Collection
Science and technique of democracy, No. 43

Venice Commission

The preconditions for a democratic election

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The European Commission for Democracy through Law (Venice Commission) is an advisory body on constitutional law, set up within the Council of Europe. It is composed of independent experts from member states of the Council of Europe, as well as from non-member states. At present, more than 50 states participate in the work of the Commission.

INTRODUCTION

Mr Gianni BUQUICCHIO
Secretary of the Venice Commission

Ladies and Gentlemen,

I am delighted to be here in Bucharest today for the opening of this important conference, organised under the Romanian presidency of the Council of Europe.

The Venice Commission, the Council of Europe's body that specialises in constitutional matters, has been working on electoral matters since its creation. Indeed, elections are an essential precondition for democracy, and they are therefore one of the Commission's main concerns.

The Venice Commission's work on electoral matters includes giving opinions (for example the opinion on the law on local elections in Romania), undertaking comparative studies and compiling the VOTA database, which was set up with a key contribution from a Romanian specialist. Its work also comprises the UniDem seminars on electoral matters, which have now become a tradition.

Since the first seminar on "New trends in electoral law in a pan-European context", which took place in Sarajevo in 1998, many different European capitals – in both central and eastern Europe – have hosted similar seminars. They have been held in Sofia, Belgrade, Warsaw, Moscow, and just last week Tbilisi.

Furthermore, the Venice Commission organises conferences for European electoral management bodies. The first conference organised by the Commission took place in Strasbourg in February 2005 and the next one will take place in May 2006 in Moscow. Following the democratisation of the countries of eastern Europe, the Association of Central and Eastern European Election Officials (ACEEEO) was set up. This organisation enables close links to be established between electoral commissions and equivalent authorities, but due to its geographical nature its activities do not really concern western Europe. This is why the idea for pan-European co-operation on election issues came about. Our aim is to ensure that annual meetings of this kind continue to be held and in 2007 we expect to organise the fourth conference of European electoral management bodies along with the ACEEEO's annual meeting in Strasbourg. This will also symbolise the reunification of Europe on electoral matters.

* * *

The topic that we will discuss over these two days is of considerable importance for democracy. While everyone recognises that there is no democracy without free and fair elections, the temptation is to base one's judgement of what constitutes free and fair elections simply on the vote itself. However, what happens before and after the vote is just as important.

What happens after the vote is the counting of the ballots, the announcement of the results and, obviously, the appointment of the elected body in line with those results. What happens before the election is more complicated, and it will be the topic of our debates over the next two days.

The Venice Commission became interested in this issue when it drew up the Code of Good Practice in Electoral Matters. The Code is a document that codifies basic standards that apply to a democratic election. It has been approved by the Council of Europe's Committee of Ministers, Parliamentary Assembly and Congress of Local and Regional Authorities. It is available for you here in French, English and Romanian.

The Code of Good Practice in Electoral Matters points to the need to guarantee a certain number of conditions that must be respected, prior to the holding of a democratic election.

The first is respect for fundamental rights. Without freedom, there is no democracy. This is the topic that we will discuss this morning. The Code makes it clear that the following in particular must be guaranteed: "freedom of expression and of the press, freedom of circulation inside the country, freedom of assembly and freedom of association for political purposes, including the creation of political parties." Mr Vinolas will elaborate on the detail of these requirements, in both international and national law.

Another fundamental issue concerns the media, and especially audio-visual media. This will be the topic for discussion during the first half of this afternoon.

Using the media for propaganda purposes is one of the classic methods employed by totalitarian and authoritarian regimes to mislead the public. Abuses of this type are not, unfortunately, only carried out by despotic regimes. This is why some of the great and long-standing democracies have legislated to put an end to abuses. Such abuses, rather than changing the result, may in fact de-legitimise it. I am thinking, for example, of those defeated in a well-known presidential election that took place forty years ago, who said that the Head of State's (De Gaulle) television speeches were the reason for his re-election. Another example was the first famous televised debate, where over-powerful lights that were positioned behind a candidate (Nixon) caused him to sweat. Reports from Ms Herdis Thorgeirsdottir and Ms Maiola will help to decode the messages that candidates – and authorities – want to pass on to naïve voters, and others.

Manipulation also occurs by means of money, which, as everyone knows, is what everything hinges on. Particular attention must be paid to the financing of political parties and especially election campaigns, as suggested by Mr Vogel and Mr Hazaparu.

Ladies and Gentlemen, it is not enough simply to lay down principles. We must ensure that they are respected. It is first and foremost for the Democratic State to check, in this field and others, that the rule of law prevails. Nonetheless, it is an issue where the risks of party-political abuse are particularly heightened, since what is at stake is power. Consequently, the role of civil society is paramount and Mr Pîrvulescu will share with us Romania's experience on this issue.

International organisations allow us to address the issue more objectively and with the benefit of transnational experience. Ms Gratschew and Mr Vulchanov will elaborate upon this.

Finally, let us not forget the thorny issue of referendums, whose results may be more important for the future of one country than those of its elections. Based on a thorough, comparative study, Mr Serdült and Mr Zellweger will show us the extent to which the great electoral principles also apply to referendums.

Before I conclude this presentation, I would like to thank the Romanian authorities, and in particular the Ministry of Foreign Affairs, for their co-operation in organising this seminar which, I stress, is taking place under the Romanian Chairmanship of the Committee of Ministers of the Council of Europe.

RESPECT FOR FUNDAMENTAL RIGHTS, IN PARTICULAR FREEDOM OF EXPRESSION, ASSEMBLY AND ASSOCIATION

Mr Didier VINOLAS
Head of Studies and Software Section
Directorate of information and communications systems
Ministry of the Interior

A topic such as this, before an auditorium of judges, electoral board members, representatives of political parties, journalists and NGOs, will have to be approached in a general way, drawing equally on international rather than national law, history (both distant and closer to the present) and the politics of the established and emerging democracies.

First of all, freedom of expression, association and assembly are inevitably the result of a particular development in the history of peoples, and although the underlying idea is basically the same, these terms do not correspond to totally identical concepts in all countries. This calls for a number of observations.

Nonetheless, national differences with regard to these fundamental freedoms are minimal and do not call into question the universality of these rights.

This relativisation, balancing or convergence of the legitimate rights of citizens and those of the state is to be found in the founding texts setting out the fundamental principles governing the collective and individual future of citizens in the states concerned. Three examples can be given.

1. In France, on 25 November 1898, the speech given by Mr Lemire, member of the National Assembly, to the Chamber tabling a private member's bill on the freedom of association, perfectly reflects the political, historical and philosophical considerations so characteristic of French society of the day which lay behind this legislative initiative.

"Freedom of association falls into the ambit of natural law because men are fundamentally social beings and not everything can be satisfied by the family and the state alone. This freedom should be acknowledged to all free peoples, whatever their system of government, but it is fundamental in a republic. Without this freedom, there will be a constant oscillation between state interference and individual powerlessness, and the majority of the social problems we face today will remain unsolvable. ... We believe that this Chamber would do a great service to the country by recognising at last the freedom of association, constantly promised, constantly declared necessary and yet constantly refused and this is why we are with the utmost confidence tabling the following bill."

2. In the preamble to the African Charter on Human and People's Rights, adopted on 27 June 1981 by the Organisation of African Unity, the member states acknowledge *"their duty to achieve the total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence"* and

undertake, amongst other things, to *"eliminate colonialism, neo-colonialism, apartheid (...) and all forms of discrimination, particularly those based on race, ethnic group, colour, sex. language, religion or political opinions"*.

More specifically, Articles 9 to 11 guarantee the freedom of expression, association and assembly, along the lines of the Universal Declaration of Human Rights, but with a few differences: the freedom not to join an association is tied in with an obligation to uphold national and family solidarity, spelt out in Article 29, and to *"preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well being of society."*

3. The 1966 Convention on Human Rights of the Organisation of American States, which entered into force on 18 July 1978 and has a clear regulatory flavour, obliges all signatory states to incorporate the provisions of the convention into their national legislation and establishes a regime of considerable freedom, within clear limits. Its preamble includes the following: *"Reaffirming their intention to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man; recognising that the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality, and that they therefore justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states; considering that these principles have been set forth in the Charter of the Organisation of American States, in the American Declaration of the Rights and Duties of Man, and in the Universal Declaration of Human Rights, and that they have been reaffirmed and refined in other international instruments, worldwide as well as regional in scope; reiterating that, in accordance with the Universal Declaration of Human Rights, the ideal of free men enjoying freedom from fear and want can be achieved only if conditions are created whereby everyone may enjoy his economic, social, and cultural rights, as well as his civil and political rights"*.

Fundamental freedoms are not guaranteed spontaneously and naturally

These freedoms may be considered by any governing power as containing the seeds of a countervailing power, which may be accepted or integrated to a greater or lesser extent, depending on the degree of democratic maturity in the political and social system.

In France, for example, the right of association was acquired over a considerable period of time: the post-1789 revolutionaries feared the reconstitution of the "corporations" and intermediate bodies of the Ancien Régime as much as the excesses of the revolutionary factions; in the 19th century, the Napoleonic empire was suspicious of political groupings, and in the approach to the 20th century, certain republicans were concerned about the role played by religious congregations. Although proclaimed by the law of 21 August 1790, "the right to assemble peacefully and to form free societies" was short-lived and had to wait until the promulgation of the law of 1901 to be finally recognised.

Now, in democratic states, the political line is that governments must adopt specific measures to protect and promote fundamental freedoms.

Governments must protect and promote fundamental freedoms

A number of observations, from the past or the present, can be made in this regard:

1. It is an error of political judgment for governments to believe that any de jure or de facto limits and constraints they may place in the path of fundamental rights (apart from constituting a clear reflection of their authoritarian and non-democratic nature) can be a means of remaining in power.

On the one hand, total control of the various means of communication is impossible (cf the wide-spread use of faxes to circulate information in the failed "Moscow putsch" of August 1991 against Mikhail Gorbachev).

On the other, the political history of the last two decades has shown that the reason for the collapse of certain political regimes in the east was less to do with economic factors than a general feeling, provoked rather than prevented by the tight grip held by the institutional system, of an inadequate level of individual freedoms.

Lastly, total freedom to disseminate information or counter-information, which is today possible on the Internet, with the associated possibility of immediate political analysis, reduces any temptations to steer the collective consciousness in a particular direction which could be the case with traditional means of transmitting ideas (the press, radio, television) and completely discredits the view that close monitoring by the state of the fundamental freedoms is a means of ensuring political survival.

Outside election periods, promoting fundamental freedoms means on a daily basis enabling public debates and exchanges to have the space they need to help inform citizens' views. During election periods, it means not placing any restriction on this. It is this that will bring voters back to the ballot box, so that they can play a part in an expression of choice which will confer unchallengeable legitimacy on the political regime that emerges from the vote. Current polls indicate that less than half of the Czech electorate intends to vote in the June 2006 general elections, and only 10-20% in the regional elections in the Czech Republic and Slovakia. In these two countries, the abstention rate in the European elections in June 2004 was between 72% and 82%.

2. In a democratic state, the real substance of fundamental freedoms gradually improves, as a consequence of the fact that the government in power is, as it were, "pacified", and becomes less mistrustful as it becomes aware over time that citizens' exercise of their freedoms is in line with the original and peaceful purpose for which they were established.

For example, over a quarter of a century, arrangements governing the freedom of assembly in France have been constantly relaxed, for political reasons and in the interests of democracy.

The law of 30 June 1881 laid down the principle that public meetings may be held until 11 pm, without the need for prior authorisation, must not be held on the public highway and must comply with a fairly formalistic system of notification, 24 hours in advance, to the Préfet or the mayor, acting on behalf of the state, specifying whether it was for the purposes of a lecture, public discussion or election meeting. The relevant administrative authority was entitled to be represented at the meeting

and was empowered to terminate the meeting at the request of the "board" or unless clashes or patently illegal acts occurred.

The "board" of the meeting organisers was responsible for "maintaining order, preventing any breach of the law, ensuring that the meeting retains the character ascribed to it in the notification, prohibiting any speech that is contrary to public order or morals or containing any incitement to commit an act constituting a serious crime (*crime*) or other major offence (*délit*)".

Special regulations governed election meetings, intended to "select or hear candidates for elective public functions", which could be attended only by the electorate of the constituency concerned, the candidates, members of the two Chambers and representatives of each of the candidates. The notification requirement period was reduced to two hours during an election period.

Because of the continuing sensitivity over the reconstitution of the corporations of the Ancien Régime, the 1881 law prohibited the setting up of "clubs".

The 1901 Freedom of Association Act did away with this particular prohibition and the law of 28 March 1907 eliminated the notification procedure, as this was viewed as an impediment to a freedom which had shown itself to be devoid of any political or social danger, and because the Catholic Church refused to comply with the requirement for an annual declaration of cultural meetings, provided for in the 1905 law on the separation of church and state. Furthermore, the 1907 law covered all meetings, "for whatever purpose" and made no distinction between ordinary and election meetings.

Fundamental freedoms are indivisible, invariable and unconditional

These freedoms should not be subject to any sort of condition or arrangement which would lead to their being exercised in a "two-speed" way. There must be full equality before the law for all citizens. The fundamental freedoms form a whole which the state may not limit, except through the law and in certain precise cases.

An example can be given from the beginning of the Soviet regime, in post-Tsarist Russia. Referring to the English Revolution in 1649 and the French Revolution in 1793, Lenin said, *""Freedom of assembly" can be taken as an example of the requisites of "pure democracy". Every class conscious worker who has not broken with his class will readily appreciate the absurdity of promising freedom of assembly to the exploiters at a time and in a situation when the exploiters are resisting the overthrow of their rule and are fighting to retain their privileges. (...) The first thing to do to win genuine equality and enable the working people to enjoy democracy in practice is to deprive the exploiters of all the public and sumptuous private buildings, to give to the working people leisure and to see to it that their freedom of assembly is protected by armed workers, not by heirs of the nobility or capitalist officers in command of downtrodden soldiers."*

Trotsky, (Pravda; 1933 Fascism and Democratic Slogans) adopts the opposite reasoning for reasons of political tactics and considers fundamental freedoms as circumstantial, if not opportunistic concepts, separate from the key principles of law, taking the view that *"freedom of assembly and freedom of the press for the working classes is conceivable only under a dictatorship of the proletariat, in other words*

with nationalisation of property, printing presses, etc. It is possible that in Germany, the dictatorship of the proletariat will also have to use special laws against their exploiters: that will depend on the circumstances of the time, international conditions, the internal power relationship. But it should not be ruled out that once they have taken power, the workers of Germany would be in a sufficiently strong position to grant freedom of assembly and the press to their former exploiters, ie proportionate to their political influence. The proletariat may be forced to limit things in this way, but it is not a question of principle."

This approach, historically justified because of the transition between two antinomic political regimes today has absolutely no legitimacy nor is there any need for it in states which claim to be democratic, even where this is something recently achieved.

PART ONE – THE INTERNATIONALLY ACCEPTED SCOPE OF FUNDAMENTAL FREEDOMS

The fundamental guarantees enjoyed today by citizens of democratic countries have been built up over the course of the last two centuries, as nations, sometimes turbulently, freed themselves from the shackles of political regimes that were a relic of the past. For the citizens of the west they now form a cultural basis, whose unanimously shared values are consubstantially those of democracy, whether in a republic or a monarchy.

In this respect this *"common understanding of [fundamental] rights and freedoms"* ties in with the wishes of the UN expressed in the preamble to the Universal Declaration of Human Rights, adopted on 10 December 1948, which also sets out to *"promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.*"

In its Convention for the Protection of Human Rights and Fundamental Freedoms (1950), the Council of Europe, for its part, states the following:

"The Governments signatory hereto, being Members of the Council of Europe,

Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10 December 1948;

Considering that this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared;

Considering that the aim of the Council of Europe is the achievement of greater unity between its Members and that one of the methods by which the aim is to be pursued is the maintenance and further realization of Human Rights and Fundamental Freedoms;
Reaffirming their profound belief in those Fundamental Freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend;

Being resolved, as the Governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration."

Today, the scope of fundamental freedoms has, on the whole, become uniform in the democratic countries of Europe. The international legal recognition they have received represents a direct framework of reference to gauge the extent to which they are applied.

PARAGRAPH ONE – FREEDOM OF EXPRESSION

1. **The Universal Declaration of Human Rights** (Article 19) was the first to establish this freedom on 10 December 1948: *"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."*

It goes hand in hand with the freedom of information and, more specifically, the freedom of the press, the cornerstone of public debate in a democratic regime. This will be further explored in other contributions to this conference.

2. **The European Convention for the Protection of Human Rights and Fundamental Freedoms** (Article 10) of 4 November 1950 followed the same approach, although it set certain limits to this freedom:

> *1. Everyone has the right to freedom of expression. this right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*
>
> *2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*

3. Article 19 of **the International Covenant on Civil and Political Rights**, adopted on 16 December 1966, under the auspices of the UN, reiterates these principles:

> *1. Everyone shall have the right to hold opinions without interference.*
>
> *2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and*

ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

4. **The draft European Constitution** (Article II-11) echoes these principles, although, in line with the Universal Declaration, lays down no limits:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

2. The freedom and pluralism of the media shall be respected.

5. What does **Romanian legislation** have to say on these matters?

The Romanian Constitution of 8 December 1991 unambiguously subscribes to this protection. It proclaims the inviolability of the freedom of expression of thoughts, opinions, or beliefs, and freedom of any creation, by words, in writing, in pictures, by sounds or other means of communication in public (Article 30).

It also prohibits censure, in whatever form, and asserts the freedom of the press for which it affords particular protection, stipulating that no publication may be suppressed.

PARAGRAPH TWO – FREEDOM OF ASSOCIATION AND ASSEMBLY

All the international texts place these on the same legal footing, although certain national legislation, such as in France, makes a clear distinction between the two. For the sake of consistency, here we shall follow the first approach.

1. For the Universal Declaration of Human Rights **(Article 20):**

1. Everyone has the right to freedom of peaceful assembly and association.

2. No one may be compelled to belong to an association.

2. **The European Convention for the Protection of Human Rights and Fundamental Freedoms** (Article 11)

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of

the armed forces, of the police or of the administration of the State.

3. **The Draft European Constitution** broadens the scope of this freedom, by making explicit reference to the role of political parties.

1. Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.

2. Political parties at Union level contribute to expressing the political will of the citizens of the Union.

4. **The Romanian Constitution** of 8 December 1991 brings its domestic legislation into line with these precepts.

Public meetings, processions, demonstrations or any other form of assembly shall be free and may be organised and held only peacefully, without arms of any kind whatsoever (Article 36).

Freedom of association is guaranteed: citizens may freely associate into political parties, trade unions and other forms of association (Article 37).

With regard to the formation of political parties, the arrangements for registering or at least depositing statutes with the competent authorities, are similar to those in the majority of countries that have provided for the status of parties in their constitution or legislation. The same applies to the various formalities: convening of the general meeting to establish the party, drawing up of a manifesto, principles of internal organisation, etc.

PART TWO – LIMITS TO FUNDAMENTAL FREEDOMS

The limits to fundamental freedoms, where such are of a democratic nature, are a consequence of texts explicitly providing for restrictions, and are part of the lawful activity of the administrative and judicial institutions, require no particular comment.

PARAGRAPH ONE – INTERFERENCE WITH THE FREEDOM OF EXPRESSION

1. <u>Unchallengeable limitations</u>

a. Although the 1948 Universal Declaration of Human Rights does not specify any particular conditions for or restrictions on the freedom of expression, many states, under the auspices of the United Nations and the acceding countries, including France, condemn statements or utterances which incite racial, national or religious hatred and incitement to murder.

The Council of Europe, when it refers to *"national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary"* is acting in line with this approach.

Any interference with the freedom of expression must therefore comply with the legal grounds specified, whether of an individual (slander, defamation) or collective nature (justification of crimes, incitement to war, to national, racial or religious hatred, to discrimination, hostility or violence), in accordance with the procedures provided for.

In this connection, it should be noted that the 1966 Convention on Human Rights of the Organisation of American States, referred to in the introduction, prohibits prior censorship in respect of freedom of expression (Article 13.2) except (cf Article 13.4) for *"public entertainments (...) for the sole purpose of regulating access to them for the moral protection of childhood and adolescence*."

The limitations on the freedom of expression specified in the Romanian Constitution require no special comment; freedom of expression must not be prejudicial to the dignity, honour, privacy of the individual and the right to one's own image.

Elsewhere, legislation prohibits defamation of the country and the nation, exhortation to war, national, racial, class or religious hatred, incitement to discrimination, territorial separatism, public violence, and displays of obscenity and immorality.

