

GUIDELINES FOR BROADCAST COVERAGE OF ELECTION CAMPAIGNS IN TRANSITIONAL DEMOCRACIES

Introduction

The following Guidelines concern broadcast coverage of election campaigns in transitional democracies. These are countries which have recently emerged from a period of non-democratic governance, characterized by, among other features, the absence of free and fair elections.⁽¹⁾ The Guidelines are intended to be directly applicable only to the period of the election campaign itself and only to the government broadcast media; they may, however, also be relevant to government-controlled press during election periods, and to government media coverage of political matters during non-campaign periods.

The term "government media" is used in these Guidelines to refer to broadcasting channels that are owned, operated or controlled by the government, as well as to channels that are managed by government appointees or that are governed by boards, a majority of whose members are selected by the government or ruling party. The Guidelines also apply to public service broadcasting channels, namely, media which are supported entirely or in part by government funds but are governed by boards that are independent of government and all political interests.

Three kinds of election broadcast are discussed: (a) direct access programmes including advertising, over which the political party or candidate has complete editorial control; (b) interviews, debates, candidate forums, radio "talk-back" shows, voter education programmes and similar formats, referred to in these Guidelines as "special information programmes", over which the broadcaster has editorial control; and (c) news coverage, over which the broadcaster also has editorial control.

The degree of government control of broadcasting varies between transitional democracies: in many countries, broadcast media operate under heavy government influence, while in a few, state-owned television and particularly radio have a substantial degree of editorial independence and a commitment to balance, fairness and even investigative reporting. The status of private media also varies: in some transitional democracies, especially during the first years, the government has a complete monopoly on the television media; in others, private stations may be licensed to broadcast regionally, and in a few (especially after several years), one or more national private television stations may be operating. Similarly, in some countries, the government controls all radio stations; in others, a number of private stations are authorized. Where private media do operate, they are often in the hands of

strong supporters of the government and only rarely present views which differ from government media.

Conditions vary among transitional democracies and even among different regions within the same country. The predominant vehicle for communicating political messages in some countries or regions is television; in others, radio, the press or other methods (such as leaflets, meetings, loudhailer messages) may be the predominant vehicle; and in some, two or more of these media are of approximately equal influence. These varying conditions do not affect the need for governments to implement these Guidelines; they may, however, require governments to undertake additional information initiatives to ensure that all citizens are fully informed and able to participate in the election process.

In countries where radio and/or television are the predominant media for communicating political party and candidate messages, the obligation of the government media to provide the public with accurate, balanced information and to grant access to parties or candidates on a non-discriminatory basis is all the stronger.(2) First multi-party elections, both where the prior government remains in power and where some form of interim government has been installed prior to elections, present particular challenges and warrant special vigilance.

To comply with international law, government media must fulfil the duties of impartiality and non-discrimination. As part of the transition to democracy, ARTICLE 19 strongly recommends that governments transform government broadcast media into public service media. As a first step and as a matter of urgency, editorial independence should be safeguarded.

Several of the Guidelines are phrased in mandatory terms. These are based on principles of international human rights law derived from international treaties, case-law and evolving state practice.(3) Non-compliance with these Guidelines, regardless of various country-specific conditions, raises a presumption of unfair media practice which could taint the fairness of the election process.

Other Guidelines are phrased as highly recommended or recommended based upon the experiences of both transitional and well-established democracies.(4) Non-compliance with these Guidelines calls into question the fairness, impartiality, balance and informative content of media coverage.

Most of the Guidelines indicate required and recommended practice for government media during the election campaign period. These Guidelines are 1, 2, 5, 7, 8, 9, 10, 11, 12, 15 and 16. Other Guidelines concern the government itself and indicate what is required and what is recommended to ensure full enjoyment of freedom of expression for all media — government and private, broadcast and print — and for political parties and candidates, during the election campaign. These Guidelines are 3, 4, 5, 6, 13 and 14.

Private media do not carry the same responsibilities under international law as do government media. Nevertheless, ARTICLE 19 encourages private broadcasters as a matter of professional responsibility to comply with the Guidelines which apply to government media. Such voluntary implementation of the Guidelines, including for example, the requirements of balanced and impartial news coverage and the granting of direct-access air time on a non-discriminatory basis would enhance the fairness of an election. ARTICLE 19 also encourages professional associations of journalists and broadcasters to adopt relevant Guidelines and to encourage their members to adhere to them.

THE GUIDELINES IN SUMMARY

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The Guidelines address the duty of government media:

- * to inform the public about matters relevant to the elections, including to provide voter education (Guidelines 1 and 11)
- * to be balanced and impartial in their election reporting (Guideline 2)
- * not to refuse to transmit an election broadcast unless it constitutes a clear and direct incitement to violence or hatred (Guideline 5)
- * to be accurate, balanced and impartial in their news and current affairs programmes (Guideline 8)
- * to grant parties and candidates air time for direct access programmes on a fair and non-discriminatory basis (Guideline 9)
- * to grant equal time to both sides of a referendum vote (Guideline 15), and
- * to comply with the above Guidelines also in local and regional elections (Guideline 16).

