Thematic factsheet[1]
Update: June 2018

MEDIA AND ELECTIONS

Free elections and freedom of expression, particularly freedom of political debate, together form the bedrock of any democratic system. The two rights are inter-related and operate to reinforce each other: freedom of expression is one of the conditions necessary to ensure the free expression of the opinion of the people in the choice of the legislature. For this reason, it is particularly important in the period preceding an election that opinions and information of all kinds are permitted to circulate freely. Nonetheless, the two rights may come into conflict in the period preceding or during an election and it may then be necessary to place certain restrictions on freedom of expression of a type which would not usually be acceptable, in order to secure the free expression of the opinion of the people in the choice of the legislature. In striking a balance between these two rights, the Contracting States have a margin of appreciation, as they do generally with regard to the organisation of their electoral systems.

During election campaigns, regulatory frameworks should encourage and facilitate the pluralistic expression of opinions and should provide for the obligation to cover election campaigns in a fair, balanced and impartial manner in the overall programme services of broadcasters. Such an obligation should apply to both public service media and private broadcasters in their relevant transmission areas.

Article 3 of Protocol No. 1 (right to free elections) does not guarantee the right of a political party to air-time on the radio or television in the run-up to elections. Issues could arise in exceptional circumstances, for example if, in an election period, one political party was refused air-time when other parties were not.

PRINT MEDIA AND ELECTIONS

ELECTORAL-LAW RESTRICTION ON PRINT MEDIA DURING ELECTION CAMPAIGN

Orlovskaya Iskra v. Russia - 42911/08
Judgment 21.2.2017

Under Russia's Electoral Rights Act of 2002 and the State Duma Deputies Election Act of 2005, "mass media outlets" are prohibited from engaging in "pre-election campaigning", which includes disseminating information about a candidate "in combination with positive or negative comment". The applicant NGO published a regional newspaper whose political affiliation was specified on the front page. During the

[1] This document presents a non-exhaustive selection of the CoE instruments and of the ECtHR relevant case law. Its aim is to improve the awareness of the acts or omissions of the national authorities likely to amount to a hindrance of Article 10 of the Convention. This information is not a legal assessment of the alerts and should not be treated or used as such.

2007 election campaign for the lower chamber of Parliament, the newspaper published a number of articles criticising a candidate in those elections. The regional electoral committee examined the articles and concluded that they contained elements of electoral campaigning which had not been paid for from the official campaign fund of any party, in breach of the relevant domestic provisions. The applicant was found guilty of an administrative offence and fined.

Stating that "it may be desirable" for publications to contain a review of several candidates or parties or their programmes, the European Court of Human Rights emphasised that it had "not been convincingly established" that the "print media should be subjected to rigorous requirements of impartiality, neutrality and equality of treatment during an election period". According to the Court, the Russian regulative framework restricted the activity of the print media on the basis of a criterion that was vague and conferred a very wide discretion on public authorities that were to interpret and apply it. The public watchdog role of the press is no less pertinent at election time. By subjecting the expression of comments to the regulation of campaigning and by prosecuting the applicant with reference to this regulation, there had been undue interference with the applicant newspaper's editorial choice to publish a text taking a critical stance and to impart information and ideas on matters of public interest.

Conclusion: violation of Article 10 of the Convention

INJUNCTIONS AGAINST PRINT MEDIA FOR CRITICISM AT ELECTION TIME

Lack of procedural safeguards when issuing injunction against national newspaper following criticism against candidate to election

Cumhuriyet Vakfı and Others v. Turkey - 28255/07
Judgment 8.10.2013

The applicants were respectively the owner, publisher, editor-in-chief and chief editorial writer of a daily Turkish newspaper Cumhuriyet. In April 2007, in the run-up to the presidential elections, the newspaper published a a quote from a 1995 British newspaper article in which one of the candidates in the 2007 elections, Mr Abdullah Gül, was alleged to have said: "It is the end of the Republic of Turkey – we definitely want to change the secular system". Mr Gül subsequently brought defamation proceedings against the applicants. In May 2007 a domestic court issued an injunction restraining re-publication of the quote published in Cumhuriyet and of any news related to the pending defamation proceedings. Mr Gül was elected President and, in view of his new status, decided not to pursue the matter. In March 2008 the case was dismissed and the interim injunction lifted.

According to the European Court of Human Rights, the very general and unqualified terms of the ban set out in the injunction rendered its scope unclear and potentially extremely wide. In particular, the lack of clarity as to what material could and could not be published under the interim measure could be interpreted as forbidding coverage of any political statement made by Mr Gül relating to the subject of secularism in Turkey. In the Court's view, the injunction was therefore vulnerable to abuse and could have had a chilling effect not only on the Cumhuriyet newspaper, but also on the Turkish media as a whole in the period concerned. The injunction had remained in force for over ten months, including during two stages of the Presidential elections, as a consequence of the lack of a time-limit and the absence of any periodic review as to its continuing necessity or of a prompt determination of the merits of the case. The length and breadth of the injunction therefore had the effect of preventing the newspaper from contributing to the public debate surrounding the elections and the candidature of Mr Gül at a critical time in Turkish political history. The unexplained delays in the procedure and the failure to limit the impugned measure to a reasonable period had thus rendered the restriction on the applicants' freedom of expression unduly onerous. The domestic court had not provided any reasoning

for its decisions to grant the injunction and to refuse the ensuing request for it to be lifted. This lack of reasoning not only deprived the applicants of an important procedural safeguard, but also prevented the Court from examining whether the domestic court had duly balanced the parties' interests by taking into account specific issues inherent to the facts of the case. In addition, since the applicants had been unable to contest the interim injunction until over a month after it was first granted, they had been placed at a substantial disadvantage vis-à-vis their opponent, especially considering the perishable nature of news and the specific political environment in which the impugned measure had been applied. In the light of these procedural deficiencies, and bearing in mind the severity of the punishment failure to comply with the interim measure would have entailed, the injunction had not constituted a justified or a proportionate interference with the applicants' right to freedom of expression.