Nonetheless, this raises the question of how the government or the courts interpret the concept of "defamation of the country or nation", and "territorial separatism". These should not be used as a means of restricting freedom of expression, especially for a political party.

b. There are several potential threats to freedom of expression in the normal institutional process:

- <u>misuse of procedure</u>, judicial or administrative, which may appear to be lawful as it is based on legal grounds, but uses a lawful procedure for a purpose other than that for which it was primarily intended. Recourse to special or ordinary courts or administrative authorities other than those provided for would be symptomatic of interference with freedom of expression by the political forces in

power, either to silence a voice regarded as undesirable or to intimidate and threaten those disposed to listen to it.

For example, the dispersion by the police on 1 February 2006, reported in the French press, of an NGO demonstration in front of the FSB (ex-KGB) headquarters in Moscow, for failure to obtain authorisation from the authorities, on the grounds that the pavement was too narrow at that spot, did not, on the face of it, comply with the principle of the unrestricted exercise of freedom of expression as the measure seemed to be disproportionate to the incident in question.

The code of good practice in electoral matters adopted by the European Commission for Democracy through Law (Venice Commission) on 18 and 19 October 2002, provides that in election campaigns, restrictions on fundamental rights must have a basis in law, be in the public interest and comply with the principle of proportionality. The decision to take the action described above clearly does not fit in with the liberal and democratic tradition as it was disproportionate.

- the use of procedures, which although they may indeed be lawful, are inappropriate. Administrative or judicial action taken to deal with offences connected with the freedom of expression, generally involves professional bodies, courts or administrative authorities, accustomed to applying precise and well-known rules, and to act subject to channels of appeal which can always be utilised. This professionalism offers several guarantees: intellectual honesty; a sense of proportion between the facts and the authorities' reaction (acquired with practice); the comparability of the seriousness of offences. Accordingly, a court specialising in dealing with cases of defamation and insult, is able to weigh up the tenor of the words in question, the political tone of which may or may not be acceptable, both during and outside election periods. Similarly, a specialist police or judicial department is able to appreciate the seriousness of a terrorist threat by analysing the terms of how it has been delivered. In such conditions, it may be dangerous to turn to institutions whose primary role does not include dealing with matters relating to freedom of thought and expression in the political sphere. The ideological excesses of commissions such as that of Senator McCarthy half a century ago in the United States, are a good illustration of this. Governments must, therefore, comply with the procedures laid down and must not use existing institutional means for party-political purposes.

- a loss of balance between the need for collective security and respect for individual freedoms. Several countries, clearly democratic, have drafted or are in the process of drafting legislation to criminalise justification of terrorism or incitement to terrorist acts. One of these proposed laws, for example, provides that "any interested person may ask the president of the court of first instance for an interim injunction to prevent the dissemination, by whatever means, of texts or video or audio cassettes inciting or justifying terrorism. Such action may also be instigated by the Minister of the Interior." What guarantee is offered that "any interested person" is not a member of a political party wishing to use the electoral speeches of an adversary as a means of planting in the minds of the electorate the idea, even if the action in the courts is unsuccessful, that the person in question is engaged in activities contrary to the interests of the nation?

Another example can be found in the Patriot Act in the United States. This special legislation, passed in October 2001 for a four-year period, and providing among

other things that various American security agencies can access the readers' files in libraries and bookstores, was extended by the House of Representatives in July 2005, and then given a further 5-week extension by the Senate until 3 February 2006, and then, once again, under the same conditions, until 10 March 2006.

The capacity of citizens to be reactive and vigilant, through groups authorised by the freedom of association, is one response to this. But it is possible only if the state itself is not totalitarian or disposed to be so.

2. Inadmissible interference with the freedom of expression

This relates to interference by the state which (a) is not provided for by law or (b) is a result of a law which itself does not comply with the aforementioned universal texts.

a. The most reprehensible form is de facto censorship of ideas. This is the first freedom to be violated in a country not governed by the rule of law.

Subsequently, it might apply to works already published, but today, even authoritarian regimes which make no specific claim to being democratic, no longer practice auto da fé.

It may, in particular, be more insidious, preventing ideas from being voiced or found. The principle of the *"freedom to receive and impart information and ideas through any media and regardless of frontiers"* is breached head-on. In this connection, the decision by the world's top search engine on the Internet, Google, to exclude from its searches ideas that a state (in this case China) refuses to have circulating freely among its citizens, in exchange for the right to set up business in the country, shifts the debate on interference with the freedom of expression from the traditional arena (the state) to one today less subject to criticism, namely the private industry managing the new information and communication technologies.

This self-censorship decision led to the American Internet giants Google, Yahoo, Microsoft and Cisco being summoned to appear before the International Relations Committee of the US House of Representatives on 15 February and being severely criticised for their attitude. The companies said they were ready to work among themselves and with NGOs in order to draft a code of conduct. One Congressman has prepared a bill to "protect United States businesses from coercion to participate in repression by authoritarian foreign governments", maintaining that political censorship on the Internet "threatens the viability of the industry itself". The effect of the bill would be to oblige the major portals to locate their servers outside countries restricting Internet use.

This position is entirely in keeping with the 1966 Convention on Human Rights of the Organisation of American States, which provides in Article 13.2 and 13.3 that freedom of expression *"shall not be subject to prior censorship"* and that it *"may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions."*

b. National legislation often contains rules restricting freedom of expression

These rules are ostensibly supposed to prevent "abuse" of the freedom of expression and, for example, to protect the honour of candidates and authorities, and the constitutional order. In reality, they may serve to censor criticism against the authorities or attempts to amend the constitution, even though this lies at the very heart of democratic debate. For example, an electoral law does not comply with European standards if it prohibits campaign documents from containing insulting or defamatory remarks on official figures and other candidates, allows the continuing dissemination of false information defaming a candidate, or makes candidates accountable for infringements of the law committed by their supporters. The obligation to submit electoral campaign material to electoral boards, indicating the organisations that requested and produced it, the number of examples and the date of publication, is a form of censorship that cannot be accepted, especially where electoral boards are required to take steps against unlawful publications or those containing false information. This particularly holds good if the rules prohibiting abuse of the mass media during an election campaign are worded in a rather vague way.

PARAGRAPH TWO – INTERFERENCE WITH THE FREEDOM OF ASSOCIATION AND ASSEMBLY

1. Unchallengeable limitations

a. Most texts enshrining the freedom of association and assembly lay down certain limits in almost identical terms: *"No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State."*

These terms are to be found, in virtually identical terms, in many national laws. The courts apply them in the same way.

b. The Romanian Constitution is more proactive, in its democratic scope, and more radical in the penalty provided for, stating that *"any political parties or organisations which, by their aims or activity, militate against political pluralism, the principles of a State governed by the rule of law, or against the sovereignty, integrity or independence of Romania shall be unconstitutional"* (Article 37.2).

Led by a desire to avoid anti-democratic factions, it adds that *secret associations are prohibited.*

Provisions of this kind reflect a resolute commitment to spelling out the irreversibility of the democratic form of government and of preventing any return to the previous political order.

c. To a certain extent, this can be tied in with other approaches which, for different historical reasons, laid down certain specific prohibitions. Two examples of this can be given.

The German law on associations (Vereinsgesetz), explicitly prohibits the setting up of associations whose aims are contrary to the idea of harmony between peoples. German political parties whose aims or whose followers are prejudicial to the free and democratic fundamental order are declared to be anti-constitutional and must be dissolved. The Federal Constitutional Court forbade a particular gathering on 27 January 2001, the day commemorating the Holocaust. Proceedings are currently under way in Germany in the Federal Constitutional Court to ban the right-wing faction of the National Democratic Party.

In Austria, the Prohibition Act (Verbotsgesetz), is a law enacted to comply with the Vienna Treaty of 1955, calling on Austria to dissolve all national-socialist organisations and criminalise all their activities. By virtue of the Austrian Law on Assembly (Versammlungsgesetz), the Austrian Constitutional Court found that there could be justification for banning a meeting if national-socialist ideas were likely to be expressed, either through songs or the wearing of certain emblems**.**

When a parliament decides to strengthen its national legislation in order to introduce a legally necessary restriction on the freedom of assembly to counter any such intentions, clearly such additional legislation is not open to criticism. For example, the French National Assembly recently debated a bill to prevent mayors in certain regions bordering on Germany from making available community halls for ostensibly cultural or sporting events when in reality the aim of the organisers was to justify the crimes against humanity committed under the 3rd Reich, within the meaning of the Charter of the Nuremberg International Military Tribunal.

In order to comply fully with international and European commitments, the bill sought to take action against the holding of meetings of a racist, anti-Semitic or xenophobic nature and to make meetings subject to surveillance and monitoring measures, or indeed to ban such meetings if it became apparent that their purpose was contrary to public order.

It was for similar motives that France dissolved the extreme right-wing movement to which belonged the man who tried to shoot Jacques Chirac during the military parade on 14 July 2002.

However, as with the freedom of expression, there are certain dangers which pose a threat to these freedoms in the normal institutional process:

- misuse of lawful procedure, under the terms of which the administrative authority unduly bans a meeting claiming there is a risk to public order. The aim might be to obstruct what an adversary has to say; it might be that the result of the action taken is beneficial to a single direct competitor, or, indirectly, several opponents, on whose electorate the adversary is encroaching.

- a loss of balance between the need for collective security and respect for individual freedoms.

For example, even in a country such as France with a long-established democratic tradition, political temptations to limit the freedom of association beyond what is reasonable, have occasionally come to the surface.

In June 1971, for the first time in the history of the 5th Republic, the Senate, having initially rejected a government and National Assembly initiative to reform the Freedom of Association Act of 1901, making the setting up of an association subject, in certain cases, to prior judicial control, referred the matter to the Constitutional Council. On 16 July, the latter found in favour of the Senate, basing its decision on the preamble of the Constitution reaffirming "the fundamental principles acknowledged in the laws of the Republic", declared that the freedom of association was of a constitutional nature and cancelled the system proposed in the new law.

2. Inadmissible interference with the freedom of association and assembly

The right to organise (Article 5 of the Social Charter) is not observed in several countries where foreigners and non-nationals are banned from standing for election to works councils. The "negative right to organise", ie the obligation to join a trade union in order to benefit from priority hiring, also breaches the Charter. This de jure or de facto union monopoly survives in numerous countries in the printing sector.
The European Court of Human Rights, in the Young, James and Webster v. the United Kingdom case of 1981, held that the "closed shop" agreement, obliging the applicants to join a union in order to keep their job, was a violation of the Convention.

The freedom of peaceful assembly: following the frequent and massive demonstrations at international summits, member states have attempted to control such demonstrations.

NGOs regularly claim that this freedom is flouted. For example, in 2004 Amnesty International called on the Ukrainian authorities to ensure that those responsible for the application of laws comply at all times with the freedom of expression and peaceful assembly, and the principle of proportionality in recourse to force. Amnesty International also asked the authorities to ensure that demonstrators were not subject to ill-treatment and were not held in custody simply for having exercised their right to peaceful assembly.

The legal system applying to associations must not be deliberately undermined in order to make it more difficult for associations to register and have legal personality or to make it easier for them to be dissolved if the authorities in power consider them to be critical of the regime.

In a former Soviet Republic, the body responsible for registering and re-registering public organisations, comprising, among others, the Prime Minister, members of the Presidency and the Security Council, tasked with examining the aims, role and working methods of associations and rejecting registration applications in cases of *"failure to comply with the requirements of the law"* refused to register the "Assembly of Democratic NGOs" which sought to establish co-operation among NGOs in the field of information, to set up a system of mutual assistance and exchange of services, to extend the influence of civil society, to create a collective system for the protection of NGO rights and to recruit new members, simply because it had omitted to provide an address.

Control of the symbols used by associations is another means used by the authorities to restrict the setting up of associations or dissolve existing ones, with the relevant

texts requiring a positive expert opinion from the President of the Republic's Heraldic Council and registration with the State Heraldic Register.

Citing examples of interference with the freedom of assembly or association by states, whether such result in condemnation from the courts or are featured in NGO reports, is not per se of any specific interest in a conference such as this. An Internet search on this subject will be enlightening enough.

The fundamental rights acknowledged to citizens by states are the external signs of how democratic such countries are. Such rights, which for some are seen as antibodies and for others an integral part of the political and social metabolism, are invariably a gesture of confidence made towards society.

In the 21st century, if a country wishes to find its true democratic place among other nations, it must make an active effort to ensure that these rights are given their full value in the domestic legal order. By not unlawfully restricting such rights, particularly during election periods, and by giving citizens the means of being protagonists in the political process, the authorities can show that they are not just doing things for show.

ACCESS TO MEDIA AS A PRECONDITION FOR DEMOCRATIC ELECTIONS

Ms Herdis THORGEIRSDÓTTIR
Professor, Faculty of Law, Bifrost School of Business

1. "Access to media" as a precondition for democratic elections implies the necessity of reaching the attention of the public through the media for those participating in the political debate. This is to ensure that the outcome of elections reflects an informed public opinion. This requirement does not imply equal access of everyone to the public through the media preceding elections, which in reality is an unattainable goal, but rather that safeguards must be made to prevent one or a few parties wielding undue influence over the forming of public opinion in the political process. The problem is in fact illustrative of the paradigmatic crisis concerning both modern constitutionalism and the rights protection deriving from international commitments like that of the contracting parties to the European Convention on Human Rights[1] and to other legally binding international human rights instruments. In the context of modern society, concentration of media ownership has created major new political actor**s** who are in a position to have a crucial impact on the forming of public opinion, hence calling into question the role of the state in not merely abstaining from interfering but in having a positive duty to guarantee open access to the media in order to ensure diversity of views and information and hence the continuance of an "effective political democracy".[2]

2. Access to media as an element of the general right to freedom of expression concerns the two-way information flow; the imparting process from the forum of the media and, at the other end of the spectrum, the public's right to receive. The Committee of Ministers of the Council of Europe in a recommendation in 1999 noted the important role of the media, especially at the time of elections.[3] An open media capable of providing the populace with a coherent flow of relevant and diverse information and ideas is essential for the enlightenment process, which is the prerequisite for democratic elections. Article 3 of Protocol 1 of the ECHR states:

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.[4]

Article 3 of Protocol 1 of the ECHR creates positive obligations on every member state of the Council of Europe to guarantee that the preconditions of elections will ensure the free expression of the opinion of the people in the choice of the legislature.[5] This is no small task when scrutinised in light of the conditions in which

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1 Hereinafter ECHR.

2 As stated in the Preamble to the ECHR.

3 Council of Europe Committee of Ministers Recommendation No. R (99) 15 on measures concerning media coverage of election campaigns.

4 Emphasis added.

5 *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, Series A No. 113, § 54.

the present-day media operates. The effects of media ownership concentration – a widely recognised problem – on media quality, freedom of expression and workers' rights around the world are one of the major concerns of the International Federation of Journalists today.[6] Access criteria hence affect the situation of individuals in society who want to contribute to the political debate through the forum of the media, professional journalists' access to work, and the general public's access to information and ideas relevant to the public interest.

3. Freedom of the press is a fundamental value in a democratic society. Without this freedom the furtherance of other human rights is almost unthinkable. As an intrinsic value, freedom of expression is cherished in most constitutions and in every international and regional human rights treaty, while press freedom as such is often regarded as part of the general freedom of expression without being explicitly mentioned. The press is the main forum for political debate in any society and the protection of its function as a tool for democracy is hence crucial. This is why access to media with all kinds of information and ideas is of immense importance for ensuring the free formation of political will in elections. One of the founding fathers of the American Constitution, James Madison, said in 1822:

A popular government without popular information, or the means of acquiring it, is but a Prologue to Farce or a Tragedy, or perhaps both. Knowledge will forever govern ignorance: And people who mean to be their own governors must arm themselves with the power that knowledge gives.[7]

4. People need information for self-government, as was acknowledged in international and regional human rights treaties in the aftermath of the Second World War, when the focus was in particular on freedom of information. There emerged a new dimension of press freedom with the adoption of legal provisions explicitly mentioning the right to receive information and ideas, as in Article 10 of the ECHR, modelled after the Universal Declaration of Human Rights. Article 10 of the European Convention, which was adopted in 1950, reads:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information

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[6] See http://www.ifj.org/default.asp?Index=3699&Language=EN, accessed on 28 February 2006.

[7] G. Hunt, (ed.), *Writings of James Madison*, Putnam's, New York, 1900–10, 9:103, letter to W. T. Barry, 4 August 1822. Quoted in F. S. Haiman, *Speech and Law in a Free Society*, The University of Chicago Press, 1981, p. 368. Emphasis added.

received in confidence, or for maintaining the authority and impartiality of the judiciary.

5. As evident from the text of Article 10, the instrumental aspects of freedom of expression such as access to media have to be read into the provision or in the context of the Convention as a whole and its jurisprudence. The right to reply, explicitly provided for in Article 14 of the American Convention on Human Rights, is for example a specific tool for access to the media. The right of reply is ensured in most countries by press, broadcasting or other legislation as well as by professional codes of practice.[8] This right, however, is usually confined to correction when a party has been injured by offensive or incorrect remarks in the media. The notion of access to media in general is, however, far from being clear or absolute as the term itself is open to different interpretations, depending on what kind of access is being scrutinised.

6. The term "access to media" entails a requirement for media to fulfil a public function, often conflicting with the objectives of those owning and running media enterprises, as it indicates that people in democratic societies have a right to a certain kind of media, preferably a variety of media outlets – not only media free from state interference but also media that takes seriously its role as a public watchdog in a democracy and hence accepts the need for a two-way flow of information. Such media requires that journalists are able to impart information without resorting to self-censorship and it confirms the public's entitlement to be informed on matters of general concern. Access to media is therefore a highly contestable notion with regard to property rights, for example, the rights of media owners on the one hand to control access of various opinions to the media and the positive obligation of authorities on the other hand, to ensure pluralism of ownership of media outlets and to further guarantee diversity of views if the market fails owing to other factors conditioning the political debate. The democratic access requirement is hence a two-edged sword. The right to reply, for example, may infringe the right of editorial independence[9] at the same time as protecting the interests of the individual seeking access in order to express his or her opinion, and protecting the corollary right of the public to know.

7. The right to access to media as a precondition for democratic elections applies hence both to the individual right and the collective goal: the promotion of political debate, which is essential for the continuance of democratic society.[10]

8. The ECHR and its jurisprudence has entered the rights debate within many of the member states of the Council of Europe where there is growing appreciation of the impact of the Convention and its institutional mechanisms. Many of the judgments of the European Court of Human Rights,[11] not least those concerning freedom of expression and the press, have reinforced the paramount impact of

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[8] See Explanatory Memorandum to the Council of Europe Committee of Ministers Recommendation No. R (99) 15 on measures concerning media coverage of election campaigns.

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

[10] *Feldek v. Slovakia*, 12 July 2001, RJD 2001-VIII.

[11] Hereinafter the Court, unless necessary to distinguish it in the context of discussing other courts.

Article 10 by providing a frame of reference for shaping media policy or at least what such a policy should aspire to be.

9. The nature of Article 10 is curious, in that it protects both the natural instinct for individual expression in every conceivable form while at the same time being loaded with the weight of civil and political obligations in society, which gives it the character of a collective right rather than just an individual freedom. It protects the civil right of the individual not to be interfered with by the state. At the same time it protects the right of the citizen to be enlightened**,** calling into question the positive obligation of authorities to ensure that process. It hands out a promise of citizen access to the governing process through democratic procedures, where the media serves a major role, shedding light on the indivisibility of all human rights whether of economic, social or cultural origin.

10. Media freedom is of little value unless viewed in a societal context where everyone can benefit from it. The Court has reiterated the essential role of the press is "in ensuring the proper functioning of a political democracy".[12] The importance of the media is obvious in this respect. It is quite clear from jurisprudence concerning Article 10 that the Convention aims at a far broader protection of the media than the traditional conception of this freedom proposed. Freedom of the press is not merely the freedom to found a newspaper free of licensing, or to be free from discriminatory taxation or state interference. The press is more than a marketable commodity. There is much tension between the conception of the press as a private enterprise subject to the logic of the market and the press as an instrument of democracy. The instrumental value of press freedom can be defined first of all in terms of the paramount protection that the European Court of Human Rights has afforded to political debate.[13]

11. Even those holding extreme liberal views of media freedom as a purely negative liberty accept some form of state interference to protect individuals against being harmed by others. The principle of freedom of expression is thus far from absolute.

12. Access to media is best analysed by looking at the three forms of regulation which condition it: legal regulation, market regulation (where the legal right to impart information must give way to market forces) and self-regulation (where ethical considerations and disciplinary rules are meant to give moral guidance by setting standards against which conduct can be measured and evaluated).[14] Legal regulation does not, however, adequately take into account the fact that market regulation, and even self-regulation, may actively be impeding the press in carrying out its positive duties. Is self-regulation within the media a credible factor in the face

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

[13] *Lingens v. Austria*, note 12 above, *Observer and Guardian v. the United Kingdom*, 26 November 1991, Series A no. 216.