They further address the obligation of governments:

- * to abolish any laws that restrict freedom of expression in breach of international law and standards (Guideline 3)

- * to make special efforts to investigate threats and physical attacks on media personnel or offices and to bring those responsible to justice (Guideline 4);
- * not to censor election programmes in any way (Guideline 5)
- * to establish or designate an independent, impartial body to monitor and regulate election broadcasts (Guideline 13), and
- * to ensure that decisions of this body are subject to judicial review on an expedited basis (Guideline 14).

The Guidelines strongly recommend:

- * that the media be exempted from legal liability for unlawful statements made during election broadcasts by candidates or party spokespersons (Guideline 6)
- * that parties and candidates be granted the opportunity to reply to or correct injurious statements or criticisms directed against them (Guideline 7)
- * that government media should broadcast candidate forums and interview programmes (Guideline 10), and
- * that any media outlet that publicizes the results of an opinion poll or election projection should also include any relevant information about the circumstances and significance of the poll or projection (Guideline 12).

GUIDELINE 1:

DUTY OF GOVERNMENT MEDIA TO INFORM THE PUBLIC ABOUT ALL MATTERS RELEVANT TO ELECTIONS

GUIDELINE 1

During the period preceding an election, government media have a duty to inform the public about the political parties,

candidates, campaign issues, voting processes, and other matters relevant to the election.

Commentary: The government's obligation to ensure that "*Every* citizen shall have the right and opportunity, without ... distinction [of any kind] ... to vote ... at genuine ... elections" obliges the government to ensure that electors have the necessary information to register and vote, and to make informed choices regarding matters that are the subject of elections. This obligation is particularly heavy where the electorate have not had substantial prior experience of voting in free and fair elections. The right to vote "without distinction of any kind" encompasses the right of people who are illiterate or only minimally educated to have access to the necessary information. The government is obliged to broadcast election programmes unless it undertakes other information initiatives that would reach as many people as would broadcasting.

The media are charged with the dual public functions of "impart[ing] information and ideas on matters of public interest" and acting as watchdog of government.(6) No individual media organ is obliged to fulfil these twin functions; the obligation, instead, rests with the government to ensure that the press, radio and television collectively are able to do so. However, if the government controls or substantially supports a broadcast station, that station is obliged to fulfil these public functions.

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GUIDELINE 2:

DUTY OF BALANCE AND IMPARTIALITY

GUIDELINE 2

Government media have a duty to be balanced and impartial in their election reporting and not to discriminate against any political party or candidate in granting access to air time.

Guideline 2.1

This duty requires that news, interview and information programmes must not be biased in favour of, or against, any party or candidate.

Commentary: The government's obligation of balance and impartiality derives directly from the fundamental rights of voters and candidates to freedom of expression and information, and non-discrimination,(7) in addition to the duty of government broadcasters to disseminate accurate information about matters of public interest (discussed in Guideline 1, above).

Consistent with the international standards, guidelines of UN election missions provide that "[i]n the case of government-owned media, it is customary that equal access, both in terms of timing and length of broadcast, should be given to the competing sides" and that "the information provided by the government-owned media should not be biased in favour of one or the other side".(8)

The recent experience of transitional democracies shows that the duty of balance is most often, and most seriously, breached in the coverage of news.(9) Criteria for determining appropriate news coverage are set forth in Guideline 8.

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GUIDELINE 3:

SPECIAL OBLIGATIONS WHERE LAWS RESTRICTING FREEDOM OF EXPRESSION ARE IN FORCE

GUIDELINE 3

Any laws that restrict freedom of expression in breach of international law and standards must be abolished.

Commentary: The existence of laws which restrict freedom of expression will limit political debate and hamper the media's ability to give full and free coverage to the election, thereby interfering with the fairness of the election

process. It is recommended that such laws be abolished in good time before the election campaign begins.

The UN Technical Team on the Malawi Referendum noted in 1992 that special measures are required to ensure respect for freedom of expression during the campaign period "where the exercise of the freedom of opinion and expression has been subject to undue restriction in the past".

The preferred approach, stated the Team, is to eliminate the restrictions outright; short of this, it is customary to incorporate special legislation to protect freedom of expression that clearly takes legal precedence over previous restrictive laws and practice. Moreover, "it is most often necessary for a clear statement to be issued from the highest level of Government to the implementing agencies concerned, drawing attention to the new standards in force for the election or referendum." (10)

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GUIDELINE 4:

GOVERNMENT OBLIGATION TO PUNISH ATTACKS AGAINST MEDIA PERSONNEL AND PROPERTