical profession, for which licensing is accepted. International law also establishes that general conditions on who may practise journalism, such as the requirement of a university degree or a certain age, are not legitimate. Such conditions place unjustifiable restrictions on the right of everyone to express themselves through the print media, regardless of age or any other status. Furthermore, experience in many countries demonstrates that such conditions do not promote any useful social goal; in particular, they are not effective in promoting more professional journalism.
Right to Political Participation and to Vote

In a democracy, the will of the people is the basis of the government’s authority. But in a modern State, with millions of inhabitants, it is not practicable to consult citizens on an individual basis about each and every decision. The solution is for the people to appoint, through elections, a government to take decisions on their behalf, in accordance with its election promises.

The Right to Vote

The right of every citizen to vote in elections is guaranteed under the International Covenant on Civil and Political Rights (ICCPR). The ICCPR establishes a number of standards to which States must conform in the conduct of their elections. Effective exercise of the right to vote also depends on the electorate being sufficiently knowledgeable about the competing candidates and issues to be able to make an informed choice. The authorities are, to this end, obliged to take measures to ensure that a free and adequate flow of information is available to voters.

The Right to Political Participation

In order for a democracy to be effective, the electorate must have a free and broad choice of candidates to vote for at elections. Therefore, the ICCPR prohibits all unreasonable restrictions on the right to stand for election. The permissible restrictions on the right to stand for election are similar, though not identical, to those on the right to vote. The law may, for example, set a minimum age for candidates in the election. No candidates may be excluded by reason of their education, residence, descent or political affiliation. However, individuals holding certain positions may be prohibited from running for office, if their election would raise a conflict of interest. For example, a judge may be prevented from running for an office, if part of his or her task as a judge is to decide disputes involving the holder of the office to which he or she aspires to be elected.
The Importance of Freedom of Expression during Elections

In a democracy, citizens appoint the government of their choice by voting for their preferred suitable candidates at periodic elections. In order to exercise this power freely and wisely, the electorate needs accurate information about the various candidates, their programs and backgrounds, as well as about the key issues being debated during the election. As the UN Human Rights Committee has emphasised:

The free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion ... This implies that citizens, in particular through the media, should have wide access to information and the opportunity to disseminate information and opinions about the activities of elected bodies and their members. (Gauthier v. Canada, 7 April 1999, Communication No. 633/1995)

The provision of such information in the run-up to elections involves rights and duties for three groups: the political parties and candidates competing for elected positions, the news media and, of course, the electorate.

Political Parties and the Right to Freedom of Expression

The right to freedom of expression, as guaranteed, among others, in the International Covenant on Civil and Political Rights (ICCPR), protects the right of all political parties to convey their messages to the public through any media of their choosing.

The ability of political parties to communicate with potential voters is paramount for the proper functioning of a democracy. Voters will be reluctant to vote for a party if they are not sure what it stands for. Although voters may formally be able to vote for the party of their choice, such choice is illusory in the absence of adequate information about the competing parties and candidates. If only one or two parties have been able to communicate their views, they will inevitably dominate the election.

Some political parties will inevitably be in a better position to spread their message than others; a party founded by a well-known person or bankrolled by rich backers will more easily attract attention than a party which lacks funds or fame. Such natural advantages are simply part of politics. However, under the ICCPR, the State is under an obligation to ensure that all parties have at least some access to means of communicating with the public. Any
obstacles other than the natural disadvantages which flow from being a small party should be removed. For example, conditions such as having a certain number of members should not be required before parties may spread leaflets or hold public meetings. In addition, the State must take certain positive steps to ensure that these parties have some access to the means of mass communication. Typically, a publicly owned or funded broadcaster is under an obligation to provide a measure of free airtime to all competing parties.

The News Media and the Right to Freedom of Expression

As the principal means through which the public gathers information, the news media play a central role in the electoral process. News media afford potential voters the opportunity to learn about the various parties and their programmes and they influence the outcome of elections by exposing hidden flaws and strengths of the candidates.

