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(VENICE COMMISSION)

COMMENTS

ON MEDIA MONITORING DURING ELECTION OBSERVATION MISSIONS

by

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I. General

1. I have been asked to write an opinion on the OSCE Guidelines on Media Monitoring during Election Observation Missions. These guidelines are meant to be tools for media analysts in producing an assessment based not only on media monitoring but on the overall background that the media operate in. The evaluation of media performances during election campaigns is based on compliance with international standards and the fundamental question whether the rights of voters, candidates and the media are respected during the electoral process.

2. The focus of this report is to match the value of the media analysis and their theoretical and practical premises within the framework of Article 10 of the European Convention on Human Rights[1] read in context of the Convention as a whole, not least Article 3 of Protocol No. 1 to the European Convention which explicitly provides that the Member States must undertake to hold free elections, which will ensure the free expression of the opinion of the people in the choice of the legislature. The language of Article 3 of Protocol No. 1 to the Convention is rather different to that of the other substantive articles of the Convention and its Protocols, being expressed as an obligation imposed on states, rather than as a right of individuals.[2] It is hence quite relevant to assess the analytical framework of the OSCE guidelines within the context of Convention objectives where the realisation of these two rights taken together is essential for the furtherance and maintenance of a democratic society. The Member States of the Council of Europe must ensure that voters have access to a free press.

3. The content and structure of this report is to highlight the issues that provide the basis of the media analysis and come up with simple suggestions with regard to the analytical framework that might provide a constructive and precise method in framing the problem in a coherent perspective given its multi-faceted nature. The focus is delimited to the fundamental legal question of the OSCE methodology, the correlation of the main components of freedom of expression, the right to impart and the right to receive read in conjunction with the obligation of governments to hold free elections where the legitimacy of the outcome is measured with the informative level of the electorate.

4. The OSCE/ODIHR media monitoring methodology if properly conducted may serve the dual purpose of producing reliable results and hence provide guidelines not only for the media and citizens but also for the respective regulatory bodies to adjust measures to the conflicting issues impeding responsible media performance in particular during election periods.

5. The Council of Europe Committee of Ministers recommended in 1999 that Member States should take appropriate steps for the effective protection of journalists and other media personnel and their premises, as this assumes a greater significance during elections. At the same time, this protection should not obstruct them in carrying out their work. The recommendation emphasised the fundamental principle of editorial independence, which assumes a special importance in election periods. Regulatory measures may not, however, interfere with the editorial independence of the printed press.[3] The recommendation distinguishes between broadcast media and print media

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[1] *Hereinafter Convention.*

[2] *D.J. Harris, M. O'Boyle, C. Warbrick: Law of the European Convention (1995) Butterworths, p. 550.*

[3] *Recommendation (99) 15 on Measures Concerning Media Coverage of Election Campaigns (Adopted by the Committee of Ministers on 9 September 1999 at the 678th meeting of Ministers' Deputies).*

in this sense, confirming the fixed view that TV audiences are more credulous than readers of newspapers. The emphasis on a certain period over another illustrates the perception that reporters are enfeebled during election periods or that external forces are more encroaching during such periods (which has a point). The strife for political power is, however, not confined to delimitated cycles.

6. The core issue of the OSCE/ODIHR media monitoring is surveillance of freedom of political debate in the media. The Committee of Ministers in a Declaration (in February 2004) on the freedom of political debate in the media stated that humorous and satirical genre allows an even wider degree of exaggeration and provocation, as long as the public is not misled about facts. [4] It recalled its Resolution (74) 26 on the right of reply – position of the individual in relation to the press and its recommendation on measures concerning media coverage of election campaigns (99) 15 reaffirming the pre-eminent importance of a free and independent media for guaranteeing the right of the public to be informed.

7. In Strasbourg jurisprudence political debate enjoys the highest protection under Article 10. In the case of *Thorgeirson* v. *Iceland*, the European Court of Human Rights rejected the Icelandic government's contention that political discussion concerned mainly high politics; it also covered other matters of public concern.[5] In March 2002 the Court made clear that the scope of political debate and public matters includes corporate matters. When the ties between political and business activities overlap it may give rise to public discussion – even when writings in the press are based on slim factual bases.[6] Strasbourg jurisprudence attaches particular importance to the duties and responsibilities of those who avail themselves of their right to freedom of expression, 'and in particular journalists'.[7] Investigative journalism has become recognised as one of the main tools in fighting corruption although resistance of the established media in this matter may be difficult due to the enduring and strong ties with political and corporate power.[8] Any interference with journalistic effort to reveal corruption in high places is acknowledged by the Court as requiring strict scrutiny. The Committee of Ministers called attention to the role of journalism in fighting corruption in a recommendation in 2000: '[C]orruption represents a serious threat to the rule of law, democracy, human rights, equity and social justice; it hinders economic development and endangers the stability of democratic institutions and the moral foundations of society'.[9]

8. The need to afford the press with all the safeguards it needs to carry out its role as the public watchdog[10] is increasingly highlighted. The OSCE/ODIHR guidelines on media analysis underscore the inevitability of affirmative action.

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[4] *Committee of Ministers of the Council of Europe Declaration 12 February 2004.*

[5] *Thorgeirson v. Iceland, 25 June 1992, Series A no. 239, § 64.*

[6] *Dichand and Others v. Austria, application no. 29271/95, judgment of 26 February 2002, § 52.*

[7] *Jersild v. Denmark, 23 September 1994, Series A no. 298, § 31; Unabhängige Initiative Informationsvielfalt v. Austria, application no. 28525/95, judgment 26 February 2002, § 43.*

[8] *H. Thorgeirsdottir, Journalism Worthy of the Name. A Human Rights Perspective on Freedom within the Press, Lund University 2003.*

[9] *Recommendation No. R (2000) 10 of the Committee of Ministers to Member States on codes of conducts for public officials (Adopted by the Committee of Ministers at its 106th session on 11 May 2000).*

[10] *Jersild v. Denmark, 23 September 1994, Series A no. 298; Bladet Tromsø and Stensaas v. Norway [GC], 20 May 1999, RJD 1999-III, p. 289, § 59.*

9. The methodology of the media analysis *per se* seems on the whole technically acceptable although such analyses are bound to be complex due to the expansion of the research, the scope of the problem and the diverse conditions in the media field.

10. The media in modern societies is subject to the interaction of the legal regulation, the control of the market and the struggle of self-regulation in this relationship. If this correlation is constructed in a logical argument from the start the methodological basis of the media analysis may become sharper and more revealing of legal as well other controversies. A good starting point to pursue clear results and findings is to noticeably identify the basic areas of the problem.

11. **The author of this report *recommends* that the analytical framework of media analyses is confined to three constructive areas and that the focus is first and foremost on the right to impart information and ideas of all kinds; the law regulating journalism and the potential extent of public interference to restrict or enhance this right; the impact of the economic logic for the privately owned media and the capacity of journalists to live up to the role imposed on them in jurisprudence**.[11]

a) Legal regulation
b) Market regulation
c) Self-regulation

12. **Legal regulation** does not entail fixed positive obligations with regard to the printed press such as rules on access, fairness and impartiality while broadcasting licenses are usually conditioned on compliance with such rules. Convention case law, however, explicitly submits that it is incumbent on the press, the print media as well as the audiovisual media[12] to impart information and ideas on matters of public interest, which the public has the right to receive.[13] In so doing the media must not overstep the bounds set out in paragraph 2 of Article 10 such as hurting the rights and reputation of others. On the last account the media can be held liable while there are no sanctions or remedies in cases where the print media ignores its positive duties of imparting to the public all matters of general interest.[14] The positive requirements are usually not entrenched in legal codes and it is hence difficult to show how they can be violated or brought under review of the exception to the right.

13. Broadcasting independent of ownership is most widely subject to legal regulation although the principles applying to public service broadcasting according to Council of Europe standards differs from broadcasting for purely commercial or political reasons because of its specific remit, in terms of content and access; it must guarantee editorial independence and impartiality; provide a benchmark of quality; offer a variety of programmes and services catering for the needs of all groups in society and be publicly accountable.[15] The interaction of legal regulation with **market regulation** is highlighted in the concern of the Parliamentary Assembly that: "Public service broadcasting, a vital element of democracy in Europe, is under threat. It is challenged by political

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[11] *H. Thorgeirsdóttir, Journalism Worthy of the Name. A Human Rights Perspective on Freedom within the Press, Lund University 2003.*

[12] *Jersild v. Denmark, 23 September 1994, Series A no. 298, § 31.*

[13] *Observer and Guardian v. the United Kingdom, 26 November 1991, Series A no. 216, § 59.*

[14] *OSCE Guidelines Draft as of 8 June 2004, p. 13. This problem is evoked on p. 13 of the report without further elaborating it in the context of the legal standards discussed in chapter 1 of the report.*

[15] *Parliamentary Assembly Recommendation (1641) 2004.*

and economic interests, by increasing competition from commercial media, by media concentrations and by financial difficulties. It is also faced with the challenge of adapting to globalisation and the new technologies."[16] The Recommendation favours concerted action by the various limbs of the Council of Europe in order to "ensure proper and transparent monitoring, assistance and, where necessary, pressure, so that Member States undertake the appropriate legislative, political and practical measures in support of public service broadcasting". There is an emerging consensus on the necessity of enhancing the role of public service broadcasting within the Member States of the Council of Europe due to ownership concentration on the media market, as recognised in a recent report by the Parliamentary Assembly of the Council of Europe.[17]

14. Journalism is not only dependent on an affirmative appraisal of the market but also the good will of authorities which due to corporate funding in politics often have close ties with the business community, which does not facilitate **self-regulation** leading to responsible and mature journalistic coverage. Whatever the amount of financial pressure on journalism, the mere presence of the power of the business community and the unclear division between it and the political sphere is a reminder of the much more complex ways of "interference" not prescribed by law at the dawn of the 21st century rather than at the conception of the Convention in 1950. The American Convention on Human Rights, which entered into force in 1978 presumes and thus prohibits the threat to media freedom of private controls[18] as well as the abuse of government. The media fighting for independence from external pressures is, in many of the Council of Europe Member States, the victim of precarious economic conditions, which make it easy prey for mighty political and economic interests.[19]

15. Certain legal controversies in the OSCE/ODIHR methodological framework need further scrutiny to fill in the gaps of the theoretical background to render the outcome more scientific. This may also benefit prospective media regulation and ultimately support the development of coherent and consistent supra national standards concerning responsible journalism during sensitive periods like elections. The issues deserving closer scrutiny are:

a) An explicit enumeration of the relevant treaty based rights for portraying a realistic picture of the legal environment of the media.
b) The distinct treatment of journalism depending on type of medium, i.e. regulation of broadcasting and hands off policy in case of printed press.
c) The assumed efficiency of pluralism of media outlets and diversity of voices.
d) The principle of editorial freedom and self-regulation.

II. The international legal framework (legal regulation)

16. Reference to international standards and benchmarks provides the basis for the methodology for assessing how the media behave during an election campaign. It is *recommended* with regard to the OSCE commitments that there is clear distinction between *de lege late* and *de lege ferenda*.

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[16] Parliamentary Assembly Recommendation (1641) 2004.

[17] Parliamentary Assembly Doc. 9000, 19 March 2001, Freedom of Expression in the media in Europe; Report Committee on Culture, Science and Education. (Rapporteur: Mr. Gyula Hegyi).

[18] Not excluding newsprints.

[19] Cf. Parliamentary Assembly Council of Europe, Doc. 9000, 19 March 2001, Freedom of Expression and information in the media in Europe, Report Committee on Culture, Science and Education (Rapporteur: Mr. Gyula Hegyi).

A number of standards that the OSCE accentuates are not recognised as having clear basis in law, independent of their feasibility in enhancing democratic societies. An authoritative source of the interpretation of these standards is the European Court of Human Rights but the European Convention on Human Rights (1950) is modelled after the Universal Declaration on Human Rights (1948) as is the International Covenant on Civil and Political Rights (1966). Both treaties set forth the principle of freedom of expression which most of these standards can be traced to although there is not a uniform interpretation as to their legal value and implementation in reality, for example access rights to the media and the right of journalists to act in accordance with ethical rules. They may be widely accepted interpretations without having a legal standing. There are many unclear areas that are bound to affect the application of the media monitoring system. What is presented as selected OSCE commitments[20] is more or less the emerging legal guidance in the fast developing area of media law on the basis of the general principle of freedom of expression, as widely protected in constitutions and international and regional human rights treaties. At the same time there are significant and crucial differences in the basic texts of the major human rights instruments when thoroughly scrutinised and vast asymmetries in terms of what can be expected of public authorities in guaranteeing a properly functioning media.

17. It may reduce the value of the OSCE/ODIHR guidelines in light of their proposed universality to require that the legal framework regulating media and the campaign during the election process should be consistent with the principles set forth in the field of freedom of expression[21] without specifying more clearly a lowest common denominator. The principles of freedom of expression as protected in for instance two regional treaties the European Convention on Human Rights and the American Convention on Human Rights vary in their scope and substance. The latter treaty in principle offers much wider protection for example against oppression of private parties in the sphere of the media.[22] The ECHR has been interpreted as to an extent offering such protections[23] while such principles in private relations do not have a clear legal treaty basis.

18. It is *recommended* that a) in light of the fact that the international legal standards are directed at regulating the behaviour of governments in relation to the media[24] and b) that public authorities shall refrain from interfering in the workings of the media and c) when necessary shall impose positive measures to promote pluralism and to protect them from attacks or undue pressures,[25] that the desired positive measures are clarified in relation to the objective and explicitly described with regard to feasible and realistic options that authorities can resort to in order to achieve this goal.

19. The importance of ensuring that media are given the widest possible latitude during election periods is emphasised with reference to Recommendation 99 (15) by the Committee of Ministers of the Council of Europe as an important reference for the assessment of election campaign coverage.[26]

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[20] *OSCE Guidelines Draft as of 8 June 2004, p. 3.*

[21] *OSCE Guidelines Draft as of 8 June 2004, p. 26.*

[22] *Fuentes Bobo v. Spain, application no. 39293/98, judgment of 29 February 2000.*

[23] *Fuentes Bobo v. Spain, application no. 39293/98, judgment of 29 February 2000.*

[24] *OSCE Guidelines Draft as of 8 June 2004, p. 5.*

[25] *OSCE Guidelines Draft as of 8 June 2004, p. 8.*

[26] *OSCE Guidelines Draft as of 8 June 2004, p. 10.*

20. In light of the extensive summary of international standards concerning a free and responsible media it would be desirable that the guidelines of the media analysis are explicit and simple taking into consideration unsolved legal controversies still affecting the media landscape and media performance: for example questioning the distinct requirements made to broadcasters on the one hand and the hands off policy with regard to the printed press on the other, which may render the desired objective an irresolute in light of the significance of political coverage in newspapers as well as broadcasting during election periods.

III. Market regulation of the right to impart

21. The extent of respect for journalistic ethics within media institutions is highlighted in chapter 2 of the OSCE document which is an analysis of the issues concerning media, politics and elections. It is pointed out that the media tends to support a political agenda that favours the corporate interests of their owner. For this reason a model is suggested to analyse the impact of ownership, advertising and the ideological benchmarks, for example when the media accepts without questioning free market economics and does not allow scope for any real criticism thereof. Hence a one sided view of the world shapes the political coverage. Monopolies and manipulation of the information flow present a threat to journalistic activities and ultimately democracy.

22. The right to receive has in recent decades been interpreted as the need to protect the public from the press itself[27] due to the manipulation factor. The problem however is that the right is not self-executing,[28] in particular with regard to the positive requirements imposed on the press.[29] This in turn sheds light on the importance of guaranteeing the imparting process particular protection.[30]

23. Despite the realisation of public and private threats on editorial independence discussed in the OSCE/ODIHR overview, self-regulation in journalism seems a foregone conclusion. Responsible journalism is described as stemming from the reliance of journalists on a code of ethics. The document accentuates the significance of a socially responsible media where media professionals adhere to a code of conduct, stating that no code of conduct will guarantee professional journalism unless the political, social and economic systems allow journalists to carry out their duties freely.

24. Self-regulation within the media means that journalists adhere to the codes of conduct adopted by journalists' association widely. Such self-regulation is seen as approaching some form of press responsibility without being subject to state control.[31] The profession is to monitor and discipline its own. The voluntary conduct means that editors and journalists submit their decisions under critical examination and is typically applicable where editorial discretion is crucial in evaluating the bounds that are not to be overstepped for the protection of the reputation of others. Although codes contain integrity rules, where journalists are assumed to act in accordance with the duty to inform the public, the staff of the media has little support in going against vital corporate/political interests. Ethical performance may be more difficult during election periods.