[14] See H. Thorgeirsdottir, *Journalism Worthy of the Name: Freedom within the press and the affirmative side of Article 10 of the European Convention on Human Rights*, Martinus Nijhoff Publishers Leiden/Boston, 2005, p. 462.

of ownership or other external pressures? Are there grounds to believe that the staff of private enterprises can fend off such efforts without risking their own jobs?[15]

13. The special status of press freedom in constitutions and human rights instruments derives from its democratic function in society to inform the public.[16] The value of press freedom is not rooted in the property rights of its owners or the particular dynamics that gave rise to them.[17] In the case law of the ECHR,[18] the press is termed the Public Watchdog[19] because of its vital role in society. The use of this term to describe the role of the press is analogous to the Fourth Estate concept – indicating that the press plays a public trusteeship role. In the words of one United States Supreme Court Justice:

[T]he press has a preferred position in our constitutional scheme, not to enable it to make money, not to set newsmen apart as a favoured class, but to bring fulfilment to the public's right to know.[20]

14. The core of both concepts is the implicit notion of what has become known as investigative journalism. The European Court of Human Rights has consistently emphasised "the pre-eminent role of the press in a state governed by the rule of law".[21] Press freedom is certainly part of the overall protection offered by Article 10 and rests on the same foundation as the individual freedom of expression. The emergence of the new dimension of press freedom, which is the right to receive, marked a departure from the traditional view of the press's freedom as mainly a freedom of the publisher to be free of prior, public restraints. This principle was confirmed in a landmark decision in the case of *Sunday Times v. the United Kingdom* in 1979 where the Court took an affirmative stance towards the democratic role of the press and its significance for the public. It referred to the need for a provocative debate that would agitate either the state or any sector of society, which required the co-operation of an enlightened public, and it made it incumbent on the media to shoulder the responsibility of informing people of all matters of public interest, not only by providing information but also by imparting ideas. The Court concluded, "not only do the media have the task of imparting such information and ideas: the public also has a right to receive them".[22]

15. The imparting process itself, however, requires a separate theory and justification. The need to afford the press with all the safeguards it needs to carry out

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15 Ibid, p. 9.

16 The press enjoys protection as a legal person in European Convention jurisprudence, cf. the judgment in *Autronic AG v. Switzerland*, 22 May 1990, Series A no. 178.

17 See O. M. Fiss, "Building a Free Press" in A. Sajó and M. Price (eds), *Rights of Access to the Media*, Kluwer Law International, 1966, p. 92.

18 Hereinafter the Convention, unless there is need to distinguish it from other instruments by referring to the European Convention on Human Rights.

19 The concept is capitalised to accentuate the role of the press in Convention jurisprudence.

20 *Branzburg v. Hayes*, 408 US 665 (1972), at 726, no. 2, Justice Douglas' dissenting opinion.

21 Cf. *Castells v. Spain*, 23 April 1992, Series A no. 23,6 § 43; *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, Series A No. 239, § 63.

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

its role as the public watchdog[23] is increasingly highlighted. From Convention jurisprudence this may be gathered: the press may not overstep certain bounds at the same time as it must adhere to its duty of informing the public. The press has the task of informing the public properly[24] and to that extent, of setting things in an analytical context.[25] In order to do so journalism must be daring and not hesitate to go against accepted views,[26] as the importance of political opposition is crucial in democracy.[27] The practice of journalism involves shocking and disturbing some sections of the population in order to shed light on various sides of reality. According to a recent declaration by the Council of Europe Committee of Ministers, political debate requires that the public is informed about matters of public concern, which includes the right of the media to disseminate negative information and critical opinions concerning political figures and public officials, as well as the right of the public to receive them.[28] 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.[29]

16. When most broadcasting is in the hands of large, privately owned media corporations the question of access of various political actors becomes even more pertinent. At the adoption of the Convention in 1950 the principal television stations in the member states were state-owned monopoly services.[30] The European Court of Human rights later submitted[31] that the insertion of the third sentence in Article 10 §1 at an advanced stage of the preparatory work on the Convention reflected a political concern on the part of several states, namely that broadcasting should be the preserve of the state.[32] It emphasised that states are permitted to regulate by a licensing system the way in which broadcasting is organised in their territories, particularly in its technical aspects[33] but also with regard to other considerations, including such matters as the nature and objectives of a proposed station, its potential audience at national, regional or local levels, the rights and needs of a specific audience and the obligations deriving from international instruments.[34]

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[23] *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.

[24] *Sunday Times v. the United Kingdom*, note 22 above.

[25] *Lingens v. Austria*, note 12 above, § 30.

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

[27] *Castells v. Spain*, note 21 above.

[28] Declaration on freedom of political debate in the media, adopted by the Committee of Ministers on 12 February 2004 at the 872nd meeting of the Ministers' Deputies.

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

[30] In the United States radio and television have from the outset been operated by private undertakings.

[31] *Groppera AG and Others v. Switzerland*, 28 March 1990, Series A no. 173, § 55.

[32] Ibid, § 60.

[33] It must also be taken into consideration that that the technicals aspects, like the "scarcity of spectrum argument" is no longer relevant.

[34] *Informationsverein Lentia and Others v. Austria*, 24 November 1993, Series A no. 276, § 32.

17. Changed views and technical process have drastically changed the media environment in recent decades. The position recognised in the "third sentence" of Article 10 has for a long time been understood as a justification for traditional broadcasting regulation in Western Europe, which always aimed at structuring the broadcasting order with positive measures.[35]

18. In recent years various authorities in media law have emphasised the need for a coherent regulatory framework for all news media,[36] because of new technology and changes in the market resulting from the vertical and horizontal convergence of different media. The printed press, which had been developing for centuries, was not seen as threatening democratic objectives until it was firmly established.

19. In *Informationsverein Lentia and others v. Austria*,[37] the Court ruled that to protect public opinion from manipulation it was not necessary to have a public monopoly in the broadcasting industry, reiterating the principle of the public's right to receive and that "such an undertaking cannot be successfully accomplished unless it is grounded in the principle of pluralism, of which the State is the ultimate guarantor".[38]

20. Undermining political pluralism, which along with the rule of law "forms the basis of all genuine democracy",[39] may constitute an infringement of Article 10. The state, being the ultimate guarantor of such diversity must intervene when monopolies prevent political change.[40] Broadcasting regulation within the member states that requires a fair portrayal of opposing political views is an attempt to guarantee such diversity.[41] Those requirements entail certain access quotas, in the form of the right to reply and/or the requirement of a fair portrayal of political

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35 W. Hoffman-Riem, *Regulating Media, The licensing and supervision of broadcasting in six countries*, Guildford Press, 1966, p. 278.

36 See E. Barendt, *Broadcasting Law:A comparative study*, Oxford University Press, 1995; H. Thorgeirsdottir, *Journalism Worthy of the Name: Freedom within the press and the affirmative side of Article 10 of the European Convention on Human Rights*, Martinus Nijhoff Publishers, Leiden/Boston, 2005.

37 Note 34 above.

38 Ibid., § 38.

39 Committee of Ministers, Declaration and Programme On education for Democratic Citizenship, Based on the rights and Responsibilities of Citizens (Adopted by the Committee of Ministers on 7 May 1999 at its 104th session).

40 *Informationsverein Lentia and Others v. Austria*, note 34 above, § 38.

41 Cf. Article 15 of the Icelandic Broadcasting Law No. 68/1985, which provides that the National Broadcasting Service (RUV) is an independent organisation owned by the state. According to Article 15 § 2 the RUV must observe the principles of democracy and human rights and freedom of speech and opinion. According to Article 15 § 3 it is to provide a general news service and be the sounding board for different views and topical matters of public concern. According to Article 15 § 4 radio programmes must be aimed at the diversity of Icelandic society and provide all the services technically possible and for the benefit of the people.

According to Article 9 of the General Broadcasting Act No. 5317/2000: Broadcasting stations must observe democratic principles in all their conduct. They must respect freedom of expression and present in their programmes diverse views in controversial matters. If, however, a broadcasting station has received its licence for the professed purpose of advancing a particular cause, it is exempt from the obligation of presenting views that go against this cause.

views. The printed press is exempt, however, from any such demands in domestic legislation.

21. Laws regulating media ownership and cross-ownership are intended to ensure pluralism and diversity of political views, while plurality of media outlets is not synonymous with diversity of political opinions. In a market economy advertisers tend to favour media outlets with mainstream views and which do not question the democratic threats that corporate power may pose to political processes.[42]

22. The maintenance of strong public service broadcasting is another way of ensuring that citizens have universal, equal and unimpeded access to broadcast content that is more impartial and less subject to commercial conditions than material offered by private media. The Committee of Ministers has emphasised the particular responsibility of public service broadcasters during times of elections.[43] The established perception of public service is that of informing, educating and entertaining the citizenry. The Committee of Ministers in a recommendation in 1996 stressed:

[T]he vital role of public service broadcasting as an essential factor of pluralistic communication, which is accessible to everyone at both national and regional levels, through the provision of a basic comprehensive programme service comprising information, education, culture and entertainment.[44]

23. The principles applying to public service broadcasting according to Council of Europe standards differ 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.[45]

24. Corresponding to the European "public service ethos" was the "Fairness doctrine" imposed by the Federal Communication Commission (FCC) on broadcast licensees in the USA, creating an obligation on them to cover issues of public importance. The US "Fairness doctrine", which was a model for the duties of balance and fairness set forth in some Western European countries such as Germany, did not prohibit broadcasters from editorialising, although it stipulated fairness in the coverage of programming, dealing with controversial matters of general importance.[46] The "Fairness doctrine" was contested as being unconstitutional in the well-known *Red Lion Broadcasting* case of 1969, where the Supreme Court of the USA declared that it was the right of viewers and listeners, not the right of

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42 See H. Thorgeirsdottir, note 14 above.

43 See Council of Europe Committee of Ministers Recommendation No. R (99) 15 on measures concerning media coverage of election campaigns.

44 Committee of Ministers Recommendation No. R (96) 10 of the Committee of Ministers to Member States On the Guarantee of the Independence of Public Service Broadcasting (Adopted by the Committee of Ministers on 11 September 1996 at the 573rd meeting of the Ministers' Deputies).

45 Parliamentary Assembly Recommendation (1641) 2004.

46 Hoffman-Riem, note 35 above, p. 34.

broadcasters, which was paramount.[47] In 1987 the FCC concluded that the "Fairness doctrine" was not constitutional as the technical scarcity rationale no longer applied. The "Fairness doctrine"' was used in an analogous way as the third sentence in Article 10 §1, which the European Court of Human Rights, despite the political environment in the early 1990s, said served other purposes than the exclusively technological.[48]

25. The internationalisation of the media market, deregulation and concentration of ownership result in the fact many public service broadcasters are struggling and their future is uncertain. 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 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".[49] The Assembly calls for 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 apparently an emerging consensus on the necessity of enhancing the role of public service broadcasting within the member states of the Council of Europe because of ownership concentration in the media market, as recognised in a recent report by the Parliamentary Assembly of the Council of Europe.[50]

26. The European Union confirmed the important contribution made by public service broadcasting to the democratic process in a Protocol to the Treaty of Amsterdam on Public Service Broadcasting, which submits that "the system of broadcasting in the member states is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism".[51]

27. Access rights have the same aim as regulation of media ownership, that is, of broadening the perspective within the media by opening it up to different viewpoints.[52] 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.[53] Diversity will not be achieved unless the media is balanced in representing the viewpoint of both genders, ethnic minorities and different social and economic classes. There are tremendous access disparities at

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47 *Red Lion Broadcasting Co. v. FCC*, 395 US (1969), 619.

48 *Groppera Radio AG and Others v. Switzerland*, note 31 above.

49 Parliamentary Assembly Recommendation (1641) 2004.

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

51 Treaty of Amsterdam signed on 2 October 1997, entered into force on 15 May 1999; it amended and renumbered the EU and EC Treaties.

52 See Recommendation No. R (99) 1 of the Committee of Ministers on measures to promote media pluralism (Adopted by the Committee of Ministers on 19 January 1999 at the 656th meeting of the Ministers' Deputies).

53 *Erdogdu and Ince v Turkey* [GC], note 12 above, § 54.

present that have an impact on the public debate. The media has been accused of not being representative enough by neglecting minority viewpoints.[54] Those with financial or political power usually have greater access to the media than those whose voices might make a difference for democracy, if heard.

28. The European Convention on Transfrontier Television includes a right-to-reply provision in Article 8 of the 1998 Protocol amending the 1989 Convention. Article 9 of the same Convention provides for the public's access 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.

29. 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 for ranking political debate higher than most other categories of expression. Democracy is implausible without plurality, broadmindedness and tolerance, its characteristic features.[55] While it is the duty of the contracting parties to the ECHR to take reasonable and appropriate measures to protect and ensure the rights and freedoms of the Convention, the national authorities have wide discretion in the choice of means to be used. Enforcing access to the media is theoretically and practically difficult.

30. Pluralism as a significant trait of political democracy signifies the freedom of political dissent. "The promotion of free political debate is a very important feature in a democratic society", as the European Court of Human Rights has emphasised.[56] The Court has submitted: "One of the principal characteristics of democracy is the possibility it offers of resolving a country's problems through dialogue, without recourse to violence, even when they are irksome. Democracy thrives on freedom of expression."[57] Pluralism in this sense is therefore not merely referring to the number of media outlets or the supply of diverse media material but to the diversity of views contributing to the operation of an effective political democracy. In a case against Turkey the Court said that "the domestic authorities in the present case failed to give sufficient weight to the public's right to be informed of a different perspective on the situation".[58]

31. One of the most difficult questions in relation to access to the political debate which takes place in the forum of the news media concerns 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 audio-visual

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

[55] *Handyside v. the United Kingdom*, note 26 above, § 49.

[56] *Feldek v. Slovakia*, note 10 above, § 83.

[57] *Socialist Party and Others v. Turkey*, 25 May 1998, RJD 1998-III, p. 1233, § 45.

[58] *Erdogdu and Ince v. Turkey* [GC], note 12 above, §42; Sener v. Turkey, 18 July 2000, RJD 2000-VIII, § 45.

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.[59] It is well established in Convention jurisprudence that Article 10 does not give a citizen or private organisation a "general and unfettered right" to put forward an opinion through the media unless in "exceptional circumstances".[60] 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.[61]

32. The former European Commission of Human Rights 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.[62] 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.[63]

33. The access of controversial political organisations to the media may be also be restricted if it is viewed as inciting violence against the state or other citizens. In the case of *Purcell v. Ireland*,[64] journalists and producers employed by Radio Telefís Éireann (RTE) complained that an order restricting live interviews with members of Sinn Féin 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 European Commission of Human Rights noted that the Irish broadcasting ban on live interviews with spokesmen of Sinn Féin, a legally existing organisation (albeit not denying that it was an integral part of the IRA, an illegal organisation), 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 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.[65]

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59 *Informationsverein Lentia and Others v. Austria*, note 34 above, § 38.

60 Application No. 25060/94, note 54 aboved.

61 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, note 54 above, p. 73; Application No. 9297/81, *X Association v. Sweden*, Commission's decision 1 March 1982, DR 28, p. 204.

62 Application No. 24744/94, *Huggett v. the United Kingdom*, DR 82-A.

63 Ibid., p. 101.

64 Application No.15404/89, *Betty Purcell and Others v. Ireland*, Commission's decision 16 April 1991, DR 70.

65 Ibid.

The Commission referred to the "immediate" impact of television as opposed to the print media and the limited possibilities of correcting or qualifying broadcasting material, as opposed to material in 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.[66]

34. The limited access to broadcasting has led to speculation 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 of 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.[67] Jörg Haider complained under Article 10 that the way in which the ORF (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.[68] 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*".

35. 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. ECHR case law, however, explicitly submits that it is incumbent on the print media as well as the audio-visual media[69] to impart information and ideas on matters of public interest, which the public has the right to receive.[70] In so doing the media must not overstep the bounds set out in paragraph 2 of Article 10, such as harming 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.[71] The positive requirements are usually not entrenched in legal codes and it is therefore difficult to show how they can be violated or brought under review.

36. The traditional thinking about rights, which has predominantly concerned the relationship between the individual and the state, is based on the traditional

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66 Ibid.

67 D. Gomien, "Pluralism and Minority Access to the Media" in Rosas and Helgesen (eds), *The Strength of Diversity, Human rights and pluralist democracy*, Kluwer Law International, 1992, p. 50; J. Donnelly and R. E. Howard, "Assessing National Human Rights Performance: A theoretical framework", 10 Human Rights Quarterly, 1988, p. 51.

68 Application No. 25060/94, note 54 above.

69 *Jersild v. Denmark*, 23 September 1994, note 23 above, § 31.

70 *Observer and Guardian v. the United Kingdom*, note 13 above, § 59.

71 OSCE Guidelines Draft as of 8 June 2004, p. 13. This problem is evoked on p. 13 of these draft guidelines without any further elaboration of it in the context of the legal standards discussed in Chapter 1 of the draft guidelines.

assumption that human rights instruments are intended to erect barriers between the individual and the state.[72] This view is gradually changing.

37. Whatever the amount of financial pressure on the media, the mere presence of the power of the business community and the unclear division between it and the political sphere is a reminder that at the dawn of the twenty-first century there are much more complex ways of "interference" not covered by legislation than existed 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[73] as well as abuse by government. The media's struggle 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 powerful political and economic interests.[74] The problem is that this situation, albeit widespread, is not justifiable since the violators are not operating within a legal framework. The law does not extend to the actual threat of insidious economic and politic pressures. The Convention was adopted to protect individuals from state violations 50 years ago. Now large corporations, through the process of privatisation and globalisation, have in many respects replaced authorities with regard to the impact they have on individual life in society.[75]

38. The International Federation of Journalists describes the situation in the world at present in these words:

Public concern about corporate and political dominance over media and information services is greater than ever. Confidence among readers, viewers, listeners and users of information is low and there is an increasing perception that journalism is failing to carry out its watchdog role in society because of the vested interests that drive the media business. Not surprisingly, politicians are worried, too. The media concentration process has paralysed policy makers and it is time to stimulate fresh debate and prepare concrete actions to confront the challenge of corporate power in mass media."

39. Access to private media today, when dominant media firms and economically powerful actors are in a position to exclude other actors from exercising their fundamental rights, may be of public concern. States are not permitted to delegate functions to private persons in such a way that fundamental rights are undermined by, for instance, widespread "privatisation". The Court has repeatedly pointed to the potential positive obligations inherent in the Convention

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72 K. Klare, "Legal Theory and Democratic Reconstruction" in 25 *University of British Columbia Law Review* 69, 1991, at p. 97, excerpts in H. J. Steiner, H. J. and P. Alston, *International Human Rights in Context*, Clarendon Press, Oxford, 1996, pp. 177-79.

73 Not excluding newspapers.

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

75 The UN Agenda for Democratization (GA A 51/761 20 Dec 1996) states in § 96: "Business and industry today has more power over the future of the global economy and the environment than any government or organisation of governments. Transnational or multinational corporations in particular, which are today estimated to be 40,000 in number, controlling some 250,000 foreign affiliates worth approximately USD 2.6 trillion in book value and accounting for some one-third of world private-sector assets are playing an extremely important role in economic development."

guarantees on the basis of Article 1 of the Convention: that the responsibility of the state might be engaged as a result of not observing its obligation to enact domestic legislation.[76]

40. The recent case of *Appleby v. the United Kingdom* touches on the right of access of individuals and groups in society to express their political views in conditions where a private party occupies what can be termed a quasi-public space – analogous to monopolistic media. The applicants in this case, members of an environmental group, alleged that they had been prevented from meeting in the town centre, a privately owned shopping centre, to impart information and ideas about proposed local development plans. They claimed that the state was directly responsible for the interference of their freedom of expression and assembly as it was a public entity that built the shopping centre on public land and a minister who approved the transfer into private ownership.[77] The applicants argued that the state had a positive obligation to secure the exercise of their rights within the shopping centre. They argued that the shopping centre must be regarded as a "quasi-public" space and that the views they wanted to communicate were of a political nature, requiring the greatest level of protection. The Court held that the government did not bear any direct responsibility deriving from the fact that a public development corporation transferred the property to the private owner or that this was done with ministerial permission.[78] The Court explicitly acknowledged that the issue to be determined was whether the government had failed in any positive obligation to protect the exercise of Article 10 rights from interference by others, in this case the owner of the shopping centre. Although freedom of expression is an important right, it emphasised that regard must also be had to the property rights of the owner. The Court sought guidance from US jurisprudence and concluded that there was no emerging consensus concerning this problem that could assist the Court in this case concerning Article 10, stating:

That provision, notwithstanding the acknowledged importance of freedom of expression, does not bestow any freedom of forum for the exercise of that right…Where however the bar on access to property has the effect of preventing any *effective exercise* of freedom of expression or it can the said that the essence of the right has been destroyed, the Court would not exclude that a positive obligation could arise for the State to protect the enjoyment of Convention rights by regulating property rights. The *corporate town*, where the entire municipality was controlled by a private body, might be an example.[79]

41. The conclusion to be drawn from this recent case law is that the state must ensure that there are effective safeguards to prevent powerful private parties who have acquired an extremely strong position from destroying the fundamental rights of others. This principle applies in particular with regard to barring access of others during election periods when it is crucial that the public is exposed to opposing

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[76] *Vgt Verein gegen Tierfabriken v. Switzerland*, 28 June 2001, RJD 2001-VI, § 45, citing *Marckx v. Belgium*, 13. 6. 1979, Series A no. 31, § 3; *Young, James and Webster v. the United Kingdom*, 13 August 1981, Series A no. 44, § 49.