Given their tremendous importance, there is always a risk that news journalists will be subjected to pressure to report in a certain way. In order to assist them in the task of reporting as objectively and honestly as possible, journalists enjoy rights protected under the ICCPR. In particular, journalists have a right freely to seek, receive and impart information in any way they see fit, without interference from the government, subject only to legitimate restrictions, for example appropriate defamation laws. The authorities may not harass, intimidate or otherwise obstruct journalists in their work, or impose censorship, or, conversely, offer rewards for reporting in a certain way. In order to assist them in the task of reporting as objectively and honestly as possible, given their tremendous importance, there is always a risk that news journalists will be subjected to pressure to report in a certain way. In order to assist them in the task of reporting as objectively and honestly as possible, and they should not suffer any adverse consequences for publishing material which places the government in a negative light.
The Voters’ Right to Freedom of Information

The ICCPR confers on the general public the right to receive information. Combined with the right to participate in public affairs, also guaranteed under the ICCPR, this means that the public has a right to receive complete and unbiased information about the contending parties. The main responsibility to ensure that this right is respected lies with the State, which has an obligation to create an environment within which the media – who are the primary source of information – are able freely to go about their job of informing the public. Publicly owned or funded media also have an important role to play in informing the public, and are under an obligation to do so, and without political bias.

At the same time, the media are under a professional obligation to inform the public fully and truthfully about all matters relevant to the elections. This leaves journalists with the occasionally difficult task of reporting on all the parties in a neutral way, however laudable or repugnant a particular candidate may seem to the journalist in question. However, in a democracy, the power belongs to the whole population, not just the educated or informed elite. It is imperative that journalists do not substitute their own judgment for that of the electorate by reporting more extensively and favourably on one party than another.
Different Types of Coverage in the Broadcast Media

As part of their duty to inform the public, broadcasters normally offer different types of programming during elections. Broadly speaking, these may be classified into three different categories:

- news and current affairs programming;
- interviews, debates and other ‘special information’ programming; and
- direct access programming.

These three types of programming each serve a different purpose and require a distinct approach. The key aim for broadcasters should be to ensure that the public receive sufficient information, from a variety of sources and perspectives, to enable them to cast an informed vote.

1. News and Current Affairs

News and current affairs programmes are an essential means by which the general public receives political information, during, as well as outside of, election periods. During elections, this form of programming assumes a particular importance. Broadcasters in many established democracies are under a strict obligation to be balanced and impartial in their coverage of election events, and may not express a particular preference for one candidate or party, or discriminate against a particular party or candidate.

Although the principle of balance is a simple one, its implementation in the context of news reporting during elections can be problematic, given that the governing party normally receives considerable attention by virtue of its role in running the country. The ARTICLE 19 Guidelines suggest that measures should be taken to counterbalance this, for example by granting a right of reply to opposing parties or implementing an ‘equal time’ rule to ensure that coverage is also provided to parties outside of government.

Furthermore, given the potential for editorial opinions to be confused with news, the ARTICLE 19 Guidelines recommend that publicly owned or funded media should not broadcast any editorial opinions at all in relation to the elections. Indeed, where a private broadcaster presents his or her own views, these should be clearly identified as such and should not be aired during news programmes.
2. Special Information Programmes

News and current affairs programmes are rarely enough, by themselves, to inform the public sufficiently about electoral issues. The media should, therefore, broadcast additional programming, which focuses specifically on the policies and programmes under discussion during the election. Such programming should provide an opportunity for party leaders and other candidates to be questioned directly, and for candidates to debate with each other. A number of formats – including candidate debates, panels of candidates and interviews – may be used for this purpose.

Taking into account general obligations of balance and impartiality, broadcasters have a degree of editorial discretion in deciding how to structure such programmes. A fair and transparent formula must be used in deciding whom to invite and non-candidate participants should be carefully selected so as to ensure balance. Special information programmes should be aired, among other times, during prime viewing or listening hours.

3. Direct Access Programmes

So-called ‘direct access’ programming includes the allocation of airtime to political parties and candidates to broadcast short clips produced by themselves, as well as paid advertising. Direct access programming is important as it is one of the very few ways political parties and candidates can present themselves directly to the public.

Public service broadcasters are often required to provide free airtime and production support to facilitate these programmes.