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[27] *R. Pinto, La Liberté d'Information et d'Opinion en Droit International, 1984 Economica, p. 19.*

[28] *Cf. O'Brien, The Public's Right to Know: The Supreme Court and the First Amendment, 1981 Prager, p. 17.*

[29] *Sunday Times v. the United Kingdom, 26 April 1979, Series A no. 30, § 65.*

[30] *H. Thorgeirsdottir, Journalism Worthy of the Name. A Human Rights Perspective on Freedom within the Press, Lund University 2003.*

[31] *H. Thorgeirsdottir, Journalism Worthy of the Name. A Human Rights Perspective on Freedom within the Press, Lund University 2003, p. 454.*

25. **An important aspect of the media monitoring instrument is to highlight cases of undue interference in the editorial freedom of the media or attempts to undermine their independence. This is the weakest part of the analysis and its weakest guarantee as is further discussed here below.** The media are classified by the type of medium, print or electronic – and the kind of ownership. The role of the print media is analysed as complementing the role of broadcasting where the latter can reach large segments of the population while the print media may be dominant in analysing and forming public opinion.[32]

26. **The OSCE/ODIHR guidelines are based on the view** that significant differences exist between the print and the broadcast media. Publicly funded broadcasters must provide a complete and impartial picture of the entire political spectrum in their coverage of election; private broadcasters should also abide by standards of impartiality in their news and current affairs and offer fair and accurate coverage of elections. The view is however accepted that the print media is entitled to partisanship but should adhere to journalistic ethics while simultaneously it is recognised that their journalists are not protected from pressures from their editors or political pressures.

27. Inherent in Recommendation 99 (15) referred to (above # 4) is an unacknowledged bias recognised by many scholars in media law, that of the different treatment of the printed press and broadcasting. It follows from the reading of Article 10 that rules on licensing broadcasting in the Member States of the Council of Europe must meet the requirements of Article 10 of the European Convention and have to be necessary in a democratic society in one or more of the interests which freedom of expression is conditioned on. The Recommendation 99 (15) explicitly submits that: Regulatory frameworks on media coverage of elections may not interfere with the editorial independence of the print media.

28. **Accordingly the guarantee to scrutinise undue interference in the editorial freedom of the media is not valid in case of the print media, which means that the main argument of the media analysis collapses.**

29. **It is important to point out here that the distinction referred to between editorial freedom of printed press and that of broadcasting have not been underscored to this degree in the European Court's case law.**

30. The principles regarding the press' social responsibilities are formulated *primarily* with regard to the print media although they doubtless apply also to the audiovisual media, as the Court explicitly submitted in the case of *Jersild v. Denmark* where it also stated: "Whilst the press must not overstep the bounds set, inter alia, in the interest of "the protection of the reputation or rights of others", it is nevertheless incumbent on to impart information and ideas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog".[33]

31. The Court's distinction is predominantly concerned with the immediate impact of broadcasting and it has therefore underscored that the principle of the diversity of views in broadcasting is *especially* valid in relation to audio-visual media, whose programmes are often

[32] *OSCE Guidelines Draft as of 8 June 2004, p. 19.*

[33] *Jersild v. Denmark, 23 September 1994, Series A no. 298, § 31.*

broadcast very widely.[34] The Court has furthermore submitted that: "In considering the "duties and responsibilities" of a journalist, the potential impact of the medium concerned is an important factor and it is commonly acknowledged that the audiovisual media have often a much more immediate and powerful effect than the print media.[35] The audiovisual media have means of conveying through images meanings which the print media are not able to impart."[36] In more recent case law the Court has submitted that a prohibited measure (political advertising), which was applied only to radio and television broadcasts, and not to other media such as the press, "while the domestic authorities may have had valid reasons for this differential treatment, a prohibition of political advertising which applies only to certain media, and not to others, does not appear to be of a particularly pressing nature."[37]

32. **The duty ascribed to the printed press in the European Court's case law means that there is not an autonomous zone surrounding editorial freedom of newspapers.** It is not for the Court or for the national courts for that matter, to substitute their own views for those of the press as to what technique of reporting is adopted by journalists. In this context the Court recalls that Article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed.[38]

33. According to Convention case law states cannot absolve themselves from responsibility by devolving authority to private bodies or individuals.[39] The Court does not regard it as its task to indicate which means a State should utilise in order to perform its obligations under the Convention.[40] If it however so happens that fundamental rights are crushed by private parties the State is responsible.

34. **There are subsequently four issues that may be taken more into account in the methodological basis of the OSCE/ODIHR guidelines:**

a) Political debate is sacrosanct in Strasbourg jurisprudence.[41]

b) The duty to uphold this political debate applies to newspapers and broadcasting media.

c) The state is the ultimate guarantor of diversity of news and views in the media.[42]

d) According to Convention case law states cannot absolve themselves from responsibility by devolving authority to private bodies or individuals.[43]

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[34] Informationsverein Lentia and Others v. Austria (no. 1), judgment of 24 November 1993, Series A no. 276, p. 16, § 38.

[35] Purcell and Others v. Ireland, Commission's admissibility decision of 16 April 1991, application no. 15404/89, Decisions and Reports (DR) 70, p. 262.

[36] Jersild v. Denmark, 23 September 1994, Series A no. 298, § 31.

[37] VgT Verein gegen Tierfabriken v. Switzerland, 28 June 2001, RJD 2001-VI, § 74.

[38] Oberschlick v. Austria, 1 July 1997, RJD 1997-IV, § 67; Jersild v. Denmark, 23 September 1994, Series A no. 298, § 31.

[39] Costello-Roberts v. the United Kingdom, 25 March 1993, Series A no. 247.

[40] VgT Verein gegen Tierfabriken v. Switzerland, 28 June 2001, RJD 2001-VI, § 78.

[41] Wingrove v. the United Kingdom, 25 November 1996, RJD 1996-V, § 58; Sürek v. Turkey (No.1) [GC], no. 26682/95, RJD–I, § 61.

[42] Informationsverein Lentia and Others v. Austria (no. 1), judgment of 24 November 1993, Series A no. 276, p. 16, § 38.

IV. Self-regulation in light of legal framework and market

35. **The OSCE/ODIHR guidelines emphasize the importance of consistency of the legal framework regulating the media and the campaign during the election process both with international law. The need to amend internal contradictory or conflicting laws is also accentuated**.[44]

36. Again, it must be *recommended* that the OSCE/ODIHR guidelines intended to assess the role of the media during an election campaign clearly distinguish which aspects of international law are to provide the framework and where such standards are completely at odds with market regulation. The guidelines should not try to solve the irresolute by referring to self-regulation which amounts to little where there is no clear legal standard and business concerns go far beyond ethical rules and where much of the press is not dedicated to the purpose of the press, to the discharge of the public responsibility.

37. Although the reservation is made that self-regulatory measures are seldom efficient to ensure pluralism and fair access to all contestants, the OSCE/ODIHR guidelines assert that regulation during election periods should have a light touch but that the system of self-regulation "may be more advisable when conditions facilitate responsible and mature journalistic coverage".[45] The European Federation of Journalists has underscored the threats arising from media globalisation, which may lead to more opportunities for commercial exploitation of the information market but which will diminish pluralism and diversity in journalism.[46] Clearly, there are many loopholes with regard to self-regulation not least where it is automatically assumed to be functioning without any legal support.

38. **The author of this report *suggests* that an explanation is given of what are the "conditions facilitating responsible and mature journalistic coverage."**[47]

39. The Court has submitted that it is obligatory for journalists to adhere to the professions' ethical codes in order to enjoy Article 10 protection.[48] It is, however, difficult to uphold public service values by individual journalists if they are not clearly stipulated in the law and if they do not enjoy particular protection in so doing.

40. The growing case-law on press freedom since the late 1970s has incrementally developed the substantial guarantee that Article 10 of the Convention affords the press in attending to its obligations. Given the pre-eminent role of the press in democratic society the Court acknowledges its right to battle against authorities yet without sufficient guarantee that the press will stand or stands a chance to succeed. In the case of *Goodwin* v. *the United Kingdom*, the Court established

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[43] *Costello-Roberts v. the United Kingdom, 25 March 1993, Series A no. 247.*

[44] *Cf. OSCE/ODIHR Guidelines DRAFT as of 8 June 2004, p. 26.*

[45] *OSCE/ODIHR Guidelines DRAFT as of 8 June 2004, p. 26, p. 27.*

[46] *Statement adopted by the European Federation of Journalists (a branch of the International Federation of Journalists) at its annual meeting in Prague, 26 May 2003.*

[47] *OSCE/ODIHR Guidelines DRAFT as of 8 June 2004, p. 27.*

[48] *Goodwin v. the United Kingdom, 27 March 1996, RJD 1996-II, p. 500, § 39; Bergens Tidende and Others v. Norway, supra note 155, § 53.*

that journalists might be distinguished from ordinary citizens when exercising Article 10 rights.[49] This approach is in congruity with, for example, the constitutional protection enjoyed by the press to conduct its 'public function' in Germany. Some newsgathering privileges have been adopted under Article 10 as compatible with the democratic mission of the press to conduct investigative journalism. In *Goodwin* v. *United Kingdom* the Court referred to the protection of journalistic sources as one of the basic conditions for press freedom. Such a protection is certainly an important step in underscoring that the press needs 'extra protection' to guarantee the public's right to receive information.

41. Certain inconsistencies in Convention jurisprudence and European standards will have to be kept in mind when guidelines intended to improve media *performance* during election periods are set forth. The situation within the media is subject to insidious and uncontrollable forces that have not been sufficiently revealed to provide a legal base for practical and efficient remedies.[50]

42. The proposed supervisory body implementing the regulation for media coverage and the suggested complaint procedures and appeals mechanism seem in full congruity with the underlying principles of Council of Europe standards with regard to electoral matters and media performance in democratic societies. It is however difficult to see how such a supervisory body is "to monitor the respect of the rules"[51] when they are mainly *de lege ferenda.*

43. It is *recommended* that the guidelines place more emphasis on the states' obligation to guarantee the right to impart, explicitly protected in Article 10 of the European Convention on Human Rights. It is recognised that the ability of the media to resist various pressures during election periods, depends on their strength and autonomy.[52] The European Court of Human Rights jurisprudence holds that journalists dispose of their Article 10 protection if they do not adhere to the ethical rules of their profession[53] and that it is incumbent on them to impart the truth concerning public affairs.[54] The guidelines provide that "any measures or actions promoting or causing self-censorship among journalists should be considered as an attack on their editorial freedom".[55] Evidently physical attacks and harassment resulting in disappearances and killings of journalists require that states adopt positive measures in order to guarantee not only the right to freedom of expression but also the fundamental right to life and to be free from torture.[56] The right to life is an obligation *erga omnes* in contemporary international law. The right to freedom of expression within the media does not have such a clear legal standing. There is emerging jurisprudence on the necessity of the legal protection of journalists' sources and on the protection of journalists engaged in dangerous professional missions. But there are still no laws in place that offer journalists protection in their work. Self-censorship is widely thought to be a cause for concern while it must be regarded as a serious violation of the principle of freedom of expression

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[49] *Cf.Roemen and Schmitt v. Luxembourg, application no. 51772/99, judgment of 25 February 2003.*

[50] *Cf. H. Thorgeirsdóttir, Journalism Worthy of the Name. A Human Rights Perspective on Freedom within the Press, Lund University 2003.*

[51] *OSCE/ODIHR Guidelines DRAFT as of 8 June 2004, p. 27.*

[52] *OSCE/ODIHR Guidelines DRAFT as of 8 June 2004, p. 32.*

[53] *Goodwin v. the United Kingdom, 27 March 1996, RJD 1996-II, p. 500, § 39.*

[54] *Sunday Times v. the United Kingdom, 26 April 1979, Series A no. 30, § 65.*

[55] *OSCE/ODIHR Guidelines DRAFT as of 8 June 2004, p. 30.*

[56] *Cf. Erdogdu and Ince v Turkey [GC], 8 July 1999, RJD 1999-I, § 54. See also Parliamentary Assembly Recommendation 1506 (2001) Freedom of expression in the media in Europe.*

demanding laws strictly prohibiting the dismissal of a journalist or other forms of retaliation affecting status or earnings.

44. The OSCE/ODIHR guidelines specify the direct and overt pressures that journalists are faced with, "even within well-established democracies".[57] The guidelines stress the norms regulating media during the election campaign should be clearly stated and should leave no room for manipulation or misinterpretation.[58] This is looking into the failure and *demanding improvements*. When there is no law explicitly limiting ownership control or manipulation of news coverage, unequal access and unfair treatment and all sorts of insidious tactics it is doubtful to brush off the problem by referring it to journalists, who have no say in the matter if such demands go against their superiors or the wishes of media owners.

45. The failure of self-regulation results from the need of the medium to survive as a business entity. The first consideration is to make profit and other considerations such as public accountability and responsible coverage of political subjects must yield to the main objective. It may even seem more demanding to adopt a legal framework that enables journalists to adhere to their positive duties than to establish rules concerning the negative requirements. Self-regulation is after all much more capable of rectifying inaccuracy that is already evident, such as perversion, intrusion or harassment. The impact of self-regulation in this form does not extend further than at times fixing the obvious but there is no guarantee that it will fill the gap of market failure or increase responsibility of the media.

46. It is *recommended* that the guidelines distinguish between damaging types of expression, punishable by law and even prohibited on the hand and rules of integrity on the other hand which are found in some ethical codes (Sweden) and provide guidance to journalists in carrying out their responsibilities but are not legally enforceable. The duties and rights of journalists derive from the public's right to know facts and opinions but there is no guarantee that journalists adhere to these duties. The ethical codes may submit that the responsibility of journalists towards the public has priority over any other responsibility, particularly the responsibility to their employers and the state organs (Switzerland). It must however be kept in mind that in order to act in accordance with the codes journalists must enjoy real protection against job dismissal or other forms of retaliation if their conduct goes against the corporate or political interests of their employers.

47. Journalists cannot use the Convention as a basis of complaint against their 'oppressors' if the latter are preventing them from adhering to their codes of conduct, albeit the Court has held that such is the duty of journalists if they want to enjoy the safeguards of Article 10.[59] The predominant rule of most journalistic codes is: "Respect for truth and for the right of the public to truth is the first duty of the journalist."[60] The political debate in the forum of the media can be easily restricted and manipulated without constituting an evident breach of Article 10. The infringement is real if it is an act of public authorities, but it is in the grey zone if the violator is a private party. The legal basis for action against journalists or the media are questionable in real life situations where it is hard to prove the infringement of generalised formulations because a detailed and precise description of the alleged activity and victim is lacking. The problem of violation of

[57] *OSCE/ODIHR Guidelines DRAFT as of 8 June 2004, pp. 27- 28.*

[58] *OSCE/ODIHR Guidelines DRAFT as of 8 June 2004, p. 26.*

[59] *Bladet Tromsø and Stensaas v. Norway [GC], 20 May 1999, RJD 1999-III, p. 289.*

[60] *International Federation of Journalists' principles on the conduct of journalists.*

fundamental rights in the 'private sphere' has increased extensively, *inter alia* due to privatisation of public bodies, since the adoption of the Convention.

48. It should be *recommended* that the report makes a clear distinction between the freedom of the media as a classical freedom seeking autonomy from the state and the duty of the media, when it is asserted that managers and owners should accept the principles of journalistic ethics and independence and they should not exert pressure on their employees to act at variance with these principles.[61]

49. The European Court of Human Rights has elaborated on the behaviour of media owners and it has acknowledged the *Drittwirkung* factor or third party effect on fundamental rights.[62] In the case of *Österk* v. *Turkey* in 1999 the Court stated:

> "Admittedly, publishers do not necessarily associate themselves with the opinion expressed in the works they publish. However, by providing authors with a medium, publishers participate in the exercise of the freedom of expression, just as they are vicariously subject to the 'duties and responsibilities', which authors take on when they disseminate their opinions to the public."[63]

50. It should be pointed out with regard to the role of internet in elections that the content providers of many web sites may be subject to the same pressures as journalists of the traditional media.

51. **Another possible misconstruction** in the base of OSCE/ODIHR methodology and a common assumption submitted in the guidelines is that a variety of media outlets "with differing editorial policies can still ensure the voters' rights to receive diverse and varied information as well as the candidates' right to put forward their platforms."[64]

52. **A variety of media outlets does not automatically mean that editorial policies differ.**

53. A democratic government needs diversity of voices to live up to its ideals. Diversity of voices can be achieved through diversity of media outlets and diversity of ownership. Competition law may prevent monopolies in media markets but such laws are economic laws and they may guarantee competitive marketplaces but not diversity of ideas and opinions circulating within these markets. The economic logic of such an environment may foster journalism that relies on the goodwill of advertisers rather than journalism that has a priority in serving the public in accordance with the objectives of public international law.

54. As submitted in a recent report of the Parliamentary Assembly of the Council of Europe concerning media monopolisation: Plurality of markets does not equal plurality of content.[65] A well functioning economic market is not sufficient to secure an independent, free and pluralistic

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[61] *Cf. OSCE/ODIHR Guidelines DRAFT as of 8 June 2004, p. 19.*

[62] *Fuentes Bobo v. Spain, application no. 39293/98, judgment of 29 February 2000 (not yet published).*

[63] *Öztürk v. Turkey [GC] no. 22479/93, judgment of 28 September 1999, RJD 1999-VI, § 49.*

[64] *OSCE/ODIHR Guidelines DRAFT as of 8 June 2004, p. 31.*

[65] *Parliamentary Assembly report, Doc. 10195, 3 June 2004, Monopolisation of the electronic media and possible abuse of power in Italy, § 73.*

press. More is needed than competition law to break up monopolies.[66] Constitutional scholars have pointed to the fact that despite quite strict, long standing anti-trust rules in the United States, programmes in the media are very homogenous.[67] A democratically determined speech may not result in a pluralistic political agenda since to survive on the market the media must please those who really run the show.

55. The Parliamentary Assembly of the Council of Europe in Resolution 1003 (1993), emphasised that journalism is a part of a corporate structure and that legitimate respect for publisher's and owner's ideological orientations is limited by the absolute requirements on truthful news reporting and ethical opinions to respect the citizen's fundamental right to information.[68] Resolution 1003 recommended rules governing editorial staff to regulate relations between the journalists and the publishers and proprietors within the media separately from the normal requirements of labour relations.[69] It furthermore made clear that 'entrepreneurial objectives have to be limited by the conditions for providing access to a fundamental right'.[70]

56. **It is *recommended* that corporate journalism is not set aside as a marginal problem. Attention must be turned to the legal obligations of all types of news media as public watchdog and how its proper function can be guaranteed independent of the factors impeding its operation.**

V. Rights of others (voters)

57. **OSCE/ODIHR guidelines accentuate the right of voters, the rights of candidates and parties during election periods.**[71] This approach of the guidelines in guaranteeing the rights of others may be backed by the reasoning of the European Court of Human Rights in its case law on the positive duty of the State in guaranteeing free elections and the need for voters to have access to a free press.

58. The Court in *Mathieu-Mohin and Clerfayt v. Belgium* stated: "According to the Preamble of the Convention, fundamental human rights and freedoms are best maintained by an 'effective political democracy'. Since it enshrines a characteristic principle of democracy, Article 3 of Protocol No. 1 is accordingly of prime importance in the Convention system."[72] The right to receive information from the media is closely linked to the electoral process as reflected in the wording of Article 3 of Protocol No. 1, which states:

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[66] *Cf. C. R. Sunstein, Democracy and the Problem of Free Speech, 1995 Free Press paperback edition (first published 1993), p. 3.*

[67] *Cf. E. Barendt, "Access to the Media in Western Europe" in A. Sajó and M. Price (eds), Rights of Access to the Media, 1996 Kluwer Law International, p. 109.*

[68] *Parliamentary Assembly of the Council of Europe, Resolution 1003 (1993) on the ethics of journalism, Doc. 6854, § 10.*

[69] *Ibid., § 32.*

[70] *Ibid., § 11.*

[71] *OSCE/ODIHR Guidelines DRAFT as of 8 June 2004, p. 25.*

[72] *Mathieu-Mohin and Clerfayt v. Belgium, 2 March 1987, Series A no. 113, § 47.*

> "The High Contracting Parties undertake 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 legislature."[73]

59. Article 25 of the International Covenant on Civil and Political Rights[74] provides *inter alia* that every citizen shall have the right and the opportunity without unreasonable restrictions to vote and be elected at genuine periodic elections, which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors. One of the drafters of Article 25 of the ICCPR stated that 'no government is valid unless it reposes on the will of the majority'.[75]

60. To the extent that the Convention authorities have had to address Article 3 of Protocol 1[76] they have attached considerable significance to it.[77] Article 3 of Protocol 1 creates a positive obligation on member states to 'hold' democratic elections.[78] The Commission has taken the view that this provision entails "universal suffrage"[79] and then, as a consequence, to the concept of subjective rights of participation, the "right to vote" and the "right to stand for election to the legislature". The Court has held that Article 3 of Protocol 1 does not create an obligation to introduce a specific electoral system, provided that the system employed ensures "equality of treatment of all citizens in the exercise of their right to vote and their right to stand for election".[80] In exercising its ultimate supervision the Court takes into consideration "that features that would be unacceptable in the context of one system may be justified in the context of another, at least so long as the chosen system provides for conditions which will ensure the free expression of the opinion of the people in the choice of the legislature".[81]

61. A textual interpretation of this provision taken in conjunction with Article 10 would prohibit any efforts to manipulate and process information with the aim of misinforming the public.[82] Like its counterpart Article 15 of the ICCPR, Article 3 of Protocol 1 presupposes that the conditions for the media to exercise its corollary function of the public's right to receive are not controlled by a few people or manipulated to exclude criticism and political opposition. In reality access to the media in order to ensure a wide variety of news and views, necessary to respond to the need of the populace for an analytical picture of the world, is not wide open to adversary opinions to promote the emergence of 'a sufficiently clear and coherent political will'.[83] A monopolistic media market, imparting tendentious information to the public, does not ensure the conditions necessary to guarantee the free expression of the popular will. Such a situation is an example of non-

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[73] *Emphasis added.*

[74] *Hereinafter ICCPR..*

[75] *U.N GAOR 3d Comm., 16th Session, 1097th mtg. at 186, U.N. Doc. A/C.3/SR. 1097 (1961) (statement of Mr. Ferreira Aldunate, Uruguay).*

[76] *Mathieu-Mohin and Clerfayt v. Belgium, 2 March 1987, Series A no. 113, § 52.*

[77] *Cf. S. Marks, 'The European Convention and its "Democratic Society"' in LXVI BYIL 1995.*

[78] *Mathieu-Mohin and Clerfayt v. Belgium, 2 March 1987, Series A no. 113, § 52.*

[79] *Ibid. § 51.*

[80] *Application no. 11123/84, Etienne Tête v. France, Commission's decision 9 December 1987, DR 54, p. 52.*

[81] *Mathieu-Mohin and Clerfayt v. Belgium, 2 March 1987, Series A no. 113 § 54.*

[82] *Cf. Parliamentary Assembly Recommendation 1506 (2001) Freedom of expression in the media in Europe.*

[83] *Mathieu-Mohin and Clerfayt v. Belgium, 2 March 1987, Series A no. 113, § 54.*

governmental interference curtailing on a wide scale fundamental human rights to the extent of severely threatening the democratic fabric. Dissidents or those opposing the hegemony of big business in society are inhibited by the cost of media access. At the same time their rights are infringed upon, it affects the rights of others to form an opinion.

62. The Court has made clear that political rights referred to in the *Travaux Préparatoires* with regard to interpretation of Article 3 of Protocol 1 means that the commitment is not merely thought of in relation to justifying interference, that the primary obligation is not one of abstention or non-interference but one of adoption by the state of positive measures.[84] The scope of the Convention can be expanded beyond what the drafters intended fifty years ago due to the fact that circumstances have changed.[85] The states have a wide margin of appreciation in this sphere without curtailing the rights in question to such an extent as to impair their very essence and legitimate aim. In particular the conditions within the states must not 'thwart the free expression of the opinion in the choice of the legislature'.[86] As the Court has reiterated the essential role of the press is 'in ensuring the proper functioning of a political democracy'.[87] The importance of the media is clear in this respect. The media is one of the means to see that government carries on its business in public, bringing about the transparency of power without masks.[88] An independent and responsible media is one of the essential prerequisites of ensuring the free formation of public opinion preceding elections.