[77] *Appleby and Others v. the United Kingdom*, 6 May 2003 (not yet published).

[78] Ibid., § 41.

[79] Ibid, § 47, quoting *Marsh v. Alabama*, 326 US 501 (1946). Emphasis added.

political views. The Court held in this particular case that other methods were available to the applicants and having regard to the nature and scope of the restriction in this instance it did not find that the government failed in any positive obligations to protect the applicants' freedom of expression.[80] The Court's approach does not free the state from interfering if powerful private parties are suppressing fundamental rights, as the Court did not exclude that a positive obligation could arise for the state to protect the enjoyment of Convention rights by regulating property rights.[81] In a partly dissenting opinion, Judge Maruste emphasised the importance of judicial authorities acknowledging the indirect responsibilities of the state, submitting: "It cannot be the case that through privatisation the public authorities can divest themselves of any responsibility to protect rights and freedoms other than property rights".[82]

42. The positive obligation case law is gradually growing to provide genuine benefits to the 800 million people within the jurisdiction of the European Court of Human Rights. The Court takes into consideration the fact that the scope of the obligation will inevitably vary, given the diversity and situations present in contracting states, the difficulties involved in fine-tuning modern societies and the choices which must be made in terms of priorities and resources.[83] Nor must such an obligation be interpreted in such a way as to impose an impossible or disproportionate burden on the authorities.[84] The margin of appreciation grants states this scope as the member states' parliaments have the major responsibility for regulating changes in controversial social, economic and political matters. It is their task to achieve the results called for by the Convention.

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80 Ibid, § 48-59.

81 Ibid., § 47.

82 Ibid., Judge Maruste partly dissenting.

83 *Özgur Gündem v. Turkey*, 16 March 2000, RJD 2000-III, § 43.

84 Ibid., § 43, citing *Rees v. the United Kingdom*, 17 October 1986, Series A no. 106, § 37; *Osman v. the United Kingdom* [GC], 28 October 1998, RJD 1998-VIII § 116.

METHODS FOR MEDIA ANALYSIS IN ELECTION OBSERVATION

Ms Giovanna MAIOLA
Osservatorio di Pavia

The role played by the media within the electoral process is crucial and widely acknowledged; in spite of differing views and theories on the effect of media coverage on voters' choices, there is a general consensus on the fact that the media, particularly television, constitutes an essential factor within the electoral framework with regard to three main areas:

- the right of access and coverage for candidates, that enables them to reach wide audiences and inform the electorate about their political platforms;
- the right of voters to receive information concerning political alternatives, giving them the opportunity to make an informed choice;
- the right of journalists to cover the election campaign, to raise issues, to discuss problems and to propose alternative views to their audience.

In this perspective, media coverage of the election campaign should be able to reach a balance between this set of intertwined, and sometimes conflicting, rights. The basic principle of pluralism represents here a key to understanding why a growing number of international resolutions and declarations identify fair and balanced media coverage as one of the conditions for democratic elections:

The Committee of Ministers…noting the important role of the media in modern societies, especially at the time of elections; stressing that the fundamental principle of editorial independence of the media assumes a special importance in election periods; aware of the need to take account of the significant differences which exist between the print and the broadcast media; underlining that the coverage of elections by the broadcast media should be fair, balanced and impartial; considering that public service broadcasters have a particular responsibility in ensuring in their programmes a fair and thorough coverage of elections which may include the granting of free airtime to political parties and candidates; Recommends that the governments of the member states examine ways of ensuring respect for the principles of fairness, balance and impartiality in the coverage of election campaigns by the media, and consider the adoption of measures to implement these principles in their domestic law or practice where appropriate and in accordance with constitutional law.[1]

The centrality of the media is acknowledged with regard to a number of areas: defining the public image of candidates, shaping perceptions on political alternatives as well as providing a public forum for the exchange of opinions, confrontation and

[1] Council of Europe, Committee of Ministers, Recommendation No. R (99) 15 of the Committee of Ministers to Member States, on Measures Concerning Media Coverage of Election Campaigns (Adopted by the Committee of Ministers on 9 September 1999 at the 678th meeting of the Ministers' Deputies).

criticism. In this context the analysis of media coverage in the electoral context is a common practice in a number of countries. Media monitoring represents the main instrument used to observe how the media reports on candidates and the election campaign. In this regard media monitoring has become a widespread exercise and national regulators, international election observation missions as well as non-governmental organisations (NGOs) regularly undertake media monitoring projects in order to assess:

- whether political parties and candidates receive fair access in the media;
- whether political parties and candidates are covered in a balanced and not prejudicial manner;
- whether the media and the authorities comply with both the national normative framework regulating the campaign and the international obligations of which the country is a signatory;
- whether the public was enabled to receive correct and sufficient information to make a decision on election day.

In spite of this, media monitoring alone is not sufficient to provide the relevant information necessary to define a comprehensive assessment of the coverage. As a matter of fact, the content of media coverage is often shaped by two main elements, namely the degree of journalists' independence from the political – and sometimes economic – power and the legislative framework governing media activity, particularly with regard to the period leading up to elections.

As a consequence, in every project of media analysis, particularly in the context of international observation missions, the adoption of methodological approaches able to guarantee the utmost reliability and completeness of findings is crucial to ensure credible and trustworthy results This paper aims to illustrate the methodologies commonly used in election observation missions with regard to media analysis as well as to define guidelines and best practices for studying the media coverage; it also illustrates the challenges to the observation of the media posed by the new media environment and evolving technologies applied to communication.

Election observation: what is media analysis?

Media analysis can be defined as a set of interlocked areas of study whose main aim is to produce an overall evaluation of media coverage of the electoral process – in terms of both candidates and electoral issues; more generally, media analysis is intended to serve as a tool for assessing the media system's degree of autonomy from the political system, the level of diversity among the different media outlets (external pluralism) and the balance displayed by each media outlet when covering contestants (internal pluralism).

The degree of autonomy of the media system from the influence of governing officials and political parties needs to be evaluated while considering the autonomy the media outlets have when choosing their editorial policies. The degree of autonomy may be the outcome both of the level of pressures journalists have to face and of the body of laws and regulations on the media. The level of diversity among media outlets indicates how heterogeneous the media landscape is, in terms of the number of diverse media actors operating in the media system, both public and

private, but also in terms of ownership of assets and orientations presented to the public.

Any assessment of media behaviour during an election campaign should consider the media system as a whole, in order to give an answer to some key questions. In particular, any media analysis should produce an evaluation on the basis of some fundamental questions based on two main principles laid down in international standards:

The right to receive information

- Did voters receive sufficient accurate information from the media to make an informed choice?
- Had voters the possibility of getting access to a variety of sources of information with different points of view?
- Did the media provide the voters with sufficient information on the election administration and voting procedures? Were voter education programmes sufficient to effectively and accurately inform the electorate about the voting process?
- Did the public/state media comply with their obligations to inform the public on relevant issues of the electoral process?
- Were the provisions, as set out by the national legal framework (in relation to opinion polls and electoral "blackout" period), respected by the media and the political parties?

The right to impart information

- Repression: did the media face any kind of censorship or obstruction by the authorities?
- Pressures: did the media face any kinds of interference with their editorial policy from political parties and public authorities?
- Were election contestants and political parties able to present their candidacies and platforms to the electorate through the media?
- Did election contestants and political parties have equal access, on a non-discriminatory basis, to the public-/state-owned media?
- Did election contestants and political parties have fair treatment by state-owned or public media?
- Were election contestants and political parties subjected to the same conditions (rates, time, etc.) as for paid-for advertisements?
- Were the different kinds of TV programmes (such as news programmes, debates, free airtime, paid-for political advertisements, etc.) biased and, if so, in favour of whom?
- Did the private media comply with the obligations as set forth in the national legal framework?
- Did the private media provide the public with coverage of the election campaign and election-related issues? If so, were they impartial? If biased, did they favour the ruling party in government or any other political party?

In order to give a credible and reliable answer to all these questions media analysis resorts to different methodological approaches applied to three different fields of investigation:

1. The documentary analysis, used for the examination of the legal framework for the media. The laws regulating the media are a central element, moulding their activity and status in a given context. Some documents should always be reviewed through a documentary analysis:

- the constitution;
- media law(s);
- other laws within the civil and penal code that can affect the media;.
- the election law;
- rules and regulations on media coverage issued by the election administration;
- rules and regulations issued by the media regulatory bodies;
- self-regulation instructions drafted by associations of journalists or similar organisations.

The legal analysis should be undertaken with two different objectives: first and foremost, to verify the external consistency, namely the compliance of the legislative framework with international standards and commitments in the realm of freedom of the media, freedom of the press and elections. Second, to ascertain the internal consistency, namely the harmony and the coherence of the overall body of different laws and regulations on media.

A detailed acquaintance with the norms relating to the media and elections in a country is also necessary to assess whether media outlets and political actors respected the provisions set forth for the election period.

2. The field research, applied to the observation of the media landscape. The analysis of the media landscape of a country, including the observation of the political environment, represents the precondition for any consideration on the relationship between the media and the political system, any interpretation being potentially misleading when taken out of context. Contextual methods enable the media analyst to understand the phenomenon in its historical, political, social and cultural environment. In this regard, the methods of field research and qualitative interviews are suitable for:

- obtaining specific knowledge not retrievable through other quantitative techniques,
- exploring the context of the observation in order to set an appropriate research design for media monitoring,
- validating the results obtained through other quantitative techniques and facilitating their interpretation.

The election process does not take place in a vacuum, therefore the environmental conditions need to be carefully investigated. Media analysis needs to take into account contextual data such as the description of the media landscape; the number of electronic and print media outlets operating in the country; the typology of the

public-/state-owned media; the number of licences issued at national and local level; the number of pirate stations operating in the country; the geographical coverage of the existing media; the audience and readership ratings of the media, when institutional or professional surveys are available; the hours of broadcasting or frequency of publication for every media outlet; the dimensions of the media companies, in terms of employees and collaborators; the kind of media, targeted audiences and their potential impact on the public; the number of media outlets specifically dedicated to specific ethnic/linguistic minorities present in the country; the economic conditions of the media, the general market, the presence of specific subsidies or tax breaks; the structure and transparency of ownership (concentration versus variety); the number and ownership of news agencies and printing houses; the structure and control of the distribution system for print media; licensing requirements for broadcasting media; any kind of link or overlap between political actors and media outlets.

Some of this information can be obtained by reviewing official documents of the state, reports on the media environment produced by universities, associations of journalists, international organisations, local or international NGOs or other active groups in the media field. Other information can be retrieved by meetings with representatives of the media and other experts. For this purpose, the media analyst usually interviews some key actors and stakeholders, including:

- institutional actors, as members of the ministry of information and/or telecommunications, state committees on the press, bodies in charge of media-related issues within the central election commission, special committees on media, broadcasting councils, etc.
- representatives and associations of print and electronic media, i.e., directors, editors-in-chief, prominent journalists, representatives of news agencies, publishing and printing houses, unions of journalists, etc.
- national and international associations (governmental or non-governmental) operating in the media sector, i.e., all the active groups permanently or temporarily based in the host country.

Qualitative interviews of journalists usually touch on key aspects of the campaign such as election-related issues; journalists' opinion on the regulations of media coverage during the elections; journalists' editorial policies for election coverage; the kind of programmes electronic media outlets are planning for covering elections; the allocation of airtime (free or paid) to candidates; the rules regulating paid-for advertisements and what rates are applied; any internal code of conduct or instruction for journalists for covering election events; any complaints from political parties and candidates received by the media.

Another crucial part of the study of the media context is represented by the recording of all the relevant events affecting – actually or potentially – freedom of expression for candidates and the media. In this regard, it is essential to observe whether the media outlets experiences any impediments or obstructions to their activity, whether they face any kind of direct or indirect censorship, or direct or indirect pressures from authorities or their owners.

3. The content analysis applied to media monitoring of the election campaign. In general terms, media monitoring can be defined as a technique of scientific observation based on qualitative and quantitative analysis of media content. When undertaken in the context of election observation, it aims to study and produce reliable information about political and electoral communication in the media; if correctly structured, this technique enables the production of credible results and it represents a way of studying the production and the performance of the media in an objective and impartial way. In addition, media monitoring constitutes a tool for promoting basic rights related to freedom of expression and the right to participation in public life. Through quantitative and qualitative techniques, media monitoring serves to produce results related to the coverage of political actors and groups; the quality of their coverage; the main bias related to their coverage; the subjects of the campaign; the civic education made available to voters; and any infringements of the relevant laws regulating and protecting the media. Also, findings and conclusions of media monitoring may have an influence on the awareness and behaviour of four main target groups: regulatory bodies controlling media activity; politicians and candidates; citizens, voters and civil society associations; journalists and media professionals.

Media monitoring: what to observe and how?

The first step in a media monitoring project is choosing the sample, that is, the process of selection of the body of analysis: which TV channels and radios will be monitored, which newspapers, the period and the time slot for monitoring the electronic media. The need to select a sample derives from the normal limits of resources available for such projects; however, when properly defined, a sample can provide reliable information on the general trends of the media coverage. A good sample can be obtained by considering both the purposes of the analysis and the characteristics of the media outlets. Information concerning the media environment is therefore crucial in order to undertake a number of choices related to:

- the number of monitored media. In order to have comparable data, once the sample has been set, it is important to stick to it and not to modify it during the course of the observation period;
- the time band of observation for the electronic media; the basic period to be monitored for TV and radio stations is during prime time (6 p.m. to 12 midnight for TV and 7 a.m. to 12 noon for radio) when audiences are normally largest. The selection of the time slots to be monitored may vary from country to country according to the specific programme schedules and the rules regulating the campaign on the media. Whatever time band is chosen, however, the observation should not be limited to news programmes but should always include all programmes broadcast in that time band. Debates, informative programmes, free airtime, and entertainment shows may all have a relevant role in shaping the opinions of the electorate as regards candidates and parties, and therefore it is important to monitor how the time is allocated among contestants even in these kinds of programmes. In addition, many regulations also provide for controls over the access of politicians for programmes outside the news category. Only by observing all types of programmes within the chosen time frame is it possible to record these kinds of breaches of the law.

- The type of media outlets that will be monitored. Criteria for choosing media outlets should take into account their ownership: publicly owned media outlets have stronger obligations than private ones as they are financed with public funds and therefore they should not be partisan in their coverage. Therefore the observation of state or public media is a priority as it is generally bound by more burdensome obligations. The main private electronic media outlets should be also included, chosen on the basis of their geographical range, audience and potential impact on voters. With regard to the press, all the most important national dailies should be monitored, selected on the basis of their geographical range, readership and potential impact on voters. In those localities where ethnic or cultural diversity is reflected in different targeted media, it might be advisable to monitor also minor media outlets which might have a limited general influence but nevertheless have a considerable penetration and impact on minority groups. This might also be the case for some newspapers which target political or social elites and have small print runs but which are influential in the broader media community.
- The duration of the observation. The period of observation is another important factor: the pre-election period as well as the election campaign should be fully monitored. When resources are not enough to afford this (in some cases the pre-election period and election campaign last more than three months), the monitoring should continue for a period long enough to produce meaningful observations that can be generalised to reflect trends over the entire period.

In synthesis, the criteria that should be followed in the selection of the sample for quantitative and qualitative analysis can be summarised as follows:

Table 1 Outline of the criteria to define a sample for media monitoring

Criteria for	Electronic media	Print media
Choice of media outlet	Geographical range Audience/readership Circulation Influence Target public/Penetration Ownership	
Choice of time slot/page	Largest audience time slot Type of programme: all programmes within the chosen time slot	All pages

A second step is choosing the methodology. One of the most controversial areas within media monitoring relates to the different kind of methodological approaches that can be adopted, namely quantitative measures versus qualitative observation. The quantitative approach – the outcome of which are statistics – is usually

perceived as more objective and more "scientific". Nevertheless, numbers alone risk being misleading when not supported by qualitative remarks able to provide a more in-depth comprehension of the findings. Therefore, media monitoring is usually structured along two complementary levels, a quantitative phase and a qualitative one.

With regard to the quantitative analysis it is important to establish clearly what media monitoring is supposed to observe; in other words, what is the research interest in this kind of study? In this perspective the reference to the legal framework – both the national legislation regulating media and the international standards for freedom of expression and elections – is paramount for defining what should be observed and how. Generally the normative frame tends to focus on two main areas:

- provisions/recommendations related to a quantitative aspect, in order to guarantee that media outlets provide a certain amount of coverage for political parties and candidates, in the form of either direct access or indirect coverage. In this regard, the quantitative approach is a valid tool for assessing whether media outlets complied with this kind of obligation;
- provisions/recommendations related to a more qualitative aspect, namely the observance of criteria of fairness, balance and objectivity on the part of the media covering political parties and candidates. This second aspect is usually more problematic to analyse, given the risk of a high level of subjectivity; for this reason a quantitative approach is often seen as the most appropriate way to avoid distortions and biases deriving from individual perceptions. Nonetheless, the complexity of this matter makes it impossible to rely on statistic alone to provide an exhaustive description of the phenomenon: in simple terms, once we say that subject "A" was covered in a negative manner for 30 minutes, we need also to be able to explain why and in which context. It is therefore useful to complement the numeric data with more qualitative remarks organised in a structured model.

Those two areas – coverage/access and fairness/objectivity – represent the core elements to be observed by media monitoring. In this perspective the nature of a media monitoring project can be summarised by some questions related to the communication process that are then translated into variables:

Table 2 Outline of the basic questions asked in quantitative analysis

Quantitative analysis	
WHO	Relevant actors
WHERE	Media outlet, programme, kind of programme, page, etc.
WHEN	Day, start time, end time, time categorised
HOW MUCH	Calculation of: time/space direct speech/interview space
WHAT	Subjects of communication
HOW	Tone of coverage

All these variables constitute the basis for the quantitative analysis of the election campaign in the media: for every media outlet a number of different programmes – or articles in the case of newspapers – are monitored, direct access and coverage of political actors are measured in each programme/article, the tone of the coverage is calculated according to a numeric scale, the subject of the coverage is coded. This part of media monitoring is therefore exclusively quantitative and it produces numeric data regarding the internal pluralism achieved by each media outlet. More in detail, the basic elements observed in this kind of analysis are the following:

- the genre of programme/kind of article used to cover political actors and parties;
- the position of the programme/article;
- the political actors, i.e., those individuals or collectives with a political role, a governmental role, a role within parties or within political forces;
- the gender of the political actor;
- the time/space of coverage, i.e., the measure – seconds or square centimetres – of the coverage received by an actor;
- the time/space of access, i.e., the measure of an actor's direct access;
- the subject, i.e., the topic the political actor covers;
- the tone, measuring the quality of the coverage received by the political actor.

The qualitative analysis completes the statistical results, thus permitting a better understanding of the overall media performances. This kind of analysis also aims at describing situations and phenomena for which quantitative analysis is not necessary but that are relevant for assessing the general profile of the media coverage of the campaign. Specific elements are normally taken into account such as the reporting of opinion polls, the coverage of exit polls for those countries where voting takes place in different time zones, voters' education, the respect for the electoral blackout period , episodes of hate speech and inflammatory language, the journalistic style of the media outlets, the professional conduct of journalists and any instances of news omissions. Other areas of investigation include the analysis of the formats used to

cover the elections, the coverage of election administration, the advantage held by the incumbent government and the agenda of the media outlets.

Table 3 Outline for qualitative analysis

Qualitative analysis	
Media outlet to be observed	All the media monitored in the quantitative analysis When necessary, some of the media outlets not included in the sample of the quantitative analysis, or influential foreign media
Elements to be observed	Opinion and exit polls reporting Respect for election blackout Voters' education campaigns Hate speech and inflammatory language Journalistic style and professional standards Style of the formats used to cover elections Coverage of the election administration Advantage held by the incumbent government News agenda Violations of provisions for media coverage

Media analysis: assessing the results

The interpretation of data is a crucial step: numbers and qualitative observations are assembled into findings and conclusions in order to describe media coverage and to give explanations of its performance. In this regard, it is important to evaluate the numeric data, taking into account contextual information, too: the legal norms regulating media during election – both national laws and international standards – are a fundamental framework for interpreting findings. The party system, the political context, as well as the relative importance and status of the media outlet monitored, constitute other elements that have to be considered when drafting conclusions. In addition, qualitative findings represent a very useful integration of statistical data. The reasons for a certain trend, a specific value found, a meaningful variation of data can often be explained thanks to the support of the structured qualitative analysis undertaken during the monitoring.