Conclusion: violation of Article 10 of the Convention

REPORTING ON PRIVATE ISSUES REGARDING CANDIDATES TO ELECTION

Journalists' conviction for publishing information about private life of the presidential candidates' communications manager

Saaristo and Others v. Finland no. 184/06
Judgment 12 October 2010

The applicants are a newspaper company*, Ilta-Sanomat Oy*, which publishes *Ilta-Sanomat*, a paper with a circulation of approximately 200,000; one of its journalists, Satu Saaristo, and the paper's editor-in-chief at the time, Hannu Savola. In February 2000, during the presidential election campaign, *Ilta-Sanomat* published a short article, written by Ms Saaristo and approved by Mr Savola. It stated that the former husband of a political reporter had found a new partner, O.T., the communications manager of one of the presidential candidates, Esko Aho. The article also mentioned that O.T. and her new partner had been active in the same political party before she joined the campaign, along with a few details of her private life. On O.T.'s request, the police investigated the matter, and the public prosecutor brought charges against Ms Saaristo and Mr Savola under the penal code. The district court convicted the applicants for having violated O.T.'s private life. It sentenced Ms Saaristo and Mr Savola to each pay a fine and damages to O.T. amounting to 5,000 euros.

The European Court of Human Rights noted that, while O.T. was not a civil servant or a politician in the traditional sense, she was not a completely private person either, given that due to her function in the election campaign she had been publicly promoting the objectives of one of the presidential candidates. When taking up her duties as communications manager for the campaign, she had to have understood that her own person would also attract public interest and that the scope of her protected private life would become more limited. The article had contributed to an important matter of public interest, namely the presidential election campaign, in the form of political background information. The Court further noted that the sanctions imposed on the applicants had been severe. Ms Saaristo and Mr Savola had been convicted under criminal law and the amount that they were ordered to pay as compensation had to be considered as substantial, given that the maximum compensation afforded to victims of serious violence had been around 17,000 euros at the time. In the Court's opinion, the domestic courts had failed to strike a fair balance between the competing interests at stake. The reasons relied on for the criminal conviction of the applicants had not been sufficient to show that the interference with their freedom of expression had been necessary in a democratic society and the totality of the sanctions imposed had been disproportionate to the protection of O.T.'s right to respect for her private life.

Conclusion: violation of Article 10 of the Convention (freedom of expression)

BROADCAST MEDIA AND ELECTIONS

POLITICAL ADVERTISING

Refusal of permission to place television advert owing to statutory prohibition of political advertising

Animal Defenders International v. the United Kingdom [GC] - 48876/08
Judgment 22.4.2013

Facts – The Communications Act 2003 prohibits political advertising in television or radio services, the aim being to maintain impartiality in the broadcast media and to prevent powerful groups from buying influence through airtime. The prohibition applies not only to advertisements with a political content but also to bodies which are wholly or mainly of a political nature, irrespective of the content of their advertisements. Before it became law, the legislation was the subject of a detailed review and consultation process by various parliamentary bodies, particularly in the light of the European Court's judgment in the case of VgT Verein gegen Tierfabriken v. Switzerland (in which a ban on political advertising had been found to violate Article 10 of the Convention).

The applicant is a non-governmental organisation that campaigns against the use of animals in commerce, science and leisure and seeks to achieve changes in the law and public policy and to influence public and parliamentary opinion to that end. In 2005 it sought to screen a television advertisement as part of a campaign concerning the treatment of primates. However, the Broadcast Advertising Clearance Centre ("the BACC") refused to clear the advert, as the political nature of the applicant's objectives meant that the broadcasting of the advert was caught by the prohibition in section 321(2) of the Communications Act. That decision was upheld by the High Court and the House of Lords, which hold in a judgment that the prohibition of political advertising was justified by the aim of preventing Government and its policies from being distorted by the highest spender.

The European Court of Human Rights acknowledged that the statutory prohibition of paid political advertising on radio and television had interfered with the applicant's rights under Article 10. The interference was "prescribed by law" and pursued the aim of preserving the impartiality of broadcasting on public-interest matters and, thereby, of protecting the democratic process. This corresponded to the legitimate aim of protecting the "rights of others". The case therefore turned on whether the measure had been necessary in a democratic society.

Both parties to this case had the same objective of maintaining a free and pluralist debate on matters of public interest, and more generally, contributing to the democratic process. The applicant NGO considered, however, that less restrictive rules would have sufficed. The Court was therefore required to balance the applicant NGO's right to impart information and ideas of general interest which the public was entitled to receive against the authorities' desire to protect the democratic debate and process from distortion by powerful financial groups with advantageous access to influential media.

In conducting that balancing exercise, the Court firstly attached considerable weight to the fact that the complex regulatory regime governing political broadcasting in the United Kingdom had been subjected to exacting and pertinent reviews by both parliamentary and judicial bodies and to their view that the general measure was necessary to prevent the distortion of crucial public-interest debates and, thereby, the undermining of the democratic process. The legislation was the culmination of an exceptional examination of the cultural, political and legal aspects of the prohibition and had been enacted with cross-party support without any dissenting vote. The proportionality of the prohibition had also been debated in detail in the High Court and the House of Lords, both of which had analysed the relevant

Convention case-law and principles before concluding that it was a necessary and proportionate interference.