63. The Venice Commission has submitted that equality of opportunity between parties and candidates requires that the main political forces should be able to voice their opinions in the main organs of the country's media. Accordingly this right must be clearly regulated with due respect for freedom of expression and failure to observe the right to equality of opportunity in this regards should be subject to appropriate sanctions. The Venice Commission emphasised the fact that media failure to provide impartial information about the election campaign and candidates is one of the most frequent shortcomings arising during elections. The Venice Commission hence suggested that in conformity with freedom of expression, a legal provision should be made to ensure that there is minimum access to privately owned audiovisual media, with regard to election campaign and that spending by political parties may likewise be limited in order to guarantee equality of opportunity.[89]

VI. Sensitive issues, bench marks and best practices according to OSCE/ODIHR Guidelines

64. There are various issues dealt with under this heading in chapter III of the OSCE/ODIHR such as how much media coverage may be regulated during elections; basic guidelines are that public should provide parties and candidates in elections with equal access and that coverage

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[84] *Ibid. § 50.*

[85] *Matthews v. the United Kingdom, 18 February 1999, RJD 1999-1, § 39.*

[86] *Ibid., § 53.*

[87] *Erdogdu and Ince v Turkey [GC], 8 July 1999, RJD 1999-I, § 48, Lingens v. Austria, 8 July 1986, Series A no.103, § 41, Fressoz and Roire v. France [GC], 21 January 1999, RJD 1999-I, § 45.*

[88] *Cf. N. Bobbio, The Future of Democracy, 1987 University of Minnesota Press, p. 3.*

[89] *European Commission for Democracy Through Law, Code of Good Practice in Electoral Matters, adopted by the Venice Commssion at its 52nd session, Venice 18-19 October 2002 (CDL-AD(2002)023rev), Opinion no. 190/2003, § 18-21.*

must follow criteria of balanced, pluralistic and impartial reporting. Private broadcasters must comply with national legislation in this matter and the same goes for the private print media.

65. One of the most difficult questions concerning the much-desired balanced dialogue and the vital importance of free political communication, not least during election periods, concerns open access to broadcasting, reconciling the claims of those who demand access with the importance of using broadcasting as an efficient method of communication. Given the wide impact of the audiovisual media, which the Court recognises in particular, the question is whether those controlling access to broadcasting are obliged to tend to some form of balancing in allowing access or whether they have full discretion in these matters.[90] It is well established in Convention jurisprudence that Article 10 does not give a citizen or private organization a 'general and unfettered right' to put forward an opinion through the media unless in 'exceptional circumstances'.[91] Such circumstances may occur for instance if one political party is excluded from broadcasting facilities at election time while other parties are given broadcasting time.[92]

66. Access to the media would seem to serve both the right to impart and also the right to receive because readers and audiences have a right to be exposed to different political perspectives.[93] Article 10 guarantees the right to impart and the right to receive but neither broadcasting stations nor newspapers are open to all. The Commission declared inadmissible an application under Article 10 from an independent candidate for the European Parliament who was not allowed to make a party political broadcast.[94] The complaint concerned the BBC's threshold requirement of a minimum percentage of seats in an election before a party could qualify for an election broadcast. The Commission recognised that airtime is limited and thus the threshold was compatible with Article 10 § 2 to ensure that airtime was spent on political views that commanded some public support.[95]

67. In the case of *Purcell* v. *Ireland*,[96] journalists and producers employed by Radio Telefis Eirann (RTE) complained that an order restricting live interviews with members of Sinn Fein constituted an unjustifiable interference with freedom of expression and was a serious infringement with their right to impart information to the public in a democratic society and of their right to receive information without unnecessary interference by public authority. The Commission noted that the Irish broadcasting ban on live interviews with spokesmen of Sinn Fein, not an unlawful organization (albeit not denied that it was an integral part of the IRA an illegal organization), had a legitimate aim under Article 10 § 2 in conjunction with Article 17. In assessing whether the ban was necessary it referred to the 'duties and responsibilities' inherent in the exercise of freedom of expression and 'that the defeat of terrorism is a public interest of the first importance in a democratic society . . . and where advocates of violence seek access to the

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[90] *Informationsverein Lentia and Others v. Austria (no. 1), judgment of 24 November 1993, Series A no. 276, p. 16, § 38.*

[91] *Application no. 25060/94, Jörg Haider v. Austria, Commission's decision 18 October 1995, DR 83-A, p. 66.*

[92] *Application no. 4515/70, X and Association Z v. the United Kingdom, Commission's decision 12 July 1971, ECHR Yearbook 1971, p. 538; Application no. 25060/94, Jörg Haider v. Austria, Commission's decision 18 October 1995, DR 83-A, p. 66., p. 73; Application no. 9297/81, X Association v. Sweden, Commission's decision 1. March 1982, DR 28, p. 204.*

[93] *Erdogdu and Ince v Turkey [GC], 8 July 1999, RJD 1999-I, § 54.*

[94] *Application no. 24744/94, Huggett v. the United Kingdom, DR 82-A.*

[95] *Ibid. p. 101.*

[96] *Application no.15404/89, Betty Purcell and Others v. Ireland, Commission's decision 16 April 1991, DR 70.*

mass media for publicity purposes it is particularly difficult to strike a fair balance between the requirements of protecting freedom of information and the imperatives of protecting the state and the public against armed conspiracies seeking to overthrow the democratic order, which guarantees this freedom and other human rights'.[97] The Commission referred to the 'immediate' impact of television as opposed to the print media, furthermore the limited possibilities of correcting or qualifying broadcasting material, as opposed to the print media. The 'immediacy factor' was too much of a risk. Even conscientious journalists could not control it within the exercise of their professional judgment.[98]

68. Jörg Haider complained under Article 10 that the way in which the ÖRF (Austrian Broadcasting Corporation) reported on news events in general and on him in particular did not meet the requirements of plurality of information and objectivity as required by society.[99] The Commission dismissed Haider's complaint under Article 25 submitting that he did not qualify as a victim since complaining as a representative for the people in general constituted *'actio popularis'*.

69. The limited access to broadcasting has led to such speculations that the right protected under Article 10 in the democratic context is of little value if those who wish to express their ideas are denied access to either publicly or privately owned channels or communication. There is no real freedom of expression if one is prevented from speaking to one's target audience, or at least those who wish to hear; hence those without access to the media are not really free to express their views.[100] In order to make up their mind, voters need to be exposed to more views than those of the party they intend to vote for or end up voting for. That is the antecedent reasoning underlying all the case-law warranting political debate the highest protection. Democracy is implausible without plurality, broadmindedness and tolerance, its characteristic features.[101] Undermining political pluralism, which along with the rule of law 'forms the basis of all genuine democracy' may constitute an infringement of Article 10.[102] The Court is willing to safeguard outspoken criticisms, provided it does not incite violence against the state or other citizens.

70. The OSCE/ODIHR guidelines propose that parties and candidates shall be provided with direct access in the public media free of charge. With regard to private electronic media, it is suggested that an election administration body may allocate part of its budget to cover payment for airtime.[103]

71. **The OSCE/ODIHR guidelines' suggestion of reimbursement to the privately owned media[104] for allotting free airtime to elections contestants is an option worthy of serious consideration.**

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[97] *Ibid.*

[98] *Ibid.*

[99] *Application no. 25060/94, Jörg Haider v. Austria, Commission's decision 18 October 1995, DR 83-A, p. 66.*

[100] *D. Gomien, 'Pluralism and Minority Access to the Media' in Rosas and Helgesen (eds.), The Strength of Diversity, Human Rights and Pluralist Democracy, 1992 Kluwer Law International, p. 50; J. Donnelly and R. E. Howard, 'Assessing National Human Rights Performance: A Theoretical Framework', 10 Human Rights Quarterly, 1988, p. 51.*

[101] *Handyside v. the United Kingdom, 7 December 1976, Series A no. 24, § 49.*

[102] *Committee of Ministers, Declaration and Programme on Education for Democratic Citizenship, Based on the Rights and Responsibilities of Citizens (Adopted on 7 May 1999 at its 104th session).*

[103] *OSCE/ODIHR Guidelines Draft as of 8 June 2004, p. 41.*

[104] *OSCE/ODIHR Guidelines Draft as of 8 June 2004, p. 41.*

VII. Content regulation and right of reply

72. **It is *suggested* that all media should permit a right of reply and corrections within their programmes or publications. This rule relies on the same principle of balanced and fair treatment of the contestants, which should be respected by all media during the campaign.**

73. Related to access rights, but distinct as well, is the claim that individuals be given an opportunity to reply to unfair coverage. The right to reply refers to factual allegations in the media. The primary importance of this right is remedial, to redress wrongs to the individual.[105]

74. The right to reply is firmly secured with regard to broadcasting in the Convention on Transfrontier Television, Article 8. It implies that each transmitting party shall ensure that every natural or legal person regardless of nationality or place of residence shall have the opportunity to exercise a right of reply or seek other comparable legal or administrative remedies relating to programmes transmitted by broadcaster within its jurisdiction, within the meaning of Article 5 (duties of transmitting parties). In particular, it shall ensure that timing and other arrangements for the exercise of the right of reply are such that this right can be effectively exercised.