It is also worth mentioning that media outlets have different kind of responsibilities, according to their ownership, their nature and their scope. Traditionally the press is subject to less stringent obligations in terms of political pluralism than the broadcasting media. In fact, it is possible to define a hierarchy in the control on the media exercised by public authorities and the subsequent obligation imposed upon them: the public broadcasting service is traditionally the subject of the most stringent regulations in terms of election coverage. Given the assumption that the public media has a legal and moral obligation to serve the interests of the general public, it is in particular incumbent on state-/publicly owned media outlets to observe even more rigorous criteria, since they belong to all citizens. There is unanimity on the idea that publicly funded broadcasters should provide a complete and impartial picture of the political spectrum in the coverage of an election, given

the mission of such broadcasters, which is to serve the public and offer a diverse, pluralistic and wide range of views at all times, especially during election periods.

Private broadcasters – especially television stations – are generally asked to comply with certain obligations (particularly during the election campaign). The licence they are granted may set out some of these obligations in relation to news, information and current affairs programmes and voter education. In any case, the informative relevance of private broadcasters in the election campaign will depend on the importance – in terms of penetration, coverage and audience – of the public broadcasters. The models adopted to impose obligations with regard to electoral coverage on private broadcasters are diverse, ranging from high levels of regulation to "soft touch" approaches or self-regulatory measures.

A different approach is applied to the press, traditionally conceived as an independent source of information, an adversary of the authorities, and acting as a watchdog with regard to the government. Private print media outlets are generally entitled to a greater degree of partisanship and "unfairness" than the publicly financed press and the broadcasting media. As a consequence, they have the right to have their own political agenda as well as the right to be critical towards politicians. In addition, the general practice of self-regulation adopted by the print media can be interpreted as the need for the press not to be bound by rules set by external bodies and to be responsible itself for its editorial choices. Therefore, even during the election period, the print media usually has fewer obligations to adopt a balanced approach to candidates and political parties and consequently it is subjected to less stringent regulations than electronic media.

Open questions: the Internet and the transnational broadcasters

Media monitoring has been so far an effective, credible and reliable tool for observing media in the election process. Applied to traditional media – television, radio and the press – it served as a scientific basis for assessing media performance and for promoting the principle of equal opportunities among political contestants as well as the principle of freedom of the press.

One of the main challenges that media analysis, and more particularly media monitoring, has to face is related to the growing importance of new media in the framework of democratic processes and political communication. In this regard, two kinds of media reveal a particular relevance for the electoral process, the Internet and satellite television and radio.

The Internet has certainly increased the possibilities for informing a larger section of the population by rendering it a more active subject in the reception and production of political news and opinions. The wider information uses of the Internet remain limited although the future potential is enormous. The digital divide – the lack of penetration of new technologies in a large part of the world, as well as people's differentiated access to these technologies because of cultural and economic factors – is still an undeniable obstacle to a constant and generalised use of the Internet. In addition, so far, political parties and candidates have scarcely exploited the potential of the Internet to communicate with voters and achieve consensus through this means in an electoral campaign. The traditional types of media, particularly

television, are still the main channels used to convey information and messages to the electorate even in western countries. However, on many occasions the Internet may, regardless of its range and accessibility, play a significant role during election periods. A potentially controversial issue concerns the role and obligations of the Internet in the electoral process and how the normative framework should be imposed on websites, particularly with regard to election blackout and opinion polls. The matter is the core topic for a wider debate concerning the degree of freedom the Internet should enjoy and the extent to which regulations can realistically be applied to this medium. Generally, any control over the freedom of Internet users and publishers is regarded with disfavour, since the World Wide Web is a pluralistic and unlimited media environment accessible by everyone. Therefore the Internet remains largely unregulated and many argue that it is neither possible nor desirable to regulate it. In spite of these problematic issues, the Internet does represent a potential that in future could drastically change the possibilities for accessing and disseminating information for voters, candidates and parties. In this perspective it is of the utmost importance to reflect whether it is possible to undertake any reasonable media monitoring exercise over websites and, if so, what are the most reliable and appropriate methods of conducting a content analysis.

With regard to satellite broadcasters, the problem emerges in relation to those foreign digital channels that have a relevant impact on the electorate both in terms of audiences and in terms of trustworthiness. In fact, particularly in those countries where the media system is under the tight control of the political authorities, transnational broadcasters are the only source of alternative and independent information. One of the best examples of this phenomenon is the role played by Al-Jazeera and Al-Arabia in the Middle East. This kind of supranational media can turn into a crucial actor within the electoral process, representing one the major resources in terms of political communication. In this regard, when undertaking media monitoring in relation to such broadcasters, it is difficult to identify any certain legislative ground to evaluate the findings, because these channels are not bound by the various laws operating in the countries where elections take place; nonetheless their influence and their credibility make them the principal channel through which the electorate gathers information concerning political alternatives. It then becomes crucial to start thinking, both at theoretical and operational level, of the possible alternatives in terms of observation as well as the kind of obligations – moral or professional – they should be subjected to.

Conclusions

Media analysis and particularly media monitoring has become a key and standardised element in the framework of international election observation missions, adopted by a number of international and regional organisations. It serves as a reliable and objective means to gather information concerning media coverage of the elections and at a wider level it offers a better understanding of the media system of a specific country.

The main issue related to media monitoring concerns the choice of methods to be adopted; received wisdom suggests that a combined approach, balancing quantitative and qualitative aspects, represents the most effective and reliable option. The multi-method approach, bringing together content analysis, qualitative

interviews and documentary analysis, has proved to be a valid instrument for investigating the performance of media outlets and the environment they operate in.

One of the most interesting areas for media monitoring is represented by new media and in this regard researchers and practitioners should carefully reflect on how to observe outlets in this category, their role in the public sphere and in the electoral process and the kind of obligations they should be required to comply with.

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FINANCING OF ELECTORAL CAMPAIGNS

Mr Hans-Heinrich VOGEL
Professor of Public Law, University of Lund

Introduction: Needs and demands to finance electoral campaigns

1. Democracy is expensive – especially during electoral campaigns – both for individual candidates and for political parties. Both candidates and political parties need funds for their work. These funds have to be acquired, and they will be spent, and that – both acquisition as well as expenditure – must be both done and accounted for in an orderly manner. How can that be achieved?

2. A political party's activities – during electoral campaigns or otherwise – are usually supposed to be financed by private funds or public funds or a mixture of both. But whatever the funding system, the receiving party is not entirely free to handle the funds. It has to observe certain very basic rules.

3. Private funds – mainly membership fees or donations – are the traditional and oldest source of income for political parties, but they are a very delicate source. On the one hand every citizen must have the chance to take part in the work of a political party as a paying member and contribute to the party's costs with his or her membership fee; or at least every citizen should have the possibility to assist a political party by making a donation to it. This is necessary for the sake of the functioning of every democracy. On the other hand no one should be able to use membership fees or donations as a means to buy political influence.

4. Public funds have nowadays to a large extent replaced private funds as the main source of income of political parties. One of the reasons for this has been that states, by providing public funds, try to avoid the drawbacks of excessive private funding. But democratic states, while spending public funds – i.e., the money of their citizens – have to abide by policies of financial transparency. Such funds, therefore, have to be accounted for, and their use has to be subject to control by specific public organs, for example by a Court of Audit or a specialised supervisory authority with appropriately comprehensive competence.

5. Any individual political candidate who has to finance an electoral campaign has to obey similar rules. Such a candidate is not free to acquire private or public funds. Acquisition of private donations must not be interpreted as a means of selling political influence if the candidate is elected; donations must be given without any strings attached. Acquisition of public funds – which usually will be available only through the political party of the candidate – may establish a bond between the party (and even the decision maker within the party) and the candidate. But if voted into office the candidate will have to disregard any such bond in order to comply with the general rule that as an elected member of parliament, elected

official, etc., he or she must not take orders and will have to vote according to his or her conscience only.

6. So it is obvious that many aspects – acquisition of funds as well as expenditure, accounting and supervision – have to be taken into account when it comes to regulating the financing of electoral campaigns by political parties and individual candidates. And lawmakers' initiatives in this field of law have to be prepared with special regard for the fact that any regulation may deeply affect fundamental elements of democracy.

7. In many countries the main legislation governing the funding of political parties was adopted only during the last few decades, that is, rather recently. As a result, there is still fairly little case law – in particular from constitutional authorities – in this field, and public authorities rarely take any steps to clarify what may not be clearly regulated in existing legislation.

8. This indifference on the part of public authorities in a majority of European countries has had harmful consequences. Ambiguity or outright lack of rules meant that more or less anything was permitted. As political parties clearly could not survive merely on the funds raised through the collection of membership fees and as no, or insufficient, public funds were provided, each party had to find its own expedients. Therefore, in several countries the outcome was reliance – sometimes widespread reliance – on dubious, undercover financing practices. In quite a few instances these practices have led to the prosecution and conviction of party leaders and party treasurers who had resorted to unlawful fund-raising practices in an effort to obtain at all costs the financial means vital to their parties' activities. Very spectacular examples can be found in scandals in Italy, Germany, France and Denmark, among other countries, not all of which have yet come to a final conclusion in the courts.

9. Almost everything a political party does costs money. Money inevitably leaves a paper trail when it is moved. If you can follow the trail of moving money to, within and from a political party you will be able to find out almost everything about its actions. A systematic analysis of a party's handling of its funds can therefore reveal information about the party's doings that cannot be obtained elsewhere.

10. But no political party cherishes the notion that outsiders can get more or less free access to information about its past, ongoing and planned actions. Every political party wants confidentiality, and should be granted some. But its members, staff and candidates usually put pressure on party treasurers to achieve more confidentiality than is legally acceptable.

11. Every treasurer of a political party therefore always has to deal with two demands from the party:

- Get more money; and
- Guarantee greater secrecy.

This leads us to the dark side of financing political parties and electoral campaigns.

The dark side of financing electoral campaigns

12. The scandals in Italy, Germany, France and Denmark have had a common denominator: party treasurers or other leading individuals within certain political parties in these countries could not resist the pressure from within the party; they designed systems that could generate both more money and more secrecy than the law permitted.

13. In all cases, the basic idea was to clandestinely sell unspecified influence, undue advantages. But how could a political party get money in return without anyone noticing even if looking closely?

14. The methods the party treasurers and others used to get "their" money were very uniform, and – astonishingly – they were very often quite unsophisticated. And even more astonishing was the fact that the systems were in place and running for a long time – in top gear and with many people involved during electoral campaigns, less so in between campaigns, but nevertheless continuously.

15. One method was to sell for cash. Cash can be received and used without a paper trail; secrecy can therefore be achieved. But this is possible for small-scale transactions only – at the level of the "brown envelope". Cash in large amounts – suitcases containing the legendary 100-dollar bills – is too difficult to handle.

16. Another method has been to use public procurement, preferably of public construction projects – the bigger the better: administration buildings, an underground transport system, a waste-processing system, a sports stadium.

Any such scheme was usually started by placing civil servants loyal to the political party in government in key positions where they could exert influence on decisions regarding the award of procurement contracts. These civil servants had to ensure that the contracts were awarded to contractors close to the political party in government – or sometimes close to political parties both in and out of government, but which in this respect were working together.

17. Early schemes of this kind were quite simple and straightforward: the contractor had to pay kickbacks as a reward for getting the contract. But these unsophisticated schemes had their limitations. The basic idea was that the receiving political party and the contractor should split the profit between them. But if and when the total profit was low, the kickbacks were accordingly smaller.

18. Later, therefore, rather more sophisticated schemes were devised. The basic idea was to ensure that both a profit for the contractor and – as a surcharge – kickbacks for a political party or political parties were included in the contracted price, which was inflated correspondingly. The purchasing authority had to pay the contracted price, the contractor kept his part of the price and paid the kickbacks to the party or parties.

This basic design, however, did not always function as planned.

19. The first problem was how to handle a court case if and when a competitor initiated court proceedings against a decision to award a procurement contract to the winning bidder for an inflated price – which was higher than the price the competitor had bid. If nothing was done, the winning bidder could lose the contract in court. But this result of court proceedings could be avoided by concealment of the surcharge. It had to be hidden carefully – which usually is not too difficult if the contract is big and bidding conditions are opaque. It could, for example, be concealed as payments for deliberately excluded but inevitable additional services, as a penalty payment for some minor breach of contract by the purchasing authority, etc.

20. The second problem to be solved was how to pay.

Payment of kickbacks had to be made clandestinely either in cash or through untraceable bank accounts, neither of which is easy or practical, and sometimes outright dangerous if and when large amounts are at stake.

Schemes were therefore set up to make indirect payments. The political party itself would not receive the payment, but some other individual or organisation, which had legitimate dealings with the party and could forward either the payment, preferably hidden within other dealings, or some other benefit.

Some of these payment schemes were reminiscent of banking practices in the thirteenth and fourteenth centuries, when bankers almost effortlessly could move enormous amounts of money without anyone noticing. But those bankers did not have to overcome the third problem that their successors nowadays always encounter.

21. This third problem is how to deal with taxation, that is, mainly income tax and value-added tax and, on a minor scale, other turnover taxes such as stamp taxes, etc. This problem is a little more complicated than the others, and I cannot here deal with it in detail. Let me only say a few words about income taxation in general, without regard to the national tax laws that were applicable in the cases I mentioned earlier.

22. Any transactions between the acting persons and authorities had to be carried out without unreasonable consequences in the accounts of the contractor, which generally meant that kickbacks had to be concealed. Therefore the contractor very often had to pay income tax on the full amount of his profit including kickbacks, which limited the size of kickbacks; they could not amount to more than the surcharge minus income tax.

Income taxation therefore enormously complicates the process by which a contractor makes indirect payments to a political party. Any money which goes into the contractor's accounts and out again has to be explained, whether deductible or not. It is tempting, of course, to deal with the outgoing amount as deductible costs. But is that reasonable?

23. I could answer this question and take the analysis of these scandalous cases a few steps further, but I will stop here. I think it is obvious that these schemes one

way or another are punishable under ordinary criminal law almost everywhere in Europe. And if they are not punishable under ordinary criminal law, they are punishable under tax law. Less obvious, however, is how to investigate them and how to prove wrongdoings. I would like to deal with this topic here, but time restraints do not permit me to go into such detail.

24. As a final remark regarding these improper schemes it has to be said that it makes no difference in principle, whether one of these schemes is used by a political party on a grand scale for the purpose of making funds available for the whole party organisation, or on a smaller scale by a candidate who is running for election and receives money or goods in kind for campaign expenditure.

Measures to curb irregular financing of electoral campaigns

25. Let me now turn to the brighter side of financing political parties and electoral campaigns: the activities of the Council of Europe to improve the situation in this field of law have been extensive and quite successful.

26. Much of the irregular behaviour which some political parties in European have indulged in, in order to finance their general expenditure as well as their electoral campaign costs, was addressed in two European conventions of 1999, the Criminal Law Convention on Corruption, which entered into force in 2002[1] and the Civil Law Convention, which entered into force in 2003.[2]

27. In the Criminal Law Convention, in a rather traditional way, the Parties to the Convention undertake in Articles 4, 6 and 10 to penalise the bribery, actively and passively, of members of domestic, foreign and international parliamentary assemblies.

Further, according to Articles 13 and 14 they undertake to penalise money laundering of proceeds from corruption offences as well as acts or omissions to conceal and disguise corruption offences in accounts.

And finally, in Article 12 – a novelty in this field of law – they undertake also to penalise "trading in influence", which in English is defined as

the promising, giving or offering, directly or indirectly, of any undue advantage to anyone who asserts or confirms that he or she is able to exert an improper influence over the decision-making of any person referred to…in consideration thereof, whether the undue advantage is for himself or herself or for anyone else, as well as the request, receipt or the acceptance of the offer or the promise of such an advantage, in consideration of that influence, whether or not the influence is exerted or whether or not the supposed influence leads to the intended result.

and in French "Trafic d'influence", which is said to be

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1 CETS 173. This treaty as well as the documents of the Council of Europe mentioned below are published on the website of the Council of Europe at http://www.coe.int

2 CETS 174.

le fait de proposer, d'offrir ou de donner, directement ou indirectement, tout avantage indu à titre de rémunération à quiconque affirme ou confirme être capable d'exercer une influence sur la prise de décision de toute personne visée …, que l'avantage indu soit pour lui-même ou pour quelqu'un d'autre, ainsi que le fait de solliciter, de recevoir ou d'en accepter l'offre ou la promesse à titre de rémunération pour ladite influence, que l'influence soit ou non exercée ou que l'influence supposée produise ou non le résultat recherché.

28. In this context[3] I must also mention the Recommendations and Resolutions adopted by the Congress of Local and Regional Authorities in 1999 on political integrity of local and regional elected representatives and in 2000 on the financial transparency of political parties and their democratic functioning at regional level.[4]

29. Finally it is essential to take note of two very important recommendations:

- Recommendation 1516 (2001) on the financing of political parties by the Parliamentary Assembly;[5] and
- Recommendation Rec(2003)4 of the Committee of Ministers to member states on common rules against corruption in the funding of political parties and electoral campaigns.[6]

Good practice in financing electoral campaigns

30. Let me now proceed from initial darkness through dawn to daylight and the good practices of financing electoral campaigns and other work of political parties – and to the work of the European Commission for Democracy through Law – that is, the Venice Commission.

31. An overall goal for the Venice Commission has always been to assist in the drafting of constitutions, constitutional laws and other legislation, and within the framework of this assistance work on the law of political parties started in the early 1990s.

32. In 1997 this work became focused on more specific problems of legislation on political parties below the level of constitutions and since then the Commission has adopted four sets of guidelines for legislative work on political parties and elections in general and their financing in particular.

In 1998 the Commission adopted its first comprehensive report on prohibition of political parties and analogous measures. This report was followed up with guidelines and an explanatory report in 1999. [7]

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[3] Cf. the Explanatory Memoranda to CETS 173 and 174.

[4] Recommendation 60 (1999) and Resolution 79 (1999) on political integrity of local and regional elected officials, both debated and adopted by the Congress on 17 June 1999; Recommendation 86 (2000) and Resolution 105 (2000) on the financial transparency of political parties and their democratic functioning at regional level, both debated and approved by the Chamber of Regions on 24 May 2000 and adopted by the Standing Committee of the Congress on 25 May 2000.

[5] Recommendation 1516 (2001) on the financing of political parties, adopted on 22 May 2001 by the Standing Committee, acting on behalf of the Parliamentary Assembly.

[6] Adopted on 8 April 2003 at the 835th meeting of the Ministers' Deputies.

Another study analysed the financing of political parties. It resulted in again both a report and guidelines which were finally adopted in 2001.[8]

A third study resulted in a set of guidelines and an explanatory report, which under the title *Code of Good Practice in Electoral Matters* were adopted by the Commission in October 2002.[9]

Finally, the fourth study was concluded in March 2004 with the adoption of guidelines on some specific issues regarding legislation on political parties. These issues concerned mainly:

- registration of political parties;
- requirements regarding political parties' activities;
- involvement of public authorities in the activities of political parties; and
- membership of political parties of foreign citizens and stateless persons, with due regard to the European Convention on the Participation of Foreigners in Public Life at Local Level.[10]

All these guidelines interlock and any one of them must be applied with due regard to the others.

33. All four guidelines and reports are reasoned documents which after long deliberations and extensive research were adopted by consensus decision. They necessarily take into account the legal situation in almost all old democracies in Europe and most of the younger ones. Out of such an obviously complex universe of legislation derived from more than a century of accumulated political experience and legislative labours it is impossible to distil a one-flavour-fits-all brand of "the" law on political parties.

This should not be viewed as an undesirable ambiguity or vagueness of the guidelines. Instead, it should be interpreted as an explicit clarification that there is a considerable margin of appreciation, whenever legislation on political parties is in question, and this applies also to the financing of political parties.

Further, it has to be remembered that there is also substantial common ground. The core part of the freedom which political parties should enjoy is – as the Venice Commissions sees it – provided for in Articles 10 and 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which guarantee freedom of expression and freedom of assembly and association. These guarantees are not without limits. Restrictions may be imposed, but they have to comply with the requirements set out in Articles 10.2 and 11.2 of the European Convention. Notably, they must be prescribed by law, they have to be in conformity with the principle of proportionality, and they must be necessary in a democratic

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7 CDL-INF(2000)1. This document as well as the documents mentioned below are published on the website of the Venice Commission at http://www.venice.coe.int

8 CDL-INF (2001) 8.

9 CDL-AD (2002) 23rev.

10 CDL-AD (2004) 7rev.

society. Closely connected with these freedoms is the right to free elections as guaranteed by Article 3 of the (First) Additional Protocol to the Convention.

34. The guidelines apply to political parties, and for the purpose of the guidelines, the Venice Commission defines as a political party "an association of persons, one of the aims of which is to participate in the management of public affairs by the presentation of candidates to free and democratic elections".