Given that broadcasters have no editorial control over the content of direct access slots, their liability for such programmes should be limited. A number of other rules govern the allocation and timing of these programmes.
Balance and Impartiality in News and Current Affairs Programming

News and current affairs programming has been identified by a range of actors, including international courts and tribunals, as one of the most important forms of broadcast programming. Even outside of election periods, news and current affairs programmes are the key way in which most people receive political, as well as other, information.

During elections, this form of programming assumes particular importance. Publicly owned or funded media are under a strict obligation to be neutral and impartial in their coverage of election events, and should never express a particular preference for one candidate or party, discriminate against a particular party or candidate, or in any other way be biased. In many countries, private broadcasters are also placed under an obligation to be politically neutral and such obligations may be a legitimate restriction on freedom of expression. It may be noted, however, that a similar restriction on the print media would be very hard to justify given the different nature of this medium.

While the principle is a simple one, its implementation can be problematic. The experience of broadcasting in transitional democracies, and indeed of certain established democracies, shows that news programmes are the broadcast category where the principles of balance and fairness are most often breached. The reality is that politicians belonging to a ruling party or coalition often receive considerable attention by virtue of their role in running the country. This role not only naturally generates news stories but also allows them more scope to manoeuvre themselves into situations where they are likely to receive news coverage.

Given this, and because of the importance of the broadcast media during elections, and because of the high credibility the public attaches to news and current affairs programmes, broadcasters should make every effort to ensure that they meet their obligations of balance and impartiality. In particular, an effort should be made to counterbalance disproportionate coverage of incumbent candidates. The ARTICLE 19 Guidelines suggest that measures that could be taken include granting a right of reply to other candidates where an incumbent has received news coverage, or implementing an ‘equal time’ rule, whereby the main competing parties get equal news and current affairs coverage during the election period.

Given the potential for editorial opinions to be confused with news, the ARTICLE 19 Guidelines recommend that publicly owned or funded media should not broadcast any editorial opinions at all in relation to the elections. Private broadcasters should make a commitment to clearly identify any editorial opinions and not to broadcast them during news programmes.
Direct Access to the Media

Some form of direct access to the media is essential for parties and candidates in elections to get their message across. While news and other programming should provide voters with information about parties’ policies and platforms, direct access to the media allows them to speak in their own voices. Providing direct access to the media thus makes an invaluable contribution to the ability of parties and candidates to communicate their messages to the public. In practice, direct access of some sort is available to parties and candidates in all established democracies.

Direct access refers broadly to two distinct types of media content:

- a system of entitlement to short slots in the broadcast media, allocated among the various competing political parties and candidates; and
- paid advertising, in both print and broadcast media.
1. Direct Access Slots

The vast majority of the established democracies have instituted systems whereby a set amount of direct access slots are allocated among the various competing parties and candidates. The idea is to allow parties to speak directly to the electorate. Publicly owned or funded broadcasters are normally the main means for disseminating these slots but, in some countries, private broadcasters are also required to provide them.

The exact allocation of airtime among the parties and candidates may be calculated in different ways. In most countries with an established track record of elections, airtime is allocated in proportion to the previous performance of the party in question, as determined, for example, by the number of votes obtained in the last election. In other countries, free airtime is distributed evenly among all political parties and candidates. Whichever formula is adopted, the rules for allocation should be precise, fair and transparent.

Broadcasters have no editorial control over the content of direct access slots and, as a result, should not normally be held liable for their content. They may, however, be held liable where the media outlet concerned has taken specific steps to adopt or endorse the statements. Furthermore, this waiver of liability may not extend to extreme cases where the statements constitute clear and direct incitement to violence and the media outlet had an adequate opportunity to prevent their dissemination. 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.

Provision of these slots for free is recommended as it helps promote a level playing field during elections (paid political advertising, discussed below, is available only in the measure that parties and candidates can afford it). In many countries, public service, or publicly owned or funded, broadcasters are required not only to provide airtime free of charge but also to make available production facilities to assist political parties and candidates to prepare their clips.