75. The American Convention on Human Rights (1976) adds the right to reply in a special Article 14 with special regard to the press, its duties and the rights of others, 'injured by inaccurate or offensive statements or ideas disseminated to the public in general'. To make this right effective with regard to the press, Article 14 § 3 makes it mandatory that every medium shall have a person responsible for imparted material.

76. Various jurisdictions have incorporated statutory rights to reply in their mechanisms for regulation of the media.[106] The right to reply centres upon individuals or legal persons who can claim injury or financial loss if the impugned media coverage is not corrected. The objective of this right is to rectify individual cases rather than serve the democratic principles requiring diversity of views. Icelandic law on the right to print includes a provision on the duty of rectification.[107] In Sweden there is no legal right to reply. The matter is left to the Swedish Press Council to regulate according to its Code of Ethics. A Press Ombudsman also provides some protection.[108]

77. The United States Supreme Court has confirmed that the right to reply with regard to the print media is unconstitutional thereby preventing legislative attempts to grant any access rights to print journalism. The case of *Miami Herald v. Tornillo*,[109] introduced a distinction into the law between broadcasting and publishing.[110] The case had arisen in Florida under the state's 'right to reply' statute. The Miami Herald had refused to print a reply by a political candidate, Pat Tornillo, to a blistering editorial on him. When the politician asked for his right to reply in the column of the Herald, his request was denied, so he sued. The Florida Supreme Court reversed a lower Court's

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[105] *Cf. E. Barendt, Broadcasting Law: A Comparative Study, 1995 Oxford University Press, p. 157.*

[106] *P. J. Humphreys, Mass Media and Media Policy in Western Europe, 1996 Manchester University Press, 1996, p. 58 (Austria, France, Germany, Netherlands, Norway, Spain.*

[107] *Law on Printing 1956 No. 57 10 April, chapter VI Duty of rectification of publisher/editor.*

[108] *P. J. Humphreys, Mass media and media policy in Western Europe, 1996 Manchester University Press, p. 58.*

[109] *Miami Herald Pub. Co. v. Tornillo, 418 US 256, (1974).*

[110] *O. M. Fiss, 'The Irony of Free Speech', 1996 Harvard University Press, p. 63.*

decision, which had ruled in favour of the newspaper, maintaining that the Florida right to reply statute furthered 'the broad societal interest in the free flow of information'. The Supreme Court of the United States lastly struck down the Florida statute maintaining that even if a newspaper would face no additional costs to comply with compulsory access law and would not be forced to forgo publication by the inclusion of a reply, the Florida statute failed to clear the barriers of the First Amendment because of its intrusion into the function of editors. The Supreme Court held that a mandatory right to reply contravened editorial control and judgment. In short, statutory access rights to print journalism were unconstitutional because such legislation required publishers to use their resources to promote opinions they did not share.

78. As the right to reply refers to factual allegations in the media and is a remedy to redress wrongs to individuals making it mandatory does not seem an infringement of editorial independence nor can it be classified as a form of content regulation.

79. Article 9 of the European Convention on Transfrontier Television stipulates access of the public to major events, where each party to the Transfrontier Convention 'shall examine the legal measures to avoid the right of the public to information being undermined due to the exercise by a broadcaster of exclusive rights for the transmission or retransmission ... of an event of high public interest'. This provision underlines the importance of the right to receive but does not entail a general access right for minorities to voice their differences or bring up new viewpoints and hence, *their* right to receive.

80. Article 7 of the European Convention on Transfrontier Television[111] is directed at the responsibilities of the broadcaster with regard to indecent and pornographic content, as well as to undue incitement to violence or racial hatred. Broadcasters shall ensure that news fairly presents facts and events and encourages the free formation of opinions.

81. **The OSCE/ODIHR guidelines apply the content rule to all media to avoid stereotyping women or portray national minorities' political representatives and issues within stereotypes that may negatively affect their credibility and importance to voters.**

82. The media is a powerful institution in society in shaping public opinion. The media practicing inequality has a silencing effect on large sections of society with contingent consequences for the political process. Negative portrayal such as stereotyping women affects the way men understand women and how women perceive themselves and the same goes for other minority groups. It discredits them in their own eyes as political beings. This type of media behaviour is hardly contested in a court of law – unless it elicits a response, which may be punishable and draws attention to what provoked it in the first place. *De facto* equality requires that media practices of this kind be eliminated but not necessarily by content regulation.[112] The prohibition of using certain speech based on sex, race, ethnicity or opinion is impossible, impractical and even undesirable. There are many wolves wrapped in the cloth of freedom of the press principles. One is that prohibiting pornography, racism, much debated – in particular in U.S. jurisprudence – may lead down the 'slippery slope' where once there is regulation of some speech there is no end to it. Given the danger of going down the regulatory road it is safer never to begin. This view accentuates that the answer to speech that may have harmful real-world effects is more speech

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[111] *Text amended according to the provisions of the Protocol (ETS No. 171) which entered into force on 1 March 2002.*

[112] *H. Thorgeirsdottir, Journalism Worthy of the Name. A Human Rights Perspective on Freedom within the Press, Lund University, 2003, pp. 237-38.*

rather than content regulation. In principle this argument is loaded with common sense. It must, however, be taken into account that economic and social disparities exclude the 'defenceless' from combating the effects of injurious speech by additional speech.

83. The demands of pluralism, tolerance and broadmindedness without which there is no democratic society, exclude strict content regulation. Sanitising speech violates the principle of freedom of expression. Instead, as the Court has reiterated, it is borne out of the wording itself of Article 10 § 2 that whoever exercises the rights and freedoms enshrined in the first paragraph of that Article undertakes 'duties and responsibilities' and among them to take care in the presence of others. Journalists are to avoid offensive portrayals, which may hurt others without contributing to any form of public debate capable of furthering progress in human affairs.[113] Elaborate and professional journalism is essential to the objectives of democracy and human dignity. The remedy is thus not to prohibit the exposure of certain views and opinions – but to make sure that when they are carried forward in the public sphere, independent of their substance, their conveyance is not discriminating. Such journalism entails not dishonouring the dignity of others on the basis of qualities that cannot be attributed to anyone in particular or altered by the ones that they characterise.

84. What is imperative, in the view of the author of this report, is to establish professional standards in journalism. Authorizing the profession of journalism need not be viewed as contravening the principle that freedom of expression belongs to 'everyone' but as a measure to enhance freedom within the media, just as licensing of broadcasting is justified with democratic objectives. The author of this report has proposed elsewhere[114] that regulating the profession of journalism might provide a solution to the dilemma in the well-established democracies within the Member States of the Council of Europe. Such a measure might seem a nightmare in some of the newer Member States. Regulating the profession of journalism on the basis of competence in a non-discriminatory manner may be a necessary requirement to protect the press in adhering to its positive requirements.[115]

VIII. Advertising pressures

85. **The OSCE/ODIHR guidelines emphasise that the debate concerning paid political advertising is still ongoing**.[116]

86. The printed press is not required to behave differently in election periods. It is allowed to have its political preferences, but according to this document may not discriminate between political contenders in granting advertising space to all and without discriminating in prices. A broadcaster may not discriminate between political contenders and all contestants should have the possibility to purchase airtime. The *greatest obstacle* seems to go unnoticed here: the fact that some political contestants do not have the means to reach voters with paid advertisements and these are usually

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[113] *Otto-Preminger Institut v. Austria, 20 September 1994, Series A no. 295, § 49.*

[114] *H. Thorgeirsdottir, Journalism Worthy of the Name. A Human Rights Perspective on Freedom within the Press, Lund University 2003.*

[115] *H. Thorgeirsdottir, Journalism Worthy of the Name. A Human Rights Perspective on Freedom within the Press, Lund University 2003, p. 335.*

[116] *OSCE/ODIHR Guidelines DRAFT as of 18 December 2003, p. 35.*

the ones whose voices may be of crucial significance for the democratic process as they do not have a firm niche in an often corrupt stagnated political system.

87. Regulation of advertising may be contested on the basis of excessive regulation of economic freedom or as an indirect infringement of freedom of expression.[117] The search for a fair balance between the economic interest of the press to survive on the market and the community's interest in a press free from commercial restraints is of crucial concern if the press is to be able to play the vital role of the public watchdog. The Parliamentary Assembly of the Council of Europe drew attention to the possible influence of advertisers and sponsors on the content of newspaper articles and broadcasts, already in 1978.[118] It provided that freedom of the press should not be governed by the rules of free enterprise alone.[119] It reiterated in 1981 that the independence of programme makers *vis-à-vis* the state and commercial interests may be more severely threatened at that point in time and that the exercise of freedom of expression may be further impeded. It recommended that the Committee of Ministers, in light of Article 10 of the European Convention on Human Rights, instruct the Steering Committee on the Mass Media to examine international means to protect freedom of expression by regulating commercial advertising, especially on radio and television, and to make concrete proposals, possibly through the conclusion of a European Convention.[120]

88. Throughout the 1980s the Council of Europe members, including those which are members of the EC, worked towards the enactment of a convention to establish certain minimum regulatory standards to guarantee the basic principles of the free flow of information and ideas as well as the essential principles of the democratic society. The principle objective of the Council of Europe with the European Convention on Transfrontier Television in 1989 was to achieve a framework for the transfrontier circulation of television programmes.[121]

89. Neither the European Convention on Transfrontier Television nor the EC Television Directive adopts the view that advertising in broadcasting should be wholly unregulated. Such restrictions are also part of domestic law, now influenced by the two European documents. It is clearly stated that the EC Television Directive must be compatible with Article 10 of the Convention, which has inspired the unwritten general principles of European Community law that the European Court of Justice submits are binding for the EC institutions.[122] At the same time it is no secret that the motor of the commercial sector, the advertising revenues crucial for the new channels, was probably the key factor leading to the adoption of the EC Television Directive. The persistence of different advertising rules among member states presented the main barrier to the establishment of the common market of broadcasting.[123] The EC Television Directive was first and foremost to the

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[117] *E. Barendt, Broadcasting Law: A Comparative Study, 1995 Oxford University Press (first published 1993), p. 196.*

[118] *Parliamentary Assembly of the Council of Europe, Recommendation 834 on threats to freedom of the press and television, § 9.*

[119] *Ibid., § 12.*

[120] *Parliamentary Assembly of the Council of Europe, Recommendation 952 (1982) on international means to protect freedom of expression by regulating commercial advertising.*

[121] *European Treaty Series No. 132 in European Conventions and Agreements, Volume V, Strasbourg 1990. Amended by the Protocol thereto adopted on 1 October 1998, E.T.S. No. 171.*

[122] *B. de Witte, 'The European Content Requirement in the EC Television Directive – Five Years After' in E. Barendt (ed.), The Yearbook of Media and Entertainment Law, 1995 Oxford University Press, pp. 101, 116–117.*

[123] *Humphreys, Mass media and media policy in Western Europe, 1996 Manchester University Press, p. 265.*

advantage of the advertising industry. The main objective was to achieve the harmonisation of laws necessary to create a unified broadcasting market and to create conditions necessary for the free movement of television broadcasts.

90. The European Court of Human Rights has come to the conclusion that the media need financial backing[124] and cannot operate without advertising revenues to pay their journalists.[125] There is no provision in the Convention or in any of its Protocols, equivalent to the articles in the German and Italian Constitutions guaranteeing a right to an economic enterprise, granting full discretion to the owner of the media or the advertiser, for that matter.[126] According to this principle, public authorities cannot ban advertisements on radio or television broadcasting.[127] Regulation of advertising would accordingly become unconstitutional if it endangered the survival of a private or public broadcasting company.[128] If this were the case with the Convention the problem of editorial advertising would not be solved, as the owners of the media would be able to assert their right to economic survival as having priority over any rights of the recipients to 'uncontaminated' news. It remains a fact, however, that the Convention's approach towards political speech is firm and unchanging, and any restriction thereof demands the strictest scrutiny.[129] Commercial speech, a category which covers advertising, ranks lower, although it enjoys protection.

91. How would the Court assess the financial advantage of, for example, the pharmaceutical companies, which have been granted access as media sponsors by the amended European Convention on Transfrontier Television? They now have nearly unlimited space for self-promotion, although prohibited from meddling with news and current affairs. Their potential, however, to 'taint' the coverage of news reporting, not least in the controversial area of pharmaceutical production, should not be left to chance. The media is likely to be extremely cautious in tackling matters related to the interests of an important sponsor. It may lead journalists to slight issues if the coverage affects the business' revenues. The tendency is to accentuate insignificant matters instead. The power of pulling out that advertisers and sponsors have constitutes a chilling effect on speech in the same manner as the threat of formal procedures. The Court has acknowledged this in a different context when it said that the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court.[130] With regard to the press, any delay of imparting the news may deprive it of its value and interest and subsequently deprive the public of its rightful entitlement of knowing what the main contending issues are.

92. That commercialism is a part of modern reality is not problematic *per se*. When it starts curtailing fundamental values, however, the threat of it gains momentum. And then it does not

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[124] *Barthold v. the Federal Republic of Germany, 25 March 1985, Series A no. 90, concurring opinion of Judge Pettiti.*

[125] *Groppera AG and Others v. Switzerland, 28 March 1990, Series A no. 173.*

[126] *The German case law recognises, in particular, the 'right to an established and active commercial enterprise' (Unfair Competition Act, Section 823), referred to in application no. 10572/83, Markt Intern Verlag GmbH and Klaus Beerman v. the Federal Republic of Germany, Commission's report 18 December 1987, § 74.*

[127] *E. Barendt, Broadcasting Law: A Comparative Study, 1995 Oxford University Press (first published 1993), p. 196.*

[128] *Ibid. p. 194.*

[129] *Thoma v. Luxembourg, 29 March 2001, RJD 2001-III, § 48.*

[130] *Observer and Guardian v. the United Kingdom, 26 November 1991, Series A no. 216, § 60.*

matter whether the perpetrator is the printed press or broadcasting as a third party violating the fundamental right of political speech crucial to democracy, in election periods. Such an infringement may involve state responsibility under the Convention.

IX. Conclusion

93. The OSCE/ODIHR guidelines are to provide guidance in murky waters where there is no uniform legal doctrine with regard to media responsibility. Media freedom is a different concept and refers basically to hands off policy of authorities and prohibits unjustified interference. Widely the press is at the stage to defend itself from prosecutions for criminal defamation when criticising authorities. The positive duties of the press, the requirement that the press acts as the public watchdog and must hence not only criticise authorities but also at times the hand that feeds it (corporate ownership) is a potential claim that has hardly entered the agenda as owners and employers are uncertain about their obligations. The positive duties of the media are not entrenched in legal codes like the boundaries which the media must not overstep. It is difficult demanding better media performance when it is not really clear what is being required and how it can be brought about. There must be a clear distinction between *de lege lata* and *de lege ferenda*.

94. The weakest part of the *methodology* of the OSCE/ODIHR media monitoring instrument, which is to highlight cases of undue interference in the editorial freedom of the media or attempts to undermine their independence, is that the guarantee of editorial independence from external forces is not accepted as having legal standing in their own methodological premises in the case of the print media.

95. It is *recommended* that the methods are based on clear legal concepts. If the monitoring is to highlight cases of interference in the editorial freedom of the media there must be a legal consensus on to what extent and how editorial independence within the media is protected. In most legal systems employee relations within the privately owned media fall under the sphere of private law and any monitoring of journalistic conduct from outside may be regarded as an intrusion into the function of editors.

96. The European Court of Human Rights is an authoritative source of interpretation of what constitutes freedom and responsibilities in journalism and there are clear signs in its case law that the editorial independence of the printed news media is not an autonomous zone as there are demands on the press as public watchdog of democratic accountability.

97. It should be *recommended* that the OSCE/ODIHR guidelines present in a clear manner the states' negative obligations which require that states do not interfere with journalists during election periods or impede the media in acting as the public watchdog; and furthermore list the positive obligations which require that the states take steps with legislation or policies and direction of resources ensuring the responsible function of the media during election periods. It should also be listed what such steps should entail. The methodological framework would carry greater weight if the basis of the claim were made more serious and direct; otherwise the evaluation of media performance may not have the desired consequential effect of improving the situation.

98. To make media monitoring more effective there is a need to eliminate the chaos and uncertainty attached to the assumption that where the law is unclear self-regulation takes over. Evidently the OSCE/ODIHR media monitoring is not a treatment of retrospective legislation and it

is hence *recommended* that the analytical framework of the media monitoring method is simplified due to the chaotic legal environment where many of the democratic standards do not have clear legal treaty basis. It has been suggested here to distinguish the different types of regulations clearly into three categories: legal regulation, market regulation and self-regulation. With such a distinction at the outset the reliability of the information produced by the media monitoring will increase and may gain instrumental value for regulatory bodies that are seriously concerned about the problem.