35. Let me now, with these remarks on the whole set of guidelines as a point of departure, turn to the guidelines of 2001 on the financing of political parties and their application on matters concerning election campaigns. Let me also mention here that the rapporteur in this matter was M. Jacques Robert, at the time a member of the Venice Commission and before that member of the French Conseil constitutionnel.

36. At the beginning of this report I mentioned that democracy is expensive. You cannot get democracy cheaply or free of cost. The funds necessary for both campaign and day-to-day operations of political parties have to be acquired in an orderly way. And whatever the funding system, all funds – both private and public – have to be spent in an orderly manner, too, and they have to be accounted for. Policies of financial transparency are therefore essential. Information about the finances of political parties must be made accessible to the general public and the media, and yardsticks have to be provided for the measurement of the acquisition of both public and private funds.

37. Measurement of the acquisition of public funds is relatively easy: the yardstick is usually provided in parliamentary debate between government and opposition. The dialogue may be revealing, but one certainly has to be aware of the fact – and danger – that both government and opposition may share a common interest in a high level of public funding and in a low level of transparency requirements which from their common point of view should not be too cumbersome.

38. Constructing a yardstick for the acquisition of private contributions is more difficult. As no one should be able to use donations as a means to buy political influence, there must be, as a rule, limitations on what to accept as a donation, notably:

- a maximum level for each contribution;
- a prohibition on contributions from enterprises of an industrial or commercial nature or from religious organisations or from public authorities;
- prior control of contributions by members of parties who wish to stand as candidates in elections by public bodies specialised in electoral matters.

39. As is pointed out in the guidelines, the major democracies themselves are fully aware that the financing arrangements that they have introduced still have shortcomings, they can lead to unfairness and may leave room for abuse.

40. All states wishing to bring some semblance of order to party funding, with the aim of both allowing the free expression of pluralist political opinion and guaranteeing equal treatment of all political parties according to their respective circumstances, are confronted with a number of major issues. Let me mention one of them, which is dealt with in the guidelines and focuses particularly on electoral campaigns.

41. This issue is whether parties should be aided solely during election periods or continuously. The decision is an obviously important one.

42. Confining funding to the full or partial coverage of campaign expenses – it is pointed out in the guidelines – will empty the parties' coffers every time an election takes place and may threaten the trouble-free functioning of the democratic process through the holding of regular, free elections. In this case, political parties are regarded as private organisations which have a free hand in raising the funds necessary for their day-to-day functioning but must be aided during the holding of elections, which are organised by the public authorities on their own responsibility.

43. The second possible approach, where the state bears all or part of the costs arising from political parties' operations, follows a somewhat different line of reasoning. In this case political parties are regarded as officially recognised bodies, since they contribute to the state's ongoing democratic functioning, and it is therefore reasonable that the state should help to support their existence.

Countries which have opted for this second approach include those where parties are regarded as "institutions", whose means of subsistence cannot but be a matter of state concern. This is the case in most of the major European democracies.

Conclusion

44. Let me conclude by again quoting from and referring to the conclusions of the report which is attached to the Venice Commission guidelines on the financing of political parties.

There it is stressed that there are considerable differences between the various systems established by individual states to organise political party financing in the best possible way. But the underlying concerns are the same everywhere and the objectives fairly similar.

The constant aim is to meet the requirements inherent in the inevitable cost of democracy. If the democratic process is to function well, it is necessary both to limit, as far as possible, and eventually even to reduce expenditure by political parties. At the same time equality between parties has to be safeguarded, but this principle often appears to be jeopardised in favour of mainstream parties, which – because they obtain the highest proportion of the votes and the largest number of seats – are allocated considerable public subsidies.

And it certainly is necessary to ensure far-reaching transparency in the reporting requirements imposed on parties and efficient supervision of the uses made of the funds that they receive.

FINANCING OF POLITICAL PARTIES AND ELECTION CAMPAIGNS IN ROMANIA

Mr Dan HAZAPARU and Mr Constantin SIMA
Romanian Foundation for Democracy through Law

A multiparty system is an essential precondition for a State governed by the rule of law and for genuine democracy.

Accordingly, Article 37 of the **1991 Constitution of Romania** makes provision for the right of citizens to freely associate into political parties, trade unions and forms of association. Political parties or organisations which, by their aims or activity, militate against political pluralism, the principles of a State governed by the rule of law, or against the sovereignty, integrity or independence of Romania are deemed to be unconstitutional. Secret associations are prohibited.

The legal framework for the organisation, functioning and financing of political parties and groupings is regulated by *Law No. 14/2003 on Political Parties.*

In accordance with this law, political parties are public-law legal entities. They are defined as associations of Romanian citizens who have the right to vote and take part freely in the formation and exercise of their political will.

Each political party must have its own statute and political programme. Political parties must register in accordance with the procedure set out in this law.

Chapter 6 (Sections 32-45) of the law, entitled "*Political Party Finances*", regulates the methods of financing political parties and seeks to comply with the principle of transparency concerning the sources and use made of funding, and the principle of equality between political parties concerning their sources of finance (which by definition refers to state subsidies).

Under the law, a political party's sources of finance are classified under three headings:

1. public sources of financing, ie subsidies from the State budget, set up in accordance with the annual budget law;

2. private sources of financing, ie contributions from party members, donations and bequests;

3. income from party activities. These are expressly referred to in the *Law on political parties* and may include: renting party property for conferences and socio-cultural activities, bank interest, the sale of property with the exception of items received as donations from abroad (the aim of this restriction is to avoid illegal sources).

1. Public financing

As for sources of public financing, Section 9 of Law No. *43/2003* states that political parties shall receive subsidies annually from the state budget. Subsidies are paid monthly into each party's bank account out of the budget of the Secretariat General of the Government. The sum allocated each year to political parties may not exceed **0.04% of the state budget's receipts**.

Political parties that are represented at the beginning of a parliamentary term by a parliamentary group in at least one house of parliament receive a basic subsidy. The total of these basic subsidies corresponds to one third of all subsidies. The subsidy allowed for each parliamentary term is determined by dividing the two remaining thirds of the state budget's subsidies for political parties by the total number of members of parliament.

These subsidies are limited insofar as the total subsidy from the state budget for a political party after this is carried out may not exceed five times the basic subsidy.

Political parties that are not represented in parliament in principle receive a subsidy whose amount is determined by dividing the sum remaining after the above calculation has been carried out by the number of parties in question.

In practice, this legal provision is not applied in Romania. Parties that are not represented in parliament have never received state subsidies.

Incidentally, it was noted that from 1990 onwards, and especially following the enactment of the fundamental laws on *the rule of law* in 1992, political parties set up during this time monopolised all financial sources, public as well as private.

The parties in government in Romania, in the executive as well as the legislature, have adopted a gradual but steady policy of limiting access by other political groupings to funding, by controlling and limiting the financing of non-political organisations in civil society. The State institutions imposed by the political powers in government put in place a very efficient system to block civil society's access even to external sources of finance.

It is for this reason that civil society in Romania is not organised; the non-governmental organisations which are today visible in the socio-economic sphere are either dependent on politics or the government, or they are financed directly from outside the country (see the *Soros* case*, the Helsinki Committee*, etc).
Sums of money that have not been spent by the end of the financial year are carried over into the following year.
Another problem concerns the use made of state-provided sums of money.

Section 40 of the *Romanian law on political parties* spells out the legitimate uses for the funding received: material expenses for the upkeep and running of offices, staff expenditure, press and campaigning expenses, expenditure on organising political activities, travel, telecommunications, delegations abroad and investment in furniture and buildings necessary for the party's activities.

2. Private financing

Party members' contributions are a part of political party membership. The total amount of these contributions and the way they are divided up and spent are determined by the political party.

There is no upper limit on the total income from contributions, but the amount of contributions paid in one year by one person may not exceed 50 times the country's minimum wage (this criterion was chosen because of inflation).

Donations fall into two categories: those from **individuals** and those from **legal entities**. Donations received from an individual in one year may not exceed 100 times the country's minimum wage for the year in question. Donations received from a legal entity in one year may not exceed 500 times the country's minimum wage for the year in question.

When a donation is received, regardless of its origin, the donor's identity must be checked and registered. The identity may remain confidential, but not in the case of a yearly sum that exceeds 10 times the country's minimum wage. The list of donors of sums that exceed 10 times the country's minimum wage is published in the Official Gazette of Romania until 31 March the following year.

To avoid the politicisation of certain institutions' activities, the law on financing political parties forbids donations from public institutions and commercial companies and banks in which the state has a majority holding (Section 6).

Another means of preventing corruption and trading in influence is the prohibition on donations of material goods or sums of money for the purposes of economic or political gain (Section 35.7).

Accordingly, the total number of donations received per political party in one year may not exceed 0.005% of the state budget's receipts for that year. Another restriction is the prohibition on donations from foreign organisations or states, with the exception of donations consisting of the necessary material goods for political activities, donated by international political organisations to which the relevant political party is affiliated or from the parties with which it is in political collaboration. Such donations are published in the Official Gazette of Romania (Section 36.2).

Monitoring Sources of Financing

The regulations on the financing of political parties have to be supplemented by provisions on the monitoring of sources of financing and the use made of such funding.

States that are established democracies have provided numerous illustrations of the great temptation to evade such legal provisions.

Law No. 43/2003 states that the body authorised to ensure that the legal provisions on financing political parties are complied with is the Romanian **Court of Accounts**.

The **Court of Accounts** is the only competent body able to grant the discharge in respect of management after checking the accounts. It compiles reports that are considered by the plenary session of the judicial section of the Court. If it appears that a **criminal** offence has been committed, the plenary session submits the case to the competent criminal investigation authorities.

Political parties must maintain their accounts in line with the law on accounting and they must draw up a balance sheet to be submitted to the financial authorities. This allows for the transparency of their finances to be checked.

The financing of political parties cannot be viewed in isolation from the financing of political life in general. Accordingly, the *Law on the election of the Chamber of Deputies and the Senate* and the *Law on the election of the President of Romania* also provide that political parties and groupings taking part in the election campaign may receive, by virtue of a special law, subsidies from the state budget. These subsidies may be received only by a financial representative, appointed by the party's leadership.

Subsidies received from individuals or legal entities after the election campaign has begun may be used only after they have been publicly declared.

Another means of ensuring the lawful financing of political parties is to be found in the bill for the prevention and punishment of acts of corruption, the provisions of which also apply to persons with a managing role in a political party.

This bill is designed to be a wide-ranging regulation in the field of preventing, combating and punishing acts of corruption, whatever their nature and seriousness, however and in whatever field they are committed and irrespective of the regulations under which they are deemed to be an offence.

The legal framework mentioned above aims to ensure the lawful financing of political parties and, as a result, to limit corruption and trading of favours.

CAMPAIGN FINANCING AND MEDIA ACCESS REGULATION FOR REFERENDUMS

Mr Tobias ZELLWEGER and Mr Uwe SERDÜLT
University of Geneva

Abstract

Over the last few years, the use of referendums has become more frequent in Europe. Although there is a growing need to ensure that referendums meet with minimum democratic requirements, no European referendum standard has been adopted yet. The Council of Europe is preparing recommendations. The present paper gives an overview of the national regulations on referendum campaigns, with a focus on campaign financing and on media access. Starting with a presentation of the relevant regulation in Switzerland, the regulation in all member states of the Council of Europe with at least one referendum experience since 1995 is analysed. Distinguishing form and content of the regulation, the paper proposes typical countries for campaign financing and media access rules respectively. The wide variety of national regulations on referendum campaigns means that they do not always meet with the standards laid down in the Venice Commission's guidelines for constitutional referendums.

1. Introduction

Europe has seen an increasing use of national referendums over the last two decades. Several reasons are responsible for this development. Democratic revolutions in post-communist states have led to the adoption of new constitutions, many of which have been adopted by referendums. The ongoing integration within the European Union gave rise to numerous referendums on European issues.[1] Referendums took place on the different treaties, Maastricht, Amsterdam and Nice, although not systematically. The adoption of the euro was also voted on in some states. In many of the new member states, the decision to join the EU was made by the people. For instance, all new member states that joined the EU on 1 May 2004 had submitted the question of whether to join to a national referendum – except for Cyprus.[2] More recently, referendums took place on the Treaty establishing a Constitution for Europe. It is true that the rejection of the Constitution in the French as well as in the Dutch referendum has made the holding of future referendums on this question in other member states somewhat uncertain. Nonetheless, on the European scene the referendum seems to have become an instrument that is being employed more and more often .[3]

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1 Wilfried Marxer, "Wir sind das Volk", *Direkte Demokratie – Verfahren, Verbreitung, Wirkung*, Liechtenstein-Institut, Beiträge Nr. 24/2004, http://www.liechtenstein-institut.li

2 http://c2d.unige.ch

3 See Initiative & Referendum Institute, Initiative & Referendum Monitor 2004/2005 – *The IRI Europe Toolkit for Free and Fair Referendums and Citizens' Initiatives.* http://www.iri-europe.org

However, the quantity of referendums by itself does not prove that decision-making has necessarily become more democratic. It is well known that referendums can be, and historically have been, misused. Quite obviously, one has also to look at the quality of referendums. The variety of referendum modalities in the various states that use this instrument makes referendum evaluation a difficult task – even if limited to the European context. In examining the conditions for a referendum to be qualified as democratic, many aspects have to be taken into account. In the first place, there are the institutional requirements for a referendum to be held. Does the constitution provide for a mandatory referendum? Can a referendum be called for by a certain number of citizens, and if so, under what conditions? Does the referendum depend on the will of parliament, the government or the head of state? Is the outcome of the referendum binding or not? The modalities that apply to a referendum are equally important. Citizens should be given objective information on the question they are going to answer. Thus, the campaign preceding the voting has to allow for a public debate to take place, in fair and free conditions. Respect for the rule of law and for fundamental rights is a preliminary condition for such a public debate. Furthermore, safeguards may be necessary in order to allow different viewpoints to be expressed. All political parties and civil society organisations should be given the opportunity to participate in the referendum campaign. Also, the wording of the referendum question must be clear and not mislead the citizen. After the referendum day, judicial review of irregularities should be possible. These are only a few of the various criteria that are relevant when it comes to evaluating whether a specific referendum is free and fair, and thus democratic.

2. Focus on financing rules and media access

With the increasing number of referendums organised in European states we can also observe efforts undertaken to analyse and qualify the referendums.[4] To cite two recent studies, we can mention the *Initiative & Referendum Monitor 2004/2005* drawn up by the Initiative and Referendum Institute Europe, as well as the *TEAM Referendum Monitoring Report*.[5] However, these approaches have to face the obstacle that up to now, there seems to be no "referendum standard" or "code of good conduct" generally accepted by European states.

Reflections on such referendum standards are continuing within the Council of Europe. The Committee of Ministers adopted a recommendation to member states on referendums and popular initiatives at local level on 15 February 1996.[6] Appended to this recommendation are guidelines on referendums and popular initiatives at local level. Regarding the minimum rules that states should comply with for constitutional referendums, the Council of Europe's Venice Commission adopted guidelines for constitutional referendums at its 47th Plenary Meeting in July 2001.[7] The Green Paper presented to the Council of Europe that was drafted within

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4 Simon Hug, *Voices of Europe. Citizens, referendums and European integration*, Rowman & Littlefield, Lanham, Md., 2002.

5 TEAM Referendum Monitoring Report – Version II presented at the European Referendum Monitoring Workshop in Tartu, Estonia, 26–28 September 2003, http://www.teameurope.info

6 Recommendation No. R (96) 2.

7 European Commission for Democracy through Law (Venice Commission), Guidelines for constitutional referendums, CDL-INF (2001) 010.

the framework of the project "Making democratic institutions work in 2004" recommends the preparation of a handbook on referendums and initiatives, similar to the Venice Commission's "Code of good practice in electoral matters".[8] More recently, in April 2005, the Parliamentary Assembly of the Council of Europe adopted a recommendation on "Referendums: towards good practices in Europe",[9] inviting the Committee of Ministers to draw up a recommendation to member states containing guidelines on referendums in general. At its 64th Plenary Session in October 2005, the Venice Commission adopted an opinion on the Parliamentary Assembly's recommendation, in which it declares itself willing to support and assist any work by the statutory bodies of the Council of Europe on matters concerning referendums.[10] Moreover, the Venice Commission itself is actually conducting studies on referendums,[11] aimed at the formulation of detailed recommendations. In addition to these documents already prepared on referendums, the Council of Europe can also rely on its previous work in the field of financing political parties and electoral campaigns.[12]

The present paper aims to examine the preliminary conditions of democratic referendums. At this stage of our research, we have chosen to focus on two aspects which, in our opinion, are central to the preliminary phase of a referendum, in other words the referendum campaign. These two aspects are the rules on campaign financing and the rules on media access during the campaign. Our analysis will be based on the existing regulations in the states being examined. It is very possible that in some states the practice differs from the regulation. For example, the absence of a specific regulation applying to referendum campaigns does not necessarily mean that the campaign practice is unfair. Vice versa, it does not exclude the possibility that the practice in states with an exhaustive set of regulations is unfair.

By campaign financing regulation, we mean any rule having an impact on the financing of the various political actors' propaganda making during referendum campaigns. The political actors include state organs, political parties, any kind of civil society organisation and individual citizens. Campaign financing regulation thus covers any regulation on the granting of public funds to political actors for their campaigning, and any regulation on the provision of selective and task-bound benefits for campaigners, such as the free use of public places for campaign propaganda or special fees applying to propaganda mailing. Campaign financing regulation also covers spending limits for campaign activity as well as transparency rules, such as the obligation to reveal the identity of donors or the amount of campaign spending.

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8 Phillippe C. Schmitter and Alexander H. Trechsel (coord.), *The future of democracy in Europe – Trends, analyses and reforms*, Council of Europe Publishing, Strasbourg, 2004, p. 124.

9 Parliamentary Assembly Recommendation 1704 (2005), Referendums: towards good practices in Europe.

10 European Commission for Democracy through Law (Venice Commission), Opinion on Parliamentary Assembly Recommendation 1704 (2005) on referendums: towards good practices in Europe, CDL-AD (2005) 028.

11 European Commission for Democracy through Law (Venice Commission), Referendums in Europe – an analysis of the legal rules in European states, CDL-AD (2005) 034.

12 For references, see Parliamentary Assembly Recommendation 1704 (2005), Referendums: towards good practices in Europe, at § 10.

The precise impact of the money available to campaigners on the outcome of a referendum is not very clear. In Europe, not much research has been done on the subject. Hertig has argued that the outcome of a referendum can be bought if enough money is spent.[13] Others have criticised the lack of precision of this study and painted a more balanced picture.[14] It seems obvious, however, that to a certain extent, money does matter during referendum campaigns, and even more so for the collecting of signatures in the case of a referendum instigated by a popular initiative or in the case of an optional referendum.

By media access regulation we understand any rule having an impact on the political actors' use of mass media for propaganda reasons during referendum campaigns. Media access regulation thus covers rules on the granting of free airtime for political actors engaged in a referendum campaign, rules fixing the conditions of political advertising in the media as well as rules on fair media access during referendum campaigns, such as the obligation for public or private broadcasters to guarantee a balanced presentation of the various political opinions expressed during the campaign.

In the guidelines for constitutional referendums, the Venice Commission has fixed a number of minimum rules on funding, the use of public places and the media. In our opinion, these rules should apply to all national referendums, since there are no reasons for advocating a different campaign standard depending on whether a referendum is constitutional or not. Therefore, we are going to recall the rules related to campaign financing and media access outlined in the above-mentioned guidelines before examining the national regulations on these issues in chosen member states of the Council of Europe.

Extract of the Venice Commission's guidelines for constitutional referendums:

E. Other aspects of free suffrage

[…]

2 c. Contrary to the case of elections, it is not necessary to completely prohibit the intervention of the authorities supporting or opposing a proposal submitted to referendum. However, the national, regional and local authorities must not influence the outcome of the vote by excessive, one-sided campaigning. The use of public funds by the authorities for campaigning purposes during the referendum campaign proper (i.e. in the month preceding the vote) must be prohibited. A strict upper limit must be set on the use of public funds for campaigning purposes in the preceding period.

[…]

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[13] Hans-Peter Hertig, "Sind Abstimmungserfolge käuflich?", *Annuaire suisse de science politique* 22(1) (1982) : 35-58.

[14] See Ioannis Papadopoulos, *Démocratie directe*, Paris 1998; Jean-Daniel Delley, "La professionnalisation des campagnes référendaires", in: Francis Hamon and Olivier Passelecq, *Le référendum en Europe – Bilan et perspectives*, Paris, 2001.

F. Funding

- The general rules on the funding of political parties and electoral campaigns must be applied to both public and private funding.

- In contrast to elections, the use of public funds by the authorities for campaigning purposes need not be strictly prohibited in all cases; however, it must be restricted – see point II.E.2.c above.