It is important that the amount of time allocated for direct access slots is sufficient for parties and candidates to communicate their messages, and for the public to be informed about the issues, party positions, and the qualifications and characters of the candidates. The timing of the slots should be designed to maximise the number of viewers/listeners; wherever possible slots should be broadcast during prime time and they should never be broadcast at times when it is inconvenient for large segments of the population to view or hear them, for example past midnight.

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Provision of these slots for free is recommended as it helps promote a level playing field during elections (paid political advertising, discussed below, is available only in the measure that parties and candidates can afford it). In many countries, public service, or publicly owned or funded, broadcasters are required not only to provide airtime free of charge but also to make available production facilities to assist political parties and candidates to prepare their clips.

It is important that the amount of time allocated for direct access slots is sufficient for parties and candidates to communicate their messages, and for the public to be informed about the issues, party positions, and the qualifications and characters of the candidates. The timing of the slots should be designed to maximise the number of viewers/listeners; wherever possible slots should be broadcast during prime time and they should never be broadcast at times when it is inconvenient for large segments of the population to view or hear them, for example past midnight.

1. Direct Access Slots

The vast majority of the established democracies have instituted systems whereby a set amount of direct access slots are allocated among the various competing parties and candidates. The idea is to allow parties to speak directly to the electorate. Publicly owned or funded broadcasters are normally the main means for disseminating these slots but, in some countries, private broadcasters are also required to provide them.

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2. Advertising

Paid political advertising is another way parties and candidates can gain direct access to the electorate. Political advertising in the broadcast media is controversial. Many European countries ban political advertising in the broadcast media – while others place stringent fetters on it – on the grounds that it advantages richer parties and candidates. A Recommendation calls on European States to consider introducing limitations on political advertising.1 In the United States, on the other hand, a ban, or even restrictions, on political advertising would be deemed contrary to the right of freedom of expression.

Under international law, a ban on advertising in the broadcast media is considered to be legitimate. A complete ban in the print media would probably breach the right to freedom of expression, although some restrictions may be acceptable.

Where paid political advertising is allowed, it should be available on equal conditions and rates of payment to all contending parties.

1 Council of Europe Recommendation R(99)15, adopted 9 September 1999, Appendix, Principle II.5.
Opinion Polls and the pre-Election Period of Silence

Both the contenders for election and the general public are inevitably curious to know in advance what the outcome of the elections is likely to be. Various organisations and individuals may conduct opinion polls, where they question a substantial number of people in order to assess the popularity of the competing candidates. The results of such opinion polls are of interest to journalists, who may wish to publish them for the benefit of their audience. However, opinion polls can have a distorting impact on voting patterns, especially if they are not properly understood by the public. As part of their duty to inform voters, journalists should make sure that reporting on poll results is accompanied by an explanation of their significance.

How Opinion Polls are Conducted

Opinion polls may be conducted and/or commissioned by all sorts of different actors including academic institutes, commercial businesses, political parties, non-governmental organisations, government agencies and the news media. Polls may be conducted either during an election campaign or at the end of the campaign, in the form of exit polls of voters on election day. The main methods used for conducting polls are face-to-face interviews (in the street or in people's homes), or interviews by mail, telephone or over the Internet.

Interpreting Opinion Polls

Not all opinion polls results are equally reliable. An opinion poll conducted by an impartial organisation will in many cases be more trustworthy than, for example, a poll conducted by the government or a political party. But even a poll conducted by a disinterested organisation should be treated with caution and can be substantially wrong or misleading. There are three main factors affecting the reliability of opinion poll results.
The first factor is the wording of the question posed to the public. For example, the question: “who do you plan to vote for?” may not be answered by all people in the same way as “who do you think should win the elections?” The former question would probably lead to a more reliable prediction of the election outcome.

The second factor affecting the reliability of polls is what is known as the ‘margin of error’. If you ask only three people about their voting intentions, it is fairly obvious that the result will be extremely unreliable. Asking a hundred people will generate a better result and asking a thousand an even better one. There is, in other words, a positive relationship between the number of people interviewed and the reliability of the opinion poll. This can be calculated mathematically and expressed as a percentage called the margin of error. The lower the margin of error, the better, as it is a measurement of the unreliability of the poll.