Secondly, the Court considered it important that the prohibition was specifically circumscribed to address the precise risk of distortion the State sought to avoid with the minimum impairment of the right of expression. It only applied to paid, political advertising and was confined to the most influential and expensive media (radio and television).

The Court rejected the applicant NGO's arguments, finding notably that:

- A distinction based on the particular influence of the broadcast media compared to other forms of media was coherent in view of the immediate and powerful impact of the former. There was no evidence that the development of the internet and social media in recent years had sufficiently shifted that influence to the extent that the need for a ban specifically on broadcast media was undermined.
- Relaxing the rules by allowing advertising by social advocacy groups could give rise to abuse (such as wealthy bodies with agendas being fronted by social-advocacy groups created for that precise purpose or a large number of similar interest groups being created to accumulate advertising time).
- Moreover, a prohibition requiring a case-by-case distinction between advertisers and advertisements might not be feasible: given the complex regulatory background, this form of control could lead to uncertainty, litigation, expense and delay and to allegations of discrimination and arbitrariness.
- Further, while there may be a trend away from broad prohibitions, there was no European consensus on how to regulate paid political advertising in broadcasting. A substantial variety of means were employed by the Contracting States to regulate political advertising, reflecting the wide differences in historical development, cultural diversity, political thought and democratic vision. That lack of consensus broadened the otherwise narrow margin of appreciation enjoyed by the States as regards restrictions on public interest expression.
- Finally, the impact of the prohibition had not outweighed the foregoing convincing justifications for the general measure. Access to alternative media was key to the proportionality of a restriction on access to other potentially useful media and a range of alternatives (such as print, internet and social media) had been available to the applicant NGO.

Accordingly, the reasons adduced by the authorities to justify the prohibition were relevant and sufficient and that measure was not considered a disproportionate interference with the applicant's right to freedom of expression.

Conclusion: no violation of Article 10 of the Convention (freedom of expression)

Imposition of a fine on a television station for having broadcast an advertisement by a small political party, in breach of the statutory prohibition of any televised political advertising

TV Vest AS & Rogaland Pensjonistparti v. Norway - 21132/05
Judgment 11.12.2008

The applicants were a television company and the regional branch of a small political party (the Pensioners Party). TV Vest was fined on the grounds that it had broadcast political adverts for the Pensioners Party in breach of the statutory prohibition on such adverts. The prohibition at issue was permanent and absolute and applied only to television; political advertising in other media was permitted. TV Vest unsuccessfully contested the fine before the courts.

The European Court of Human Rights was prepared to accept that the lack of European consensus in this area spoke in favour of granting States greater discretion than would normally be allowed in decisions with regard to restrictions on political debate. The rationale for the statutory prohibition on television broadcasting of political advertising had been, as stated by the domestic Supreme Court, the assumption that allowing the use of such a powerful and pervasive form and medium of expression was likely to reduce the quality of political debate generally. Complex issues could easily be distorted and financially powerful groups would get greater opportunities for marketing their opinions.

However, the Pensioners Party did not come within the category of parties or groups that were the primary targets of the prohibition. On the contrary, it belonged to a category which the ban in principle had intended to protect. Furthermore, in contrast to the major political parties, which had been given wide edited television coverage, the Pensioners Party had hardly been mentioned. Therefore, paid advertising on television had been the sole means for the Pensioners Party to get its message across to the public through that type of medium. Having been denied this possibility under the law, the Pensioners Party had moreover been put at a disadvantage in comparison to the major parties. Finally, the specific advertising at issue, namely a short description of the Pensioners Party and a call to vote for it in the forthcoming elections, had not contained elements apt to lower the quality of political debate or offend various sensitivities. In those circumstances, the fact that television had a more immediate and powerful effect than other media could not justify the prohibition and fine imposed on TV Vest.

The restriction that the prohibition and the imposition of the fine had entailed on the applicants' exercise of their freedom of expression could not therefore be regarded as having been necessary in a democratic society, notwithstanding the margin of appreciation available to the national authorities.

Conclusion: violation of Article 10 of the Convention (freedom of expression)

Ban on broadcasting political advertising

VgT Verein gegen Tierfabriken v. Switzerland 24699/94
Judgment 28.06.2001

VgT Verein gegen Tierfabriken is a Swiss-registered association dedicated to the protection of animals. It produced a television commercial concerning animal welfare, in response to the adverts produced by the meat industry, which it intended to have broadcast by the Swiss Radio and Television Company. One scene showed a noisy hall with pigs in small pens and compared the conditions to those in concentration camps. The commercial ended with the words “eat less meat, for the sake of your health, the animals, and the environment”.

On 10 January 1994 the Commercial Television Company, responsible for television advertising, informed the association that it would not broadcast the commercial in view of its “clear political character”. The applicant association filed a complaint, which was transmitted to the Federal Office of Communication, which informed the association that the Commercial Television Company was free to purchase commercials and choose their contractual partners as they wished. A further complaint to the Federal Department for Transport and Energy was also dismissed. The association filed an administrative law appeal, which was dismissed by the Federal Court.

The applicant association complained that the refusal to broadcast its commercial was in violation of Article 10 of the Convention.

The European Court observed that the commercial could be regarded as “political” within the meaning of S. 18 § 5 of the Federal Radio and Television Act as, rather than inciting the public to purchase a

particular product, it reflected controversial opinions pertaining to modern society in general, lying at the heart of various political debates. It was, therefore, "foreseeable" for the applicant association that its commercial would not be broadcast and the interference with the applicant association's freedom of expression was, therefore, "prescribed by law" within the meaning of Article 10 § 2.