- Payment from private sources for the collection of signatures for popular initiatives, if permitted, must be regulated with regard to both the total amount allocated and the amount paid to each person.

G. Use of public places

a. Advertising

Supporters and opponents of the proposal submitted to a referendum must have equal access to election hoardings.

[…]

H. Media

Public radio and television broadcasts on the electoral campaign must allocate equal amounts of time to programmes which support or oppose the proposal being voted on.

Balanced coverage must be guaranteed to the proposal's supporters and opponents in other public mass media broadcasts, especially news broadcasts.

Financial or other conditions for radio and television advertising must be the same for the proposal's supporters and opponents.

The prohibition of the publication of opinion polls during the week before the election can be considered.

3. Country selection

Naturally, we base our report on the situation of campaign financing and media access only on those Council of Europe member states that conduct referendums. In order to delimit our task, we include countries holding referendums between 1995 and 2005. Among the 46 member states, 30 have organised at least one referendum within this time frame. Looking more closely at the number of issues voted upon in referendums , we can see that 16 countries have voted on one issue, 15 countries on two to twelve, and 2 countries on a greater number (see Table 1) – Italy with 34 and Switzerland with 104 texts clearly being the "leaders" in referendum practice among Council of Europe member states.

Table 1: Number of referendum texts voted on in 30 Council of Europe member states, 1995 to 2005

# Texts	# Countries	Countries
1	16	Cyprus, Czech Republic, Estonia, Georgia, Luxembourg, Malta, Moldova, Netherlands, Romania, Spain, Sweden, The Former Yugoslav Republic of Macedonia
2	4	Albania, Armenia, Denmark, France
3	2	Latvia, Portugal
4	2	Hungary, Ukraine
6	1	Lithuania
7	1	Poland
8	1	Slovakia
9	1	Azerbaijan
10	1	Slovenia
11	1	Liechtenstein, San Marino
12	1	Ireland
34	1	Italy
104	1	Switzerland

However, the simple count of texts voted on might be a bit misleading. For current referendum practice and regulation in this area the number of polls conducted is probably the more important figure (see Table 2). We should thus expect that countries with a relatively high frequency of polls within the last ten years should have developed a considerable body of regulation regarding media access and campaign financing, and vice versa that countries with a low number of referendum polls have less-developed rules.

Table 2: Number of polls conducted in 30 Council of Europe member states, 1995 to 2005

# Polls	# Countries	Countries
1	13	Cyprus, Czech Republic, Estonia, Georgia, Luxembourg, Malta, Moldova, Netherlands, Romania, Spain, Sweden, The Former Yugoslav Republic of Macedonia, Ukraine
2	6	Albania, Armenia, Azerbaijan, Denmark, France, Portugal
3	4	Hungary, Latvia, Lithuania, Poland
5	2	San Marino, Slovakia

# Polls	# Countries	Countries
7	1	Italy
8	1	Slovenia
9	1	Ireland
10	1	Liechtenstein
33	1	Switzerland

As Table 2 shows, we can thus form three categories of countries. Countries with a low level of referendum practice organised one to two polls (19 member countries in total), mainly in order to ratify a new constitution, to sanction important changes in the constitution, or in relation to EU membership (see Annex 2). Countries with three to ten polls use direct democratic instruments more frequently and also to decide important political matters other than constitutional, territorial or supra-national issues (10 member countries). Switzerland, with 33 polls during the observed time frame, represents the well-known exceptional case and forms the third category.

4. Results

In this section we will first present the regulations on campaign financing and on media access in the outlier country, Switzerland. Then in the two following sections we will proceed to an analysis based on the data we collected (see Annex 1). At the current stage of data collection we intend to come up with ideal types of countries for referendum campaign regulation and media access rules respectively.

4.1 The Swiss case

One would expect Switzerland, with its longstanding and frequent use of direct democracy institutions, namely the popular initiative, the optional referendum and the mandatory referendum, to have developed an extensive regulation on referendum campaigns, including rules on campaign financing and on media access. Surprisingly, this is not the case.

Switzerland is a federal state. The referendum is used both at the federal and at the cantonal level, the latter being to a large extent autonomously regulated by each of the 26 cantons.[15] In the present paper, we shall focus on the federal level. However, it is important to note that there is some kind of mutual influence between the exercise of political rights in the cantons and in the Confederation. On the one hand, the cantons have to respect the political rights as they are guaranteed by the Federal Constitution. On the other hand, the Swiss Federal Supreme Court has developed important case law on the exercise of political rights in the cantons. Some of this case law deals with referendum campaigns.[16] The principles developed by the Swiss

[15] Andreas Auer, Giorgio Malinverni and Michel Hottelier, *Droit constitutionnel Suisse*, Vol. I, *L'Etat*, Berne 2000, note 780.

[16] Idem, notes 855-60.

Federal Supreme Court, although dealing with cantonal matters, to some extent also serve as guidelines to the federal authorities.[17]

The referendum at the federal level is governed by provisions of the Federal Constitution[18] and by the Federal Act on Political Rights.[19] None of these contains rules dealing with referendum campaigns in particular. However, several fundamental rights guaranteed by the Federal Constitution have to be considered while examining the legal framework of referendum campaigns. According to article 34 paragraph 2 of the Federal Constitution, the guarantee of political rights protects the free formation of opinion by the citizens and the unaltered expression of their will. This provision does not impose strict neutrality on political authorities during the referendum debate.[20] Authorities are allowed to take a position and to recommend the approval or the refusal of a referendum question.[21] However, any kind of political propaganda by political authorities would be contrary to the constitutional guarantee of the political rights,[22] even more so if public funds were to be used for such propaganda. It is also forbidden to grant public funds to private referendum committees.[23]

Other fundamental rights guaranteed by the Federal Constitution that ensure that a referendum debate is fair are the freedom of opinion and information, the freedom of the media, the freedom of assembly and the freedom of association.[24]

However, there is no specific regulation on the financing of referendum campaigns by political parties and other civil society groups. Therefore, no public funds may be used for political propaganda, campaign spending is not limited, and there is no obligation for campaigners to reveal their donors or the amount of money spent on a referendum campaign. In this context we should also mention that the financing of political parties is not regulated in Switzerland. Political parties do not receive any public funds for their activities. As a result, they finance themselves from membership fees, from donations of party members, non-members, private companies and organisations, as well as from contributions from office holders.[25] On the federal level, there are no transparency rules at all. Whereas this is generally also the case at the cantonal level, two cantons have introduced transparency rules. In the

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17 *L'engagement du Conseil fédéral et de l'administration dans les campagnes précédant les votations fédérales*, Rapport du groupe de travail de la Conférence des services d'information élargie (GT CSIC), Berne, November 2001, pp. 10-12, http://www.admin.ch/ch/f/cf

18 Articles 138 to 142 of the Federal Constitution of the Swiss Confederation of 18 April 1999; http://www.admin.ch/ch/itl/rs/1/index.htm

19 Federal Act on Political Rights of 17t December 1976; http://www.admin.ch/ch/e/rs/c161_1.html

20 Decision of the Federal Supreme Court 121 I 252, 255 f.

21 Compare with article 11 paragraph 2 of the Federal Act on Political Rights of 17 December 1976.

22 Decision of the Federal Supreme Court 114 Ia 427, 444.

23 Decision of the Federal Supreme Court 114 Ia 427, 443.

24 See articles 16, 17, 22 and 23 of the Federal Constitution of the Swiss Confederation of 18 April 1999.

25 Andreas Ladner, "The Political Parties and the Party System", in: Ulrich Klöti, Peter Knoepfel, Hanspeter Kriesi, Wolf Linder and Yannis Papadopoulos (eds), *Handbook of Swiss Politics*, NZZ Publishing, Zurich, 2004, p. 225.

canton of Ticino, donations of more than 10 000 Swiss francs to political parties have to be published. In the canton of Geneva, anonymous donations are forbidden and transparency rules apply not only to political parties, but also to other political groups engaged in campaigns.[26] But for the time being, such rules are still exceptional.

Regarding the access to media by political parties and other civil society organisations engaged in a campaign, there are no rules that would apply during referendum campaigns only. Contrary to the situation in other member states of the Council of Europe, Swiss law does not determine an official time frame for the referendum campaign.

Nonetheless, several provisions of the Federal Act on Radio and Television, adopted on the basis of articles 92 and 93 of the Federal Constitution, are particularly important during the referendum campaign.[27] This act mandates all radio and television stations to contribute to the free formation of opinion and to provide varied and objective information for the public. The overall offering of programmes in a region must not provide one-sided information in favour of particular parties, interests or opinions only. Broadcast information has to be objective and representative of the diversity of facts and opinions. Furthermore, opinions and commentaries have to be recognisable as such. Also, political advertising on radio and television is forbidden. Whereas this general prohibition of political advertising has been softened by the case law, it is still fully applicable during referendum campaigns.[28] Last but not least, the sponsoring of the news presentations as well as of any programme related to the exercise of political rights is not allowed.

Each broadcaster has to install an independent mediator who deals with complaints about the programme.[29] The mediators' decisions can then be reviewed by an independent authority for radio and television established at the federal level.[30]

Thus, although campaigners do not get free airtime in Switzerland, and notwithstanding the fact that there are no specific rules for the referendum campaign, it seems to be generally recognised by political actors that the regulation set down in the Federal Act on Radio and Television provides for a fair referendum debate in the media.

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[26] Tiziano Balmelli, *Le financement des parties politiques et des campagnes électorales*, Fribourg, 2002, p. 330.

[27] Article 3 paragraph 1 a, article 3 paragraph 2, article 4, article 18 paragraph 5 and article 19 paragraph 4 of the Federal Act on Radio and Television of 21 June 1991; http://www.admin.ch/ch/f/rs/c784_40.html (French text).

[28] Unabhängige Beschwerdeinstanz für Radio und Fernsehen, *Entscheid vom 27. Juni 2003 betreffend Schweizer Fernsehen DRS: Werbespot der Flüchtlingshilfe*, ausgestrahlt am 15. Januar 2003; Eingabe von S vom 28. März 2003 ; http://www.ubi.admin.ch/presse/2003/de/03082801

[29] Article 57 of the Federal Act on Radio and Television.

[30] Articles 58 to 66 of the Federal Act on Radio and Television.

4.2 Referendum campaign financing in Council of Europe member countries

Regarding campaign financing regulation we can distinguish two dimensions: form and content. The formal characteristics of a regulation can be ordered according to the degree of institutionalisation. By institutionalisation we mean a process over time, during which norms and rules are transformed into binding, sanctionable elements of a political system, mostly in the form of a legal framework. The more differentiated and binding the regulation, the higher the degree of institutionalisation. On the lowest level of this cascade of institutionalisation there is the case of no regulation at all. One stage further, we can observe the informal application of already existing laws, in most cases electoral laws, for a referendum, because this is the closest to a referendum regulation there is at hand. Going one step on there is case law-based regulation and then ad hoc regulation (by parliament or the government) for each referendum. For countries with only limited referendum experience this is the type of formal arrangement we would expect. It might also occur if referendums had to be organised under time pressure or for the first time in the history of a country without it being known whether there would be sufficient use of referendums in the future to justify the drafting of a separate law on referendums. The referendum law (or any equivalent regulation with reference to other already existing laws) represents the final stage of institutionalisation.

Regarding the content of existing regulation we can distinguish again between countries with no regulation at all, those that forbid the use of public funds for campaigning, those that distribute task-bound, selective benefits to campaigners, and those that provide public funds for campaigners (be it for political parties only or for campaigners as well). In the last category, we can distinguish states that provide public funds for campaigners on an ad hoc basis from those that have institutionalised public support. In addition, we should check the existing regulation for clauses setting a limit on campaign spending and certain transparency rules for campaigners.

Among the states that have no regulation at all on the financing of referendum campaigns is Luxembourg. The absence of campaign-specific regulation in this state can be explained by the fact that the recent referendum on the Treaty establishing a Constitution for Europe in July 2005 was the first referendum to be held there since 1937.[31] Likewise, in post-communist Romania, where only two referendums have been held, one on the approval of the Constitution in 1991 and another on the revision of the Constitution on 19 October 2003, there are no rules on campaign financing.

Several states prohibit the use of public funds for campaigning. The Swiss regulation, which falls into this category, has already been examined above. Slovenia has rules on the financing of electoral campaigns, but the act on referendums does not provide for an analogous solution for referendum campaigns. Therefore, in Slovenia, public funds must not be used either for propaganda by campaigners, or for an official and neutral information campaign. According to the

[31] The referendum of July 2005 was governed by the Act on nationwide referendums of 4 February 2005 (Loi du 4 février 2005 relative au référendum au niveau national).

Slovenian Electoral Authority, there are projects to legislate in this field. In Malta, the Referenda Act[32] states that the General Elections Act and the Electoral Polling Ordinance shall apply to the conduct of referendums, except for some specified provisions. The Electoral Polling Ordinance provides for the return of election expenses to electoral candidates.[33] However, according to the second schedule of the Referenda Act, these provisions shall not apply to referendums. As a result, no public funds are used for referendum campaigns in Malta. In Poland, finally, the Act on nationwide referendums states that those engaged in referendums shall cover expenses out of their own resources and in accordance with provisions relating to their financial activities.[34]

A number of states distribute task-bound, selective benefits to campaigners, without granting direct financial support to them. In this field, Portugal has far-reaching legislation.[35] Political parties and citizens' groups that have registered for the campaign are entitled to free political advertising, on public and private television and radio stations, as well as in public buildings.[36] The modalities of such free advertising are fixed by the law. For example, the communes have to provide for places where campaigners can place their propaganda posters.[37] Also, public buildings can be used for campaigning events. The hiring of theatres for political meetings is regulated by the law, including a limit on the hiring fee. The hiring can be imposed on the private owners of theatres. The hiring of offices as headquarters for the organisation of a particular group's propaganda campaign is also regulated by law. The campaigners are also entitled to have a telephone installed free of charge.[38] In Macedonia, tax exemptions are granted for activities connected with a referendum.[39] In Moldova, local administrative authorities establish and guarantee a minimum of special places for campaign posters and provide for places for organising and holding campaign meetings.[40]

A last group of states grant public funds to campaigners for their propaganda activity. In most cases this is done on an ad hoc basis. In Spain, the law on the regulation of referendums[41] allows public funding for the government's impartial informative campaign only. Nonetheless, in January 2004 parliament approved an extraordinary budget for the funding of political parties engaged in the referendum campaign on the European Constitution. The funds were distributed among the

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32 Article 10 of the Referenda Act of 20 July 1973; http://www2.justice.gov.mt/lom/home.asp

33 Article 50 of the Electoral Polling Ordinance.

34 Article 47 of the Act of 14 March 2003 on nationwide referendum (Dziennik Ustaw [Journal of Laws of the Republic of Poland] No. 57, item 507 and No. 85, item 782); http://www.pkw.gov.pl/gallery/00/8.pdf

35 Referendum Act of 3 April 1998 (Lei n° 15-A/98 de 3 de Abril: Lei Orgânica do Regime do Referendo).

36 Article 46 of the Referendum Act.

37 Article 52 of the Referendum Act.

38 See articles 65 to 70 of the Referendum Act.

39 European Commission for Democracy through Law (Venice Commission), Referendums in Europe – an analysis of the legal rules in European states, CDL-AD (2005) 034, p. 18.

40 Article 163 read in combination with article 47 paragraph 6 of the Electoral Code of Moldova of 21 November 1997; http://e-democracy.md/en/legislation/electoralcode/vi/

41 Ley organica 2/1980 de 18 de enero, sobre regulacion de las distintas modalidades de referendum.

political parties represented in parliament, but no funds were granted to civil society organisations engaged in the campaign. Similarly, public funds have been used for campaign propaganda during the most recent referendums held in the Netherlands and in Estonia, in both cases on an ad hoc basis. In Estonia, public funds went to the government's impartial information campaign, but were also distributed among political parties and other civil society campaigners, representing both the No and the Yes campaigns. Sweden, which does not have many referendums, went quite far in devising a formula for how to divide public money between official Yes and No camps during the referendum on EU membership in 1994.[42] Only a few states have institutionalised direct financial support to campaigners. Under San Marino's law on referendums and legislative popular initiatives, both the official Yes and the official No committees received public funds for their propaganda activity during the referendum campaign.[43]

Independently of prohibiting the use of public funds for campaigns or of granting direct or indirect public support to campaigners, some states have adopted clauses setting a limit on campaign spending and certain transparency rules for campaigners.

In Poland, the act concerning nationwide referendums states that any propaganda for or against a draft proposal, published in the press or by television or radio, shall bear an indication of who is paying for the propaganda and who is the donating the funds. Ignoring this rule exposes the responsible person to a fine.[44] In Portugal, there is a limit on the amount campaigners are allowed to spend on campaigning. The Referendum Act refers to the spending limit applicable in the case of elections to the national parliament and governed by the act on the financing of political parties and electoral campaigns.[45] The spending limit is calculated on the basis of the minimum wage.[46] Furthermore, political parties and citizens' groups are responsible for keeping accounts of referendum spending. These accounts have to be presented to the National Election Commission within 90 days of the publication of the referendum results.[47] In Spain, campaign spending by political parties is restricted, but there is no control over other campaigners' spending. All private donations have to be paid into special bank accounts and donors have to reveal their identity. A donation must not exceed € 6 000.

4.3 Media access during referendum campaigns in Council of Europe member countries

There are five basic types of regulation we can find regarding media access rules during referendum campaigns: no regulation at all; general provisions about fair access rules during a campaign; the prohibition of political advertising; free airtime

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42 Information provided by the Swedish Electoral Authority.

43 Article 36 of the Law on referendums and legislative popular initiatives of 28 November 1994 (Legge n°101 del 28 novembre 1994: Nuove norme in materia di referendum e iniziativa legislativa popolare); http://www.elezioni.sm/src/elezioni/index.php?id=170

44 Article 46 and article 82 of the Act on nationwide referendum.

45 Lei n° 56/98 de 18 de Agosto: Financiamento dos partidos politicos e das campanhas eleitorales.

46 Article 19 of the Act on the financing of political parties and electoral campaigns.

47 Articles 73 to 75 of the Referendum Act.

for political parties only; and free airtime for all campaigners, including citizens' groups. Furthermore we can make a distinction between regulation applying to the public media sector only or to both public and private sectors.

Representative of the group of states that have no regulation at all on media access by campaigners are Luxembourg and Slovenia. As explained above, in Luxembourg the absence of regulation might be due to the rare use of the referendum there. In Slovenia, the lack of regulation is more surprising, since referendums are held quite regularly. However, rules for electoral campaigns exist, and in practice, airtime is granted by the media during referendum campaigns, too.

Some states have general provisions regarding fair access rules during a campaign, although without the granting of free airtime for political advertising. In San Marino, for instance, radio and television programs are guaranteed and supervised by the secretary of state for internal affairs during the referendum campaign. Different views have to be presented in a balanced manner.[48]

Other states have forbidden political advertising on radio and television. We have already analysed the Swiss legislation above. In Liechtenstein, too, the media law prohibits political advertising on radio and television. Not-withstanding the prohibition of political advertising, there can be general provisions on fair media coverage of a campaign.

Another group of states grant free airtime to political parties only. In the Netherlands, political parties represented in parliament can use the time allocated to them on the radio and television for the referendum campaign. In France, too, only the parties represented in parliament and those whose participation appears justified in view of the nature of the question asked may express their views. But both private and public media must provide supporters and opponents of the draft proposal with fair coverage.[49] In Slovakia, access to the media is allowed only for political parties that are represented in the national parliament.[50]

Quite extensive rules have been developed by those states that grant free airtime in the media to all campaigners, including both political parties and other civil society groups. In these cases, it is common for the official campaign period to be limited by the law. In Portugal, starting with the publication of the decree fixing the referendum date, any kind of commercial political advertising in the media is forbidden.[51] Any journalistic information on the referendum published in state-controlled media has to respect strict neutrality and treat the political opponents equally.[52] Private media outlets have to inform the National Election Commission on their reporting about the referendum. They also have to assure a fair journalistic treatment of the

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48 Article 7 of the Ordinance on Electoral Campaign Discipline of 14 March 1997 (Regolamento per la disciplina della campagna elettorale, del 14 marzo 1997).

49 Décret n° 2005-238 du 17 mars 2005 relatif à la campagne en vue du référendum; Décision CC "Génération écologie" et autres, 7 avril 2005, cons. 4, JO du 9 avril 2005, p. 6458.