The third source of error in opinion polls is the selection of respondents. Although questioning more people reduces the margin of error, it does not always guarantee an accurate result because there may be skews in the sample of people interviewed. For example, an opinion poll conducted by Internet may be distorted because poor people are less likely to have Internet access than rich people. If poor people tend to vote for different parties than rich people interviewed, an Internet poll will overstate the popularity of the parties favoured by rich people.

The publication of opinion poll results can have a significant impact on voting patterns. For example, voters may conclude that their favoured party is going to lose the elections anyway and decide not to bother to vote. Or voters may assume that a favoured party is already doing well in the polls and decide instead to vote for another party, which they would also like to see represented. To avoid a situation where people change their voting intentions on the basis of potentially wrong information, journalists who publish opinion poll results should explain their significance, and the risk of error, to the public.
The Code for Media during Elections, issued by the National Communications and Media Commission, lists which information should accompany any published opinion poll result. The publisher should identify: 1) the organisation that conducted the poll; 2) the organisation or party that commissioned the poll and paid for it; 3) the methodology used; 4) the sample size (i.e. the number of people interviewed); 5) the margin of error; and 6) the dates on which the poll was conducted. In addition, it should be explained that the poll reflects public opinion only at the time it was taken.

Media Silence Period

Out of concern for the impact that they have on voter behaviour, several countries prohibit the publication of opinion polls during the last few days preceding elections. Such limitations on the freedom of information may be permissible under international law.

The Role of Public Media during Elections

It is internationally recognised that publicly owned or funded media have a special role to play during elections and have certain obligations over and above those that can be imposed on other media. This is particularly the case for public broadcasters.
Public broadcasters

As publicly-funded entities, public broadcasters should observe strict requirements of neutrality and should never endorse any particular candidate, party or programme. If they do carry political advertisements, these should be offered to all parties/candidates on a strictly equal basis.

Furthermore, because of their legal obligation to inform and educate the public, public broadcasters have a duty to ensure that the public is informed about the election. This includes practical matters, such as where and how to vote, to register to vote and to verify proper registration, the secrecy of the ballot (and thus safety from retaliation), the importance of voting, and the functions of the offices that are under contention. It also includes important political issues and the political programmes and viewpoints of the various parties and candidates up for election. In broadcasting this material, it is crucial that public broadcasters not voice any opinions of their own, or endorse the ideas of any particular candidate.

The extent of this duty depends on a number of factors, including the level of awareness of the electorate as well as the availability of this information through other sources, such as private media and other public initiatives (for example posters, pamphlets or public newspapers (see below)). The duty flows from the need to inform the public; where other sources of information do not adequately inform or reach the public, public broadcasters will need to step in and provide this information.

One way to discharge this duty is to provide airtime for direct access programming to enable those up for election to present short ‘clips’ on themselves and their political views to the public. Public broadcasters are often required to provide this airtime free of charge and at an hour when a large audience will be reached, and to allocate studio time and technical resources, within the limits of their capacity, to facilitate the production of these clips. The rules relating to this programming, for example concerning the length and timing of clips, should apply fairly to all candidates.

A second way to discharge this duty is through news and current affairs programmes, as well as special information programmes, such as political importance where sufficient information on election issues is not forthcoming from other sources. Such programmes should involve all political parties or candidates up for election in the station’s geographic area of coverage. The rules and regulations governing this programming, for example regarding the length and timing of clips, should apply fairly and equally so as to avoid granting privileged treatment to any one participant. The host of a discussion programme or debate should ensure that the questions asked are balanced and should not extend privileged treatment to anyone.

Finally, also pursuant to the duty to inform, public broadcasters have a particular obligation ensure that their programming reaches all groups in society, including ethnic, religious or linguistic minorities. This is of particular relevance to those public broadcasters stations whose geographic coverage includes such groups. For some stations, it may be necessary to broadcast information in a minority language.
Public newspapers

Publicly owned or funded newspapers are, like their broadcasting counterparts, also covered by a strict obligation of neutrality. Like public broadcasters, they should never endorse any particular candidate, party or programme, and they should provide access to advertising on a strictly equal basis.