The Court also noted both the view of the Federal Council, that S. 18 § 5 served to prevent financially powerful groups from obtaining a competitive advantage in politics, and the Federal Court's judgment, which considered that the prohibition served to ensure the independence of the broadcaster, to spare the political process from undue commercial influence, to provide for a certain equality of opportunity between the different forces of society, and to support the press, which remained free to publish political advertisements. The Court was, therefore, satisfied that the measure was aimed at the "protection of the rights of others" within the meaning of Article 10 § 2.

It followed that the Swiss authorities had a certain margin of appreciation to decide whether there was a "pressing social need" to refuse to broadcast the commercial. Such a margin of appreciation was particularly essential in commercial matters, especially in an area as complex and fluctuating as that of advertising. However, the extent of the margin of appreciation was reduced, since what was at stake were not purely commercial interests, but participation in a debate affecting the general interest. The Court therefore considered whether the right balance had been struck between the applicant association's freedom of expression and the reasons adduced by the Swiss authorities for the prohibition of political advertising.

The Court observed that powerful financial groups could obtain competitive advantages through commercial advertising and might thereby exercise pressure on, and eventually curtail the freedom of, the radio and television stations broadcasting the commercials. Such situations undermined the fundamental role of freedom of expression in a democratic society, as enshrined in Article 10 of the Convention, particularly concerning information and ideas of general interest which the public were entitled to receive. This was especially important in relation to audio-visual media, whose programmes were often broadcast very widely.

However, noting that S. 18 § 5 was applied only to radio and television broadcasts, and not to other media such as the press, the Court found that a prohibition of political advertising, which applied only to certain media, did not appear to be a particularly pressing need. Moreover, it had not been argued that the applicant association itself constituted a powerful financial group which, with its proposed commercial, sought to endanger the independence of the broadcaster, to unduly influence public opinion, or to endanger the equality of opportunity between the different forces of society. Indeed, rather than abusing a competitive advantage, the applicant association intended only to participate in an ongoing general debate on animal protection and the rearing of animals. In the Court's opinion, the domestic authorities had not justified the interference in the applicant association's freedom of expression in a "relevant and sufficient" manner.

The Court further observed that the applicant association's only means of reaching the entire Swiss public was through the national television programmes of the Swiss Radio and Television Company, which were the only programmes broadcast throughout Switzerland. Regional private television channels and foreign television stations could not be received throughout Switzerland.

Conclusion: violation of Article 10 of the Convention (freedom of expression)

‘UNEQUAL’ MEDIA COVERAGE OF CANIDIDATES TO ELECTIONS

Alleged biased media coverage of parliamentary elections

Communist Party of Russia and Others v. Russia - 29400/05
Judgment 19.6.2012

The applicants are two Russian political parties – the Communist Party of the Russian Federation and the Russian Democratic Party “Yabloko” – and six Russian nationals. In December 2003, during the election of members to the State Duma all of them positioned themselves as opposition parties and candidates. The pro-government forces were represented essentially by the United Russia Party, which obtained a majority of the votes (over 37%). The Communist Party won 12.6% of the vote and obtained 52 seats in parliament. Yabloko obtained 4.3% of the vote and it did not obtain any seats. Only one of the six individual applicants was elected as an MP. The five main nationwide broadcasting companies covered the elections. Three of them were directly controlled by the State, and corporations affiliated with the State were major shareholders of the other two. During the electoral campaign each State broadcasting company was required to provide the competing candidate parties with one hour of free airtime per working day on each TV or radio channel they controlled. In addition, parties and candidates could buy a certain amount of paid airtime for campaigning on an equal footing with the others. Besides “campaigning”, all channels were involved in reporting on the elections in various news items.

The applicants complained that the media coverage was unfair, that the five major TV channels in fact campaigned for the ruling party, that airtime was allocated unevenly and that the information disseminated was not neutral. They asserted that the executive authorities had used their influence to impose a policy on the TV companies which had helped to promote United Russia. Thirdly, the applicants claimed that biased media coverage on TV had affected public opinion to a critical extent, and had made the elections not “free”. They claimed that the *de jure* neutrality of five nationwide channels had not existed *de facto*.

The European Court of Human Rights noted, however, that the Russian Supreme Court found in essence that no proof of political manipulation had been adduced, and that no causal link between media coverage and the results of the elections had been shown. The SPS political party, which had obtained generally positive media coverage, had not even passed the minimal electoral threshold, while the Rodina political block had obtained a much better score at the elections despite poor media coverage. Therefore, the Russian Supreme Court’s arguments did not appear arbitrary or manifestly unreasonable.

Moreover, the applicants had not adduced any direct proof of abuse by the responding Government of their dominant position in the capital or management of the TV companies concerned. Nor had they sufficiently explained how it was possible, on the basis of the evidence and information available and in the absence of complaints of undue pressure by the journalists themselves, to distinguish between Government-induced propaganda and genuine political journalism and/or routine reporting on the activities of State officials. It followed that the applicants’ allegations of abuse by the Government had not been sufficiently proven.

The next question was thus whether the State had been under any positive obligation under Article 3 of Protocol No. 1 to ensure that media coverage by the State-controlled mass-media was balanced and compatible with the spirit of “free elections”, even where no direct proof of deliberate manipulation had been found. According to the European Court, the system of electoral appeals put in place in the present case had been sufficient to comply with the State’s positive obligation of a procedural character. Turning to the substantive aspect, the State had been under an obligation to intervene in order to open up the media to different viewpoints. The applicants had obtained some measure of access to the nation-wide

TV channels; thus, they had been provided with free and paid airtime, with no distinction made between the different political forces. The amount of airtime allocated to the opposition candidates had not been insignificant. Similar provisions regulated access of parties and candidates to regional TV channels and other mass media. In addition, the opposition parties and candidates had been able to convey their political message to the electorate through the media they controlled. The arrangements which existed during the 2003 elections had guaranteed the opposition parties and candidates at least minimum visibility on TV.