50 Law on Referendum No. 564/1992 Coll.

51 Article 53 of the Referendum Act.

52 Article 54 of the Referendum Act.

campaigning parties and citizens' groups.[53] Journals of political parties, associations and citizens' groups are exempted.[54] During a Portuguese referendum campaign, registered political parties and citizens' groups have the right to free airtime on radio and television, both private and public.[55] Half of the slots have to be distributed among the parties represented in the national parliament, the other half are to be distributed among the other campaigners. The order in which the political advertisements are presented is drawn by lottery. In particular cases, such as campaigners calling for violence or doing commercial advertising, the free airtime can be suspended or withdrawn. In Poland, referendum campaigners who have previously registered with the National Electoral Commission have the right to campaign on radio and television. Both the recording of a referendum programme as well as the broadcasting are free of charge. The referendum programmes are broadcast on nationwide and regional channels. The total broadcasting time is fixed by law, and is divided equally among the entitled referendum campaigners. The sequence of referendum programmes to be broadcast each day is determined by a lottery. In addition to publicly funded broadcasting, entitled campaigners may broadcast paid referendum advertisements on radio and television during the referendum campaign.[56] The rates for paid advertisements are regulated by the law, and broadcasters cannot refuse to transmit such referendum programmes. On the other hand, the broadcasters are not responsible for the contents of the advertisements.

5. Final remarks

The data collection and framework of analysis we presented in the preceding sections of this paper are just first steps and represent intermediate results of an ongoing project within C2D. We can already affirm that there is a wide variety of regulations among the member states of the Council of Europe with regard both to campaign financing and to media access. Also, the analysed data shows that many combinations are possible between the different regulation types we have described. Furthermore, most states do not fully comply with the rules on funding and media as set down in the guidelines for constitutional referendums elaborated by the Venice Commission. Either the national regulations do not cover all the relevant points, or they provide for solutions which are to some extent contradictory to the guidelines. However, from the absence of perfect regulations one should not necessarily conclude that referendum campaigns are unfair, since the analogous application of electoral laws as well as a particular state's political culture are also important.

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53 Article 55 of the Referendum Act.

54 Article 56 of the Referendum Act.

55 See articles 57 to 64 of the Referendum Act.

56 Article 56 of the Act on nationwide referendum.

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ANNEX 1: Media Access and Campaign Financing Regulations in Council of Europe member countries

Country	Media Access	Campaign Financing
Albania	Equal airtime is given to the supporters and opponents of the draft proposal. The law states that you must organise unbiased programmes on Albanian Radio and TV to educate the population.	
Armenia	The legislative framework for referendums does not ensure access of political parties to free campaign time on public media, and the decision to provide access to various parties rests with the management of media outlets, including public TV channels. TV and broadcasting law, article 11: before and during referendum and election campaigns the law on elections and referendum regulates television and radio programmes. During the above-mentioned period it is forbidden to broadcast political or other campaign materials in the form of information, editorial, documentary, comment and other non-specific programmes. Television programmes of this kind should be run with the words "Political Advertisement" or "Election Campaign" shown on the screen. In the case of radio broadcasting, there should be a reminder about the nature of the content at	Campaign funding must come from a referendum fund, deposited at the Central Bank of Armenia. State and local self-governing bodies, fiscal institutions, foreign private persons and legal entities, stateless persons, charitable and religious organisations, international organisations and non-governmental organisations as well as those organisations whose share capital is more than 30% foreign-owned have no right to contribute to the referendum fund. There is a limit on the overall amount of contributions to the referendum fund. The Central Bank informs the Central Commission regularly about the financial activities of the referendum funds. Special places for displaying campaign posters are mad available. The origin of campaign material has to be indicated.

Country	Media Access	Campaign Financing
	least three times during the programme. During the referendum and election campaign the television and radio broadcasting companies shall publicise the rates for political advertisements and for airtime. Everyone shall use the paid airtime based on contracts, and the conditions shall be the same for everyone. State and local self-governing bodies, members of the Constitutional Court and Judges, officials of the Ministry of Internal Affairs and National Security, officials of the Public Prosecutor's office, the military, charitable and religious organisations as well as foreign citizens and organisations must not campaign.	
Azerbaijan	Equal airtime is given to the supporters and opponents of the draft proposal in public media.	
Cyprus	Equal airtime is given to the supporters and opponents of the draft proposal in public and private media.	
Czech Republic		
Denmark		
Estonia	No rules.	No regulation; however, during the referendum on joining the EU, the government decided to use public funds for an impartial

Country	Media Access	Campaign Financing
		information campaign. Public funds were also distributed among political parties and other civil society campaigners, both for the No and the Yes campaigns. No transparency rules.
France	Both the supporters and the opponents of the draft proposal are required to be given "fair" coverage on radio and television. Private media outlets must provide supporters and opponents of the draft proposal with fair coverage. Only the parties represented in parliament and those whose participation appears justified in view of the nature of the question asked may express their views.	
Georgia	Nothing stated in the referendum law.	?
Hungary		
Ireland	A requirement to be fair Private media must provide supporters and opponents of the draft proposal with fair coverage.	
Italy	A balance must be ensured between the various groups participating in the campaign rather than between the supporters and the opponents.	
Latvia	The Law on National Referendums and Legislative Initiatives does not contain	The Law on National Referendums and Legislative Initiatives does not contain

Country	Media Access	Campaign Financing
	any regulation regarding media access. The Central Election Commission is put in charge.	any regulation regarding campaign financing. The Central Election Commission is put in charge.
Liechtenstein	Under the Media Law, political advertising on radio and television is forbidden.	Party financing exists; however, not specifically linked to referendums. No transparency rules for referendum campaigns.
Lithuania	Equal airtime is given to the supporters and opponents of the draft proposal. The Fairness Commission secured equal access to media (IRM 04/05).	Article 3 of the Law of the Republic of Lithuania on the referendum: Political parties, other political and public organisations and citizens may allocate their own funds for campaigning.
Luxembourg	No specific rules.	No specific rules.
Malta	A balance must be ensured between the various groups participating in the campaign.	Public funds are allowed for information purposes but not for campaigning (requirement of neutrality).
Moldova	According to the Electoral Code, during campaigns, the public media grant free airtime. Additional (charged) airtime in the public and private media is limited in the amount of time allowed. Private media have to give equal opportunities (equal airtime) to both sides if they organise debates. Supervision is carried out by the Central Electoral Commission.	Under the Electoral Code: Public or private audio-visual institutions have to establish equal fees for campaigners. These fees may not exceed fees for commercials. Local administrative authorities establish and guarantee a minimum of special places for displaying campaign posters and provide for places to organise and hold campaign meetings.
Netherlands	Political parties represented in parliament can use the time allocated to them on the radio and television for the referendum	Apparently no rules: During the referendum on the European constitution, public funds were used for covering the referendum

Country	Media Access	Campaign Financing
	campaign.	committee's neutral public information campaign. During the same referendum, public funds were also used for the government's Yes campaign.
Poland	Under the Act on nationwide referendums: Campaigners who have previously registered with the National Electoral Commission have the right to free referendum campaigning on radio and television. During the campaign, broadcasting time is divided equally between entitled campaigners. The order in which referendum programmes are broadcast is determined by a lottery. In addition to publicly funded broadcasting, privately funded broadcasting is allowed.	Under the Act on nationwide referendums, the subjects engaged in the referendum campaign have to cover expenses out of their own resources and in accordance with provisions relating to their financial activities. Fees for privately funded broadcasting on radio and television are regulated by the law. Any propaganda published in the press, on television or on the radio must bear an indication of who is paying for it and who is donating the funds. Granting a salary for collecting signatures or for signing a list supporting a motion is prohibited.
Portugal	Referendum Act: Political parties and citizens' groups (comprising at least 5 000 citizens) which have registered with the National Election Commission are entitled to free airtime on public and private television and radio. Half of the airtime is to be distributed among political parties represented in the National Assembly; the other half of the airtime is to be distributed among the other campaigners.	Referendum Act and Electoral Code: During the official campaign, political parties and citizens' groups (comprising at least 5000 citizens) can benefit from various advantages: free political advertising in some public buildings; public places for posters; use of public buildings and private theatres for campaigning events; regulated hiring fees for campaign offices; free installation of a telephone in

Country	Media Access	Campaign Financing
	The order in which programmes are broadcast is determined by a lottery. Public media have to respect strict neutrality. Private media have to assure fair treatment of the campaigners. The same requirement for maintaining a balance applies to other private media (the printed media), but only if they wish to insert campaign material in their publications.	the campaign office. Contrary to the situation with elections, no public funds are distributed for referendum campaigns. There is a limit on the amount campaigners are allowed to spend (the limit is calculated on the basis of the minimum wage). Mandatory accounts relating to campaign spending have to be presented to the National Election Commission after the ballot day.
Romania	No rules.	No rules on referendums, just ad-hoc measures No public financing During the 2003 campaign, the side in favour of changing the Constitution (most of the parliamentary parties, the government, the presidency and civil society groups) was supported by a campaign funded with public money. Political parties have to reveal referendum spending.
San Marino	Referendum Act and Electoral Code: During the official campaign, radio and television programmes are guaranteed by the Secretary of State for Internal Affairs. Programmes have to give information about the campaign and equal airtime has to be given to the campaigners.	Referendum Act and Electoral Code: Both the committee in favour and the committee opposed to the referendum proposal receive public funds for their campaigning. The committees, political parties, citizens' associations and social forces benefit from public places made available for posters.
Slovakia	Law on Referendum No. 564/1992 Coll.: Access to media is given only to political parties	There are no rules for financing referendum campaigns. Financing from public

Country	Media Access	Campaign Financing
	represented in the national parliament.	sources is made transparent only after voting has taken place.
Slovenia	Rules for electoral campaigns, not for referendum campaigns. In practice, airtime is made available by the media.	Rules for electoral campaigns, not for referendum campaigns. No public funds for official information campaigns.
Spain	Law on the regulation of referenda; ad hoc regulation: Public media grant free airtime to political parties represented in parliament. This time is allocated in proportion to the various parties' electoral strength. Other political groups have the right to campaign at their own expense. Supervision is carried out by the Electoral Commission.	The referendum law allows public funding for the government's impartial informative campaign. A proposal to include in the referendum law the financing of parties engaged in a referendum campaign was rejected in 2004 (public funds are granted for electoral campaigns). The parliament approved an extraordinary budget of €9 million in January 2004 for the funding of political parties engaged in the referendum campaign on the European Constitution. Distribution is according to each party's number of seats in parliament (€8.1 million for the Yes campaign, €0.9 million for the No campaign). No public funds for civil society organizations. There is a limit on political parties' campaign spending (but no control of spending by civil society organisations). All private donations have to be paid into special bank accounts and donors have to identify themselves. The limit per donor is €6 000. Authorities make places available free of charge for

Country	Media Access	Campaign Financing
		propaganda posters, as well as venues for campaigning events. Special fees for propaganda mailing. Extraordinary budget for the political parties' campaign spending.
Sweden	Equal airtime is given to the supporters and opponents of the draft proposal. No rules on media access.	In the last two referendums, the Swedish parliament decided that both the Yes campaign and the No campaign would receive state funds for informing the voters about the alternatives (ad hoc regulation). No transparency rules.
Switzerland	Law on radio and television: Political propaganda on radio and television is prohibited (at least during the referendum campaign). No free airtime. General obligation for broadcasters to inform in a balanced way and to ensure equal opportunities for different political views (not only during the referendum campaign). Control by an independent authority for radio and television.	Use of public funds for neutral information by authorities. Use of public funds for propaganda prohibited. No public financial support for campaigners. No transparency rules some case law.
The former Yugoslav Republic of Macedonia	Equal airtime is given to the supporters and opponents of a draft proposal.	Use of public funds for campaigns for or against a referendum issue is prohibited. There are tax exemptions for activities connected with a referendum. In general, there is a lack of clear legislative regulations for campaign financing and transparency.

Country	Media Access	Campaign Financing
Ukraine	No information yet.	No information yet.

ANNEX 2: Referendums held in Council of Europe member countries since 1995

Country	Date and Content of Referendum
Albania	22.11.1998 – Constitution 29.06.1997 – Form of government
Armenia	25.05.2003 – Constitutional reform 05.07.1995 – Constitution
Azerbaijan	24.08.2002 – Changes with the aim of joining the Council of Europe 24.08.2002 – Changes with regard to Azerbaijan's adherence to the European Convention on Human Rights (ECHR) 24.08.2002 – Holding a referendum 24.08.2002 – Voting system in parliament 24.08.2002 – Procedure for electing the president 24.08.2002 – Improvements to state institutions 24.08.2002 – Reform of the justice sector 24.08.2002 – Various constitutional changes 05.11.1995 – Constitution
Cyprus	24.04.2004 – Reunification
Czech Republic	14.06.2003 – Membership of the EU
Denmark	28.09.2000 – Joining the single European currency 28.05.1998 – EU Treaty of Amsterdam
Estonia	14.09.2003 – Membership of the EU
France	29.05.2005 – The EU constitution 24.09.2000 – Reducing the presidential term from 7 to 5 years
Georgia	03.11.2003 – Reducing the number of parliamentary seats from 235 to 150
Hungary	05.12.2004 – Holding dual nationality 05.12.2004 – Privatisation of hospitals 12.04.2003 – Membership of the EU 16.11.1997 – NATO membership
Ireland	11.06.2004 – Irish citizenship – 27 amendments to the

Country	Date and Content of Referendum
	Constitutional Bill 2004 19.10.2002 – Enlargement of the EU 06.03.2002 – Protection of human life in pregnancy 07.06.2001 – Prohibition of the death penalty 07.06.2001 – Membership of the International Criminal Court 07.06.2001 – Ratification of the Nice Treaty 11.06.1999 – Recognition of local authorities 22.05.1998 – EU Treaty of Amsterdam 22.05.1998 – Irish authorities in any part of the island of Ireland 30.10.1997 – Confidentiality of discussions at meetings of the government 28.11.1996 – Release on bail rendered more difficult for suspected dangerous criminals 24.11.1995 – Introducing divorce laws
Italy	13.06.2005 – Question 1 – Restrictions on clinical research and experiments on human embryos 13.06.2005 – Question 2 – Norms on the limits of access (medically assisted procreation) 13.06.2005 – Question 3 – Norms on the finality, subject rights and access limits (medically assisted procreation) 13.06.2005 – Question 4 – Prohibition of *in vitro* fertilisation 15.06.2003 – Abolition of the obligation on landowners to allow access in connection with power lines 15.06.2003 – Article 18 of the labour law 07.10.2001 – Amendment of Title V, second Part, Constitution (Reinforcement of Italian Federalism) 21.05.2000 – Abolition of the electoral system for the composition of the "Consiglio Superiore della Magistratura" 21.05.2000 – Abolition of the potential career link between prosecutor and judge 21.05.2000 – Abrogation of the norm on the reintegration of the workplace 21.05.2000 – Abolition of deduction of contributions to trade unions and workers' associations from wages 21.05.2000 – Abolition of right of civil servants to have a second gainful employment 21.05.2000 – Abolition of the proportional method of 25% in the allocation of parliamentary seats 21.05.2000 – Abolition of the reimbursement of referendum and electoral campaign costs 18.04.1999 – Abolition of 1/4 of parliamentary seats in

Country	Date and Content of Referendum
	respect of proportional representation 15.06.1997 – Dismantling the Ministry of Agriculture 15.06.1997 – Dismantling the state-controlled Association of Journalists 15.06.1997 – Ending the right to additional, extrajudicial professions for members of the judiciary 15.06.1997 – Ending the Treasury's "Golden Share" in privatised businesses 15.06.1997 – Ending restricted access to the Civil Service 15.06.1997 – Ending the right to trespass on private property when hunting 15.06.1997 – Ending the right to automatic promotion for civil servants 11.06.1995 – Ending the restriction of state concessions to public television stations 11.06.1995 – Complete reorganisation of the administrative assemblies 11.06.1995 – Partial reorganisation of the administrative assemblies 11.06.1995 – Revoking the prime minister's powers in matters pertaining to the representation of trade unions 11.06.1995 – Restricting house arrest for *mafiosi* to their own residence 11.06.1995 – Abolition of municipal powers regarding liquor licences 11.06.1995 – Ending the direct deduction of contributions to trade unions from salaries and pensions 11.06.1995 – Abolition of elections in two rounds for municipalities of over 15 000 inhabitants 11.06.1995 – Abolition of municipal powers regarding shop trading hours 11.06.1995 – Revoking the law limiting the ownership of television stations to three 11.06.1995 – Abolition of advertising interrupting television programmes 11.06.1995 – Limiting the number of television stations an advertising agency may operate with to three
Latvia	21.09.2003 – Joining the European Union 13.11.1999 – Changes to the pensions law 03.10.1998 – Ending facilitated naturalisation
Liechtenstein	27.11.2005 – "Pro Life" (with counter proposal) 04.04.2004 – Financing for the extension of the police building 04.04.2004 – Cancellation of the subsidy for non-

Country	Date and Content of Referendum
	professional accident insurance 16.03.2003 – Extension of the powers of Hans-Adam II 29.09.2002 – Space design law 10.03.2002 – Loan for the music festival "Little Big One" 10.03.2002 – Transport policy 24.09.2000 – Agreement with Switzerland on the tax on heavy trucks linked to the prestation 18.06.2000 – Law on citizenship 27.02.2000 – Law on housing construction 31.01.1999 – Reduction of the health insurance premium 09.04.1995 – Joining the European Economic Area
Lithuania	11.05.2003 – Joining the European Union 10.11.1996 – Purchase of agricultural land by specific legal entities 20.10.1996 – Compensation for lost assets prior to 1990 20.10.1996 – Reducing the number of seats in parliament from 141 to 111 20.10.1996 – Parliamentary elections on the second Sunday of April every four years 20.10.1996 – At least half the state budget allocated to "citizens' social needs" such as health, education, social security
Luxembourg	10.07.2005 – Referendum on the European constitution
Malta	08.03.2003 – Joining the European Union
Moldova	23.05.1999 – Increased powers for the president
Netherlands	01.06.2005 – Referendum on the European constitution
Poland	08.06.2003 – Joining the European Union 25.05.1997 – Constitution 18.02.1996 – Privatisation programme 18.02.1996 – Extending the scope of mass privatisation (National Investment Funds) 18.02.1996 – Investing the profit generated by privatisation in the public pension fund 18.02.1996 – Financing pensions with the profit generated by privatisation 18.02.1996 – Privatisation by means of vouchers
Portugal	08.11.1998 – Regionalisation 08.11.1998 – Amsterdam Treaty

Country	Date and Content of Referendum
	28.06.1998 – Legalising abortion
Romania	19.10.2003 – New constitution
San Marino	03.07.2005 – Quorum of participation of 40% for parliamentary plebiscites 03.07.2005 – Quorum of participation of 40% for legislative initiatives 03.07.2005 – Not more than two preferential votes in the case of an election 03.07.2005 – Members of the government from outside parliament 03.08.2003 – Reduction of the number of preference votes from three to one 12.09.1999 – Law on citizenship 22.09.1996 – Revoking article 5 of the Hunting Regulations 22.09.1996 – Reducing the maximum number of preference votes from 6 to 3 22.09.1996 – Ending the reimbursement of travel expenses for citizens living abroad 22.09.1996 – Electoral procedure for citizens living abroad 26.10.1997 – Prohibition of real estate firms becoming shareholding companies
Slovakia	03.04.2004 – Early general elections 17.05.2003 – Joining the European Union 11.11.2000 – Early elections 26.09.1998 – No privatisation of strategically important enterprises 24.05.1997 – NATO membership 24.05.1997 – Creating military bases 24.05.1997 – Siting of nuclear weaponry 24.05.1997 – Direct presidential elections
Slovenia	08.12.1996 – Electoral system for parliament 10.01.1999 – The third steam electricity power plant TET 3 17.06.2001 – *In vitro* fertilisation treatment for unmarried women 19.01.2003 – No subdivision of the railways 19.01.2003 – Total restitution of over-paid telephone charges 21.09.2003 – Sunday trading only ten times a year 23.03.2003 – Joining the European Union 23.03.2003 – Joining NATO 04.04.2004 – Technical law on the re-registration of citizens removed from electoral lists in 1992 25.09.2005 – Law on the state television channel RTV

Country	Date and Content of Referendum
	Slovenia
Spain	20.02.2005 – The EU constitution
Sweden	14.09.2003 – The euro
Switzerland	There have been 104 referendums since 1995: http://www.admin.ch/ch/f/pore/va/liste.html
The former Yugoslav Republic of Macedonia	07.11.2004 – Macedonia's territorial organisation for local self-government
Ukraine	16.04.2000 – President may dissolve parliament when no there is no parliamentary majority or when parliament fails to approve the state budget Restriction of parliamentary immunity for people's deputies of Ukraine Reduction of the number of members of parliament from 450 to 300 Formation of second chamber of parliament (bicameral system) representing the Ukrainian regions

Sources: C2D database (http://c2d.unige.ch) and Beat Müller, ETH Zurich.

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1 *Publications are also available in French unless otherwise indicated.*

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It is not sufficient to avoid any irregularity during the vote or the counting for elections to be considered in conformity with the European electoral heritage. There are a certain number of conditions which must be respected prior to the vote for it to be considered free and fair. The reports examine the most important of these conditions, respect for fundamental rights, in particular freedom of expression, of assembly and association as well as equal access to media and the financing of electoral campaigns, both in the field of elections and referendums.