These newspapers also have an important role to play in voter education. While they are not normally required to provide free space in their columns for political parties and candidates, they should provide relevant information to ensure that the public is informed about practical matters and all political issues of relevance to the election.
Bodies Regulating the Media During Elections

The existence of an oversight body to monitor and regulate the media during elections is crucial to the integrity of the elections process and respect in practice the rules relating to election media coverage. The jurisdiction and powers of such a body should be clearly delineated and, where a self-regulatory mechanism exists, efforts should be made to ensure that the two mechanisms play a supportive, as opposed to conflicting, role. In particular, an official oversight body should not seek to duplicate or replace functions already being provided in an effective manner by a self-regulatory body.

Both the guarantee of freedom of expression and the need to safeguard the integrity of the elections process dictate that any oversight body with powers over the media be independent. The independence of the body should be formally guaranteed and, at least as importantly, should be protected through the manner in which members are appointed. The appointments process should be fair and transparent, should allow for input and participation by civil society, and should not be dominated by any particular political party. Once appointed, the tenure of members should be protected and any reimbursement should be according to set schedules and criteria.

In different countries, different bodies perform the role of ensuring implementation of the rules relating to media election coverage. In many countries, it is the general broadcast regulator which performs this function.

An official oversight body is particularly important in relation to the broadcast media, given the detailed rules that govern election coverage by broadcasters. The body should undertake a range of monitoring and regulatory functions in relation to broadcasters, including by playing a general role in monitoring broadcasts to assess their compliance with laws and regulations. These should include allocating time for direct access programmes, making sure broadcast election coverage respects obligations of balance and impartiality and ensuring that publicly owned or funded broadcasters adequately satisfy the public’s right to be informed about election-related matters.

The official oversight body should also have the power to hear and decide on complaints from media outlets, the public, and political parties and candidates regarding breach of election-related rules. In particular, it should have the power to order a right of reply if it finds that rights have been harmed by the publication of inaccurate or misleading information. Given the relatively brief duration of an election campaign, and the need for quick redress, the oversight body should render decisions promptly. This is particularly important in relation to allegedly defamatory broadcasts, as well as in relation to claims of violations that have resulted in preventing or delaying the airing of a direct access programme.

The oversight body may also have a role to play in regulating the print media sector, for example in relation to the right of reply. This is particularly important if no self-regulatory mechanism exists. However, the oversight body should not impose any content restrictions over and above those existing in laws of general application, and it should not impose licensing or registration requirements on the print media.

In case it finds serious violations of the rules regarding media election coverage, the official oversight body should have the power to recommend that the elections be postponed, suspended or annulled. However, the body should not attempt to subsume the functions of the courts and its decisions, particularly in this regard, should be subject to judicial review.
Self-regulatory and Professional Approaches

In many countries, media professionals and/or outlets have adopted self-regulatory or professional measures to promote good practice both generally and specifically in the context of coverage of electoral campaigns. A key characteristic of self-regulatory systems is that they use moral and professional suasion, rather than legal force, to promote better standards. International law recognises these as useful and necessary complements to State legislation or rules in this area.
Self-regulatory mechanisms normally involve both campaign codes of conduct or internal guidelines and a complaints mechanism to address breaches of these standards; the latter may be more or less formal. Self-regulatory systems may be instituted across a sector – such as the print media or journalists as a group – as well as within a single media organisation. Large broadcasters such as the British Broadcasting Corporation and the Australian Broadcasting Corporation have adopted detailed internal guidelines which set high standards for their programme output.

Most self-regulatory mechanisms involve only limited sanctions for breach of the code, often simply a requirement to carry a statement by the complaints body recognising the breach. Self-regulatory mechanisms may also provide for a right of reply, although it may be noted that a statement by the complaints body is probably less offensive to freedom of expression than one by the offended party (as is the case with respect to a right of reply).

Practice in countries around the world has shown that self-regulation can be highly effective, including during election times. Voluntary measures are set by the profession itself and hence have a great deal of credibility. While the formal sanctions are normally limited, the impact of internal censure is often, of itself, quite a powerful force for change. Furthermore, the primary goal of these systems is to set high professional and ethical standards, not to enforce rules. The vast majority of media outlets, as well as individual journalists, are happy to conform to internally set standards which they can trust. Ultimately, effective self-regulation should strengthen media responsibility and professionalism and increase public trust in the media.

A key advantage of self-regulatory systems is that they provide the public, politicians and even other media outlets with an easily accessible complaints mechanism. Lodging a complaint is normally free or costs very little. Procedures are simple and fair, so there is no need (and little advantage) to engage a lawyer and decisions are normally reached rapidly, providing quick and effective redress, a matter of some importance for election-related matters.

Where effective self-regulatory systems are in place, official regulatory mechanisms covering the same subject-matter will be hard to justify. As noted above, restrictions on freedom of expression must be necessary to be justified. Where self-regulation is effective, there will be no need for a formally binding system of complaints.

Self-regulatory codes of conduct or guidelines normally address a range of issues of general relevance to elections, such as obligations of fairness and accuracy, the functioning of the supervisory and implementing body, and the submission of complaints in case of alleged violations. Codes specifically geared towards elections may also cover matters such as the allocation of time slots for direct access programming, rates for paid political advertising (if allowed) and rules on reporting opinion polls. Broadcast media should take particular note of any obligations for change. Furthermore, the primary goal of these systems is to set high professional and ethical standards, not to be highly effective, including during election times. Voluntary measures are set by the profession itself and hence have a great deal of credibility. While the formal sanctions are normally limited, the impact of internal censure is often, of itself, quite a powerful force for change. Furthermore, the primary goal of these systems is to set high professional and ethical standards, not to enforce rules. The vast majority of media outlets, as well as individual journalists, are happy to conform to internally set standards which they can trust. Ultimately, effective self-regulation should strengthen media responsibility and professionalism and increase public trust in the media.

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The successful implementation of self-regulatory mechanisms is often dependent on appropriate training having been provided to those involved. Often, a significant amount of such training will be necessary in the early phases of establishing a self-regulatory system. Where local resources are scarce, the international community should make an effort to provide the necessary assistance.
Complaints and Redress

International law recognises that it is important that any political party or candidate who has been defamed or otherwise suffered illegal injury by a broadcast during an election campaign should be entitled to a correction or, where this would be an insufficient remedy, to be granted an opportunity to reply. Such a correction or reply should be broadcast as soon as possible.

During the short and intense election period, unfair and incorrect accusations can have a significant effect on the overall outcome. In ordinary circumstances, anyone who has suffered a legal wrong from a publication, for example by being libelled, can bring a legal case for redress, in that case for defamation. During elections, however, a court case would almost certainly not be resolved until after the vote had been held and it would thus be of little value in redressing any bias to the electoral process that may have occurred. An expedited right of correction or reply can
provide a rapid and effective means for redressing harm from illegal statements which, if the rules meet certain conditions, does not unduly restrict the right to freedom of expression.

We note that a right of correction is far less intrusive than a right of reply inasmuch as the former merely involves retracting and correcting mistaken allegations while the latter requires a media outlet to provide a platform for the complainant. As a result, where a correction would adequately redress the harm done, it should be preferred to a right of reply on the basis that the guarantee of freedom of expression means that the least intrusive effective remedy should be used.

International law does not prescribe a specific procedure for guaranteeing an expedited right of correction or reply. In some countries, the correction or reply is guaranteed through self-regulatory systems while in others it is provided for by law. Advocates of media freedom, including ARTICLE 19, generally suggest that these rights should be voluntary rather than prescribed by law. However, the particular circumstances of an election campaign suggest that where no voluntary system is in place, a legal right of correction and/or reply may be necessary.

As noted, it is important that those harmed should be able to claim a right of correction of reply rapidly, regardless of its formal status (i.e. whether it is voluntary or legally mandated). Ideally, an accessible oversight body should be available to deal promptly with any complaints regarding the rights of correction and reply. This could be a self-regulator body, a media regulator or a body with general supervisory responsibilities in relation to elections.

Any legal right of reply, due to its intrusive nature, should at least meet the following conditions if it is to respect the guarantee of freedom of expression:

The reply should only be in response to statements which are false or misleading and which breach a legal right of the claimant; it should not be permitted to be used to comment on opinions that the reader or viewer doesn’t like.