As regards the allegation that the State should have ensured neutrality of the audio-visual media, the applicants' claims had not been sufficiently substantiated. Certain steps had been taken to guarantee some visibility of opposition parties and candidates on Russian TV and to secure editorial independence and neutrality of the media. Probably, these arrangements had not secured de facto equality. However, when assessed in the light of the specific circumstances of the 2003 elections as they had been presented to the Court, and regard being had to the margin of appreciation enjoyed by the States under Article 3 of Protocol No. 1, it could not be considered established that the State had failed to meet its positive obligations in this area to such an extent that it had amounted to a violation of that provision.

Conclusion: no violation of Article 3 of Protocol No. 1 (right to free elections)

ACCESS TO BROADCASTERS FOR CANDIDATES TO ELECTON

Time-slots assigned by drawing lots during election campaigns and television debates reserved to parties already represented in Parliament or having the support of 4% of the electorate

Partija "Jaunie Demokrāti" and Partija "Mūsu Zeme" v. Latvia - 10547/07 and 34049/07
Decision of inadmisibility 29.11.2007

The Central Electoral Commission took the decision to announce the final results of the 2006 parliamentary elections, in which seven out of nineteen lists won seats in Parliament. Having failed to reach the threshold of 5% of the votes, the applicants' lists were not among them. They asked the Cassation Division of the Supreme Court to set the above-mentioned decision aside; the second applicant also asked the court to declare the elections unfair and invalidate them. In a judgment delivered following an adversarial hearing, the Cassation Division of the Supreme Court, ruling at first and last instance, joined the appeals and dismissed them. It confirmed the applicants' factual allegations and found that some of the advertising of two political parties had been financed by corporations whose managers had direct links with the parties concerned; the cost of the advertising was part of their electoral expenditure; that spending had been well in excess of the legal maximum; this was a clear violation of the law on political party funding. However, it found that the infringement was not serious enough to be able to speak of deformation of the will of the people; the press had discussed the matter in the run-up to the elections, so it had been widely known to the public. That being so, there was no reason to doubt the fairness of the elections in general and to invalidate the results.

Concerning the policy of the national broadcasting corporation, the Cassation Division of the Supreme Court noted that the time-slots for free air time were assigned by drawing lots, and that the second applicant's allegations – that only parties already represented in Parliament or which had the support of 4% of the electorate according to the opinion polls had been invited to take part in television debates, while the other parties had only been offered free air time in off-peak viewing slots – were unfounded. It recalled that ensuring equality among political parties did not imply an obligation to impart to each of them the same air-time on radio and television during election campaigns. Public broadcasters are entitled to take into account their importance and the support they get from the voters. This judgment

was combined with a decision drawing the attention of the Cabinet of Ministers to the shortcomings it had identified and to the need to introduce effective machinery to ensure the integrity of the electoral process.

Law - Article 3 of Protocol No. 1 (right to free elections): No matter how much advertising there was in a party's or a candidate's election campaign, that was not the only factor that influenced the voters' choice. There were also political, economic, sociological and psychological factors, for example, which made it difficult, if not impossible, to determine the exact impact of excess advertising on the number of votes obtained by a given party or candidate. The reasoning of the Cassation Division of the Supreme Court was well-balanced and the criterion of seriousness it had introduced was by no means unreasonable. There was therefore no reason to challenge its approach, which consisted in limiting the invalidation of elections to exceptional and particularly serious cases where the will of the people was genuinely flouted by a violation.

Furthermore, the applicants had taken part in adversarial proceedings in which they had been able to present all the arguments they deemed necessary to defend their interests. In examining the appeal, therefore, the Cassation Division of the Supreme Court had not overstepped the margin of appreciation open to it, the findings announced in its judgment were neither arbitrary nor unreasonable, and there had accordingly been no appearance of an interference with the free expression of the people in the choice of the legislature.

Regarding in particular the **conduct of the national broadcasting corporation, the European Court on Human Rights recalled that Article 3 of Protocol No. 1 did not guarantee the right of a political party to air-time on the radio or television in the run-up to elections. It acknowledged that problems could arise in exceptional circumstances, if in an election period, for example, one political party was refused air-time when other parties were not. However, the second applicant had not demonstrated the existence of such particular circumstances.**

Conclusion: manifestly ill-founded

TELEVISED DEBATES DURING ELECTION CAMPAINS

Warning issued against a politician for calling her opponent 'a thief' in a live television broadcast during the electoral period and court order granting her opponent a right to reply

Vitrenko and Others v. Ukraine - 23510/02
Decision on inadmissibility 16.12.2008

The first applicant was the leader of the Progressive Socialist Party of Ukraine. She stood as a candidate for the 2002 parliamentary elections. Some weeks before the elections, one of the television channels scheduled a political debate but cancelled it at the last minute. Ms Tymoshenko, who was due to appear for the debate with the first applicant, was not allowed on to the premises of the channel by the security. Being unaware of these facts, the first applicant reacted during the live broadcast to the non-appearance of her counterpart by saying "She definitely knew that I would prove that she was a thief... She deliberately did not come here and she will never wash out her guilt...". Upon a complaint by Ms Tymoshenko, the Central Electoral Commission gave an official warning to the first applicant, finding that she had infringed electoral legislation and the principle of the presumption of innocence enshrined in the Constitution of Ukraine. This warning was published in the two official newspapers. The first applicant unsuccessfully challenged this decision before the Supreme Court. Following these events, Ms Tymoshenko instituted defamation proceedings against the first applicant. Seeking to confirm her statements made on television, the first applicant requested the court to obtain from the General

Prosecutor's Office and the State Tax Administration copies of the decisions relating to the investigation of the criminal cases pending against Ms Tymoshenko. This request was rejected as irrelevant to the proceedings in question. The court found in part against the first applicant. In particular, it established that Ms Tymoshenko had never been convicted of theft or a similar criminal offence. Thus, the statements of the first applicant violated her right to be presumed innocent. It also found untruthful the first applicant's statement accusing Ms Tymoshenko of deliberate failure to appear for the television debate in question. The court ordered the channel to ensure that Ms Tymoshenko was given 50 seconds of live broadcast in which to correct the statements disseminated about her by the first applicant. It also ruled that the first applicant had to pay for the broadcast. Arguing that the term “thief” was a value judgement, the first applicant appealed, to no avail.

Inadmissible: The warning issued by the Central Electoral Commission, as well as the sanctions imposed by the courts, constituted an interference with the applicant's right to freedom of expression. The interference was “prescribed by law” and pursued the legitimate aim of protecting “the reputation or rights of others”. From the materials submitted by the parties, the word “thief” ordinarily suggested involvement in criminal activities and this would most likely be the meaning understood by the public. Therefore, it was not a mere value judgment but an untrue statement of fact. Notwithstanding the particular role played by the first applicant in her capacity as a candidate for election to Parliament and in the context of her political campaign, her criticism of a political opponent had included untrue accusations which entitled the domestic authorities to consider that there were relevant reasons to take action against her. In addition, it should be noted that the applicant had accused Ms Tymoshenko in her absence. Though the event may be considered to have been part of a public debate, there had been no actual heated exchange within a live television broadcast where political leaders may overstep certain limits. In the circumstances of the present case, the decisions of the domestic authorities to issue a warning to be published in the newspapers and to provide Ms Tymoshenko with the opportunity to rebut the accusations in the same forum where they had been made could reasonably be considered to be in line with the principles established in the Court's case-law.It could not be said that the authorities had overstepped their margin of appreciation.

Conclusion: manifestly ill-founded

BROADCASTERS’ DUTIES WHEN INTERVIEWING CANDIDATES TO ELECTIONS

Haider v. Austria **25060/94**
Decision of inadmissibility 18.10.1985

The applicant is a politician and leader of the Austrian Freedom Party. During the elections for the Vienna Municipal Council, a special programme on the elections was transmitted in television by the ORF (Austrian Broadcasting Corporation). Nine representatives of political parties, including the applicant, were then interviewed. The applicant complains before the European Commission of Human Rights under Article 10 of the Convention that the way in which the ORF reported on news events in general and on himself in particular did not meet the requirements of plurality of information and objectivity as required by Article 10.

The European Commission of Human Rights found that a right for a politician to be interviewed in a particular manner cannot be derived from Article 10. In this respect, the Commission recalled that freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention. The limits of acceptable criticism are accordingly wider with regard to a politician acting in his public capacity than in relation to a

private individual. The former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must display a greater degree of tolerance, especially when he himself makes public statements that are susceptible of criticism. The Commission also found that with regard to interviews of politicians it is in the interest of freedom of political debate that the interviewing journalist may also express critical and provocative points of view and not merely give neutral cues for the statements of the interviewed person, since the latter can reply immediately. The Commission therefore found that in the circumstances of the present case there was no appearance of a violation of the applicant's rights under Article 10 of the Convention.

Conclusion: manifestly ill-founded

ONLINE MEDIA AND ELECTIONS

REPORTING MISCONDUCT REGARDING CANDIDATES TO ELECTION

Editor fined for publishing allegations of child abuse against person standing for election

Ólafsson v. Iceland - 58493/13
Judgment 16.3.2017

The applicant, the editor of a web-based media site, published allegations made by two sisters that a relative of theirs, who was standing for election, had sexually abused them as children. The relative lodged defamation proceedings against the applicant and requested that a number of the statements be declared null and void. The Supreme Court found statements consisting of insinuations that the relative was guilty of having abused children to be defamatory and ordered the applicant to pay compensation. In the Convention proceedings, the applicant complained under Article 10 of a breach of his right to freedom of expression.

According to the European Court of Human Rights, the issue of sexual violence against children was a serious topic of public interest. By running for office in general elections, the relative had to have been considered to have inevitably and knowingly entered the public domain and to have laid himself open to closer scrutiny of his acts. A general requirement for journalists systematically and formally to distance themselves from the content of a quotation that could insult or provoke others or damage their reputation was not reconcilable with the press's role of providing information on current events, opinions and ideas. Punishment of a journalist for assisting in the dissemination of statements made by another person in an interview could seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there were particularly strong reasons for doing so. The journalist who had written the articles had tried to establish the sisters' credibility and the truth of the allegations by interviewing several relevant people and the relative had been given the opportunity to comment on the allegations. In those circumstances, being aware that the applicant was the editor, not the journalist, the Court considered that the applicant had acted in good faith and had made sure that the article had been written in compliance with ordinary journalistic obligations to verify a factual allegation. It was clear that the disputed statements originated from the sisters. They had previously written a letter containing part of the allegations and sent it to their extended family, the police and child protection services. They had published that letter and all the impugned statements on their own website before the articles were published by the editor.

It had been open to the relative under domestic law to bring defamation proceedings against the sisters and it was significant that he had opted to institute proceedings against the applicant editor only.

Although the compensation the applicant had been ordered to pay was not a criminal sanction and the amount did not appear harsh, in the context of assessing proportionality, irrespective of whether or not the sanction imposed was a minor one, what mattered was the very fact of judgment being made against the person concerned, even where such a ruling was solely civil in nature. Any undue restriction on freedom of expression effectively entailed a risk of obstructing or paralysing media coverage of similar questions.

Conclusion: violation of Article 10 of the Convention (freedom of expression)

See, also, *Magyar Kétfarkú Kutya Párt v. Hungary* - 201/17, Judgment 23.1.2018 (not final) Fine imposed on political party for making available to voters a mobile telephone application allowing them to share anonymous photographs of their ballot papers: violation [This case was referred to the Grand Chamber on 28 May 2018]

OTHER RELEVANT COUNCIL OF EUROPE'S TOOLS

A. The European Commission for Democracy through Law (Venice Commission)

"Code of Good Practice in Electoral Matters" adopted at its 51st and 52nd sessions on 5-6 July and 18-19 October 2002

The Venice Commission distinguished two particular obligations of the authorities in relation to the media coverage of electoral campaigns: on the one hand to arrange for the candidates and/or parties to be accorded a sufficiently balanced amount of airtime and/or advertising space including on state television channels ("the access to the media obligation") and on the other hand to ensure a "neutral attitude" by state authorities, in particular with regard to the election campaign and coverage by the media, by the publicly owned media ("the neutrality of attitude obligation"). The Venice Commission's Code of Good Practice in Electoral Matters also recommended the creation of an effective system of electoral appeals, among other things, to complain about non-compliance with the rules of access to the media (§ 3.3).

See below the relevant parts of the Explanatory Report to the Code of Good Practice:

"2.3 Equality of opportunity

18. Equality of opportunity should be ensured between parties and candidates and should prompt the state to be impartial towards them and to apply the same law uniformly to all. In particular, the neutrality requirement applies to the electoral campaign and coverage by the media, especially the publicly owned media, as well as to public funding of parties and campaigns. This means that there are two possible interpretations of equality: either "strict" equality or "proportional" equality. "Strict" equality means that the political parties are treated without regard to their present strength in parliament or among the electorate. It must apply to the use of public facilities for electioneering purposes (for example bill posting, postal services and similar, public demonstrations, public meeting rooms). "Proportional" equality implies that the treatment of political parties is in proportion to the number of votes. Equality of opportunity (strict and/or proportional) applies in particular to radio and television airtime, public funds and other forms of backing. Certain forms of backing may on the one hand be submitted to strict equality and on the other hand to proportional equality.

19. The basic idea is that the main political forces should be able to voice their opinions in the main organs of the country's media and that all the political forces should be allowed to hold meetings,

including on public thoroughfares, distribute literature and exercise their right to post bills. All of these rights must be clearly regulated, with due respect for freedom of expression, and any failure to observe them, either by the authorities or by the campaign participants, should be subject to appropriate sanctions. Quick rights of appeal must be available in order to remedy the situation before the elections. But the fact is that media failure to provide impartial information about the election campaign and candidates is one of the most frequent shortcomings arising during elections. The most important thing is to draw up a list of the media organisations in each country and to make sure that the candidates or parties are accorded sufficiently balanced amounts of airtime or advertising space, including on state radio and television stations.

20. In conformity with freedom of expression, legal provision should be made to ensure that there is a minimum access to privately owned audiovisual media, with regard to the election campaign and to advertising, for all participants in elections. (…) Spending by political parties, particularly on advertising, may likewise be limited in order to guarantee equality of opportunity." (…)

3.3. An effective system of appeal

92. If the electoral law provisions are to be more than just words on a page, failure to comply with the electoral law must be open to challenge before an appeal body. This applies in particular to the election results: individual citizens may challenge them on the grounds of irregularities in the voting procedures. It also applies to decisions taken before the elections, especially in connection with (…) compliance with the rules governing the (…) access to the media (…).

93. There are two possible solutions:

- appeals may be heard by the ordinary courts, a special court or the constitutional court;
- appeals may be heard by an electoral commission. There is much to be said for this latter system in that the commissions are highly specialised whereas the courts tend to be less experienced with regard to electoral issues. As a precautionary measure, however, it is desirable that there should be some form of judicial supervision in place, making the higher commission the first appeal level and the competent court the second.

94. Appeal to parliament, as the judge of its own election, is sometimes provided for but could result in political decisions. It is acceptable as a first instance in places where it is long established, but a judicial appeal should then be possible.

95. Appeal proceedings should be as brief as possible, in any case concerning decisions to be taken before the election. (…) 96. The procedure must also be simple, and providing voters with special appeal forms helps to make it so. It is necessary to eliminate formalism, and so avoid decisions of inadmissibility, especially in politically sensitive cases. 97. It is also vital that the appeal procedure, and especially the powers and responsibilities of the various bodies involved in it, should be clearly regulated by law, so as to avoid any positive or negative conflicts of jurisdiction. Neither the appellants nor the authorities should be able to choose the appeal body. The risk that successive bodies will refuse to give a decision is seriously increased where it is theoretically possible to appeal to either the courts or an electoral commission, or where the powers of different courts – e.g. the ordinary courts and the constitutional court – are not clearly differentiated. (…)101. The *powers* of appeal bodies are important too. They should have authority to annul elections, if irregularities may have influenced the outcome, i.e. affected the distribution of seats. (…)"

"Guidelines on media analysis during election observation missions", adopted by the Council for Democratic Elections at its 29th meeting (Venice, 11 June 2009) and the Venice Commission at its 79th plenary session (Venice, 12-13 June 2009):

"Free airtime

Parties and candidates should be provided with direct access to the public media free of charge. No registered contesting parties or candidates should be excluded from receiving free airtime. The amount of time allotted has to be enough to allow candidates to effectively communicate and illustrate their platforms to the public;

The allocation of time can be on an equal basis or on a proportional basis according to the specific context in which the elections are taking place.