• It should receive similar prominence to the original article or broadcast.
• It should be proportionate in length to the original article or broadcast.
• It should be restricted to addressing the incorrect or misleading facts in the original text and not be taken as an opportunity to introduce new issues or comment on correct facts.
• The media should not be required to carry a reply which is abusive or illegal.
The Role of Media Monitoring

The media play a key role in elections by providing the public with the information they need in order to make an informed decision at the ballot box. They provide a platform through which political parties and candidates can get their message across and they report on and analyse the policies and backgrounds of the various parties and candidates. Through their activities, they can make or break a candidate or party, not only by publishing negative reports but also by choosing to ignore particular parties and candidates.

Over the last 15 years, as a reflection of the ever-increasing role of the media, media monitoring has become an important part of election observation. Media monitoring can be most effectively performed by impartial, non-governmental organisations, such as citizens’ groups, professional associations or international monitoring organisations working closely with local groups. Media monitoring has also become an important part of electoral observation missions sent by inter-governmental organisations.

The primary aim of media monitoring is to assess whether the media in general, and broadcasters in particular, adhere to any requirements of balance and impartiality laid down in local laws or regulations. Even in the absence of such requirements, publicly owned or funded media are under a general obligation to be balanced and impartial.

Media monitoring can make a very practical contribution to the fairness and success of elections. At a minimum, the interim findings of media monitors, if they are made public during the election campaign, may influence the quality of media coverage. More effectively, there may be an ‘institutionalised’ dialogue between media monitors and the media, or media monitors may share their findings with the local or national electoral oversight body in an effort to engage its binding powers with the aim of making media coverage fairer. In some cases, as in South Africa in 1999, the electoral commission may even hire a non-governmental monitoring group to help it discharge its responsibility in the area of ensuring balance and impartiality in the media.

Media monitors need to examine the way in which local (and international) media report on the elections, as well as related issues, closely to assess whether or not the obligations of balance and impartiality are being respected throughout the election campaign. There are different ways of doing this. The two monitoring methods most often used can be described as “quantitative analysis” and “qualitative analysis”.

The first is the simplest, the least controversial and often has the greatest impact. It simply involves counting and measuring election coverage in the media, such as the number and length of items devoted to different parties, the length in column inches devoted to a party, the timing and number of direct access programmes and so on. The amount of coverage each party or candidate receives is usually the first criterion that will be looked at in order to evaluate allegations of bias. However, quantitative analysis does not say anything about the kind of reporting and, in particular, whether reporting is positive or negative.

More advanced monitoring methods become important in this assessment. “Qualitative analysis” is, as the name suggests, an approach that measures the quality of the coverage that parties and candidates receive. A qualitative evaluation should look at the language used and the message conveyed and use this to “qualify” the quantitative measure. A qualitative analysis may look at aspects of coverage such as the type of language used in relation to different candidates. For example, a government broadcaster might talk about an incumbent candidate only in positive terms while doing nothing but criticising opposition figures. At a more subtle level, media might use emotive words – such as ‘exposed’ or ‘revealed’ rather than ‘said’ or ‘stated’ – which can almost subliminally influence the views of an audience. The media can also generate bias by using particular terminology. For example, using the term “alleges” instead of the term “states” tends to undermine the credibility of the statement that follows, as it implies that the alleged is not reliable. A similarly negative impression can be created by adding unnecessary detail as, for example, a case where a journalist makes the comment that participants in a particular

Media monitors should also be concerned with a number of more general issues. They should closely examine any apparent instances of censorship. Governments should not do anything that might inhibit the free flow of information and opinions necessary to inform voters. For example, advertisements placed by political parties should not be banned or censored, while media workers should be allowed free to collect and report news. Media monitors should be aware that self-censorship, which may be the result of pressure from media owners, can be as big a problem as government-driven censorship. Media monitors should also examine whether the media are free to do their work without interference by third parties. This includes threats by party members or armed groups as well as actual acts of violence. Governments are under a strong international law duty to ensure the safety of media workers, and monitors should examine whether the government has complied with this duty.