- When the number of contesting parties is limited, strict equality may be applicable;

- When the number of contesting parties and candidates is high, a proportional formula may be adopted. The criteria for defining proportions can be based on a number of yardsticks: votes obtained by parties in the same kind of past elections, the number of seats in parliament, a threshold based on the number of candidacies filed in a minimum of constituencies;

Direct access should be broadcast when it is likely to reach the widest possible audience. Direct access also has to be made available on a non-discriminatory basis. Therefore, it is not acceptable to broadcast the messages of some candidates only late at night or early in the morning while other candidates are provided slots during prime time;

The process for the allocation of free airtime needs to be fair and transparent. The order of appearance should guarantee nondiscrimination against any of the parties;

An independent body that is able to effectively and promptly remedy any violations should monitor compliance with provisions regulating the allocation of free airtime."

B. COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE

RECOMMENDATION CM/REC(2007)15 TO MEMBER STATES ON MEASURES CONCERNING MEDIA COVERAGE OF ELECTION CAMPAIGNS

"I. General provisions

1. Non-interference by public authorities

Public authorities should refrain from interfering in the activities of journalists and other media personnel with a view to influencing the elections.

2. Protection against attacks, intimidation or other types of unlawful pressure on the media

Public authorities 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 the media in carrying out their work.

3. Editorial independence

Regulatory frameworks on media coverage of elections should respect the editorial independence of the media.

Member states should ensure that there is an effective and manifest separation between the exercise of control of media and decision making as regards media content and the exercise of political authority or influence.

4. Ownership by public authorities

Member states should adopt measures whereby the media which are owned by public authorities, when covering election campaigns, should do so in a fair, balanced and impartial manner, without discriminating against or supporting a specific political party or candidate.

If such media outlets accept paid political advertising in their publications, they should ensure that all political contenders and parties that request the purchase of advertising space are treated in an equal and non-discriminatory manner.

5. Professional and ethical standards of the media

All media are encouraged to develop self-regulatory frameworks and incorporate self-regulatory professional and ethical standards regarding their coverage of election campaigns, including, *inter alia,* respect for the principles of human dignity and non-discrimination. These standards should reflect their particular roles and responsibilities in democratic processes.

6. Transparency of, and access to, the media

If the media accept paid political advertising, regulatory or self-regulatory frameworks should ensure that such advertising is readily recognisable as such.

Where media is owned by political parties or politicians, member states should ensure that this is made transparent to the public.

7. The right of reply or equivalent remedies

Given the short duration of an election campaign, any candidate or political party which is entitled to a right of reply or equivalent remedies under national law or systems should be able to exercise this right or equivalent remedies during the campaign period without undue delay.

8. Opinion polls

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

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

All other matters concerning the way in which the media present the results of opinion polls should be decided by the media themselves.

Any restriction by member states forbidding the publication/dissemination of opinion polls (on voting intentions) on voting day or a number of days before the election should comply with Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as interpreted by the European Court of Human Rights.

Similarly, in respect of exit polls, member states may consider prohibiting reporting by the media on the results of such polls until all polling stations in the country have closed.

9. "Day of reflection"

Member states may consider the merits of including a provision in their regulatory frameworks to prohibit the dissemination of partisan electoral messages on the day preceding voting or to provide for their correction.

II. Measures concerning broadcast media

1. General framework

During election campaigns, regulatory frameworks should encourage and facilitate the pluralistic expression of opinions via the broadcast media.

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

Member states may derogate from these measures with respect to those broadcast media services exclusively devoted to, and clearly identified as, the self-promotion of a political party or candidate.

2. News and current affairs programmes

Where self-regulation does not provide for this, member states should adopt measures whereby public service media and private broadcasters, during the election period, should in particular be fair, balanced and impartial in their news and current affairs programmes, including discussion programmes such as interviews or debates.

No privileged treatment should be given by broadcasters to public authorities during such programmes. This matter should primarily be addressed via appropriate self-regulatory measures. In this connection, member states might examine whether, where practicable, the relevant authorities monitoring the coverage of elections should be given the power to intervene in order to remedy possible shortcomings.

4. Free airtime and equivalent presence for political parties/candidates on public service media

Member states may examine the advisability of including in their regulatory frameworks provisions whereby public service media may make available free airtime on their broadcast and other linear audiovisual media services and/or an equivalent presence on their non-linear audiovisual media services to political parties/candidates during the election period.

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

5. Paid political advertising

In member states where political parties and candidates are permitted to buy advertising space for election purposes, regulatory frameworks should ensure that all contending parties have the possibility of buying advertising space on and according to equal conditions and rates of payment.

Member states may consider introducing a provision in their regulatory frameworks to limit the amount of political advertising space and time which a given party or candidate can purchase.

Regular presenters of news and current affairs programmes should not take part in paid political advertising."

Recommendation no. R (99) 15 of Committee of Ministers of the Council of Europe on measures concerning media coverage of election campaigns provided that regulatory frameworks in Member States should provide for the obligation of TV broadcasters (both private and public) to cover electoral campaigns in a fair, balanced and impartial manner, in particular, in their news and current affairs programmes, including discussion programmes such as interviews or debates. The Committee of Ministers also recommended the States to examine the advisability of including in their regulatory frameworks provisions whereby free airtime is made available to candidates on public broadcasting services in electoral time, "in a fair and non-discriminatory manner", and "on the basis of transparent and objective criteria".

See, also, the Council of Europe study Media, elections an gender (2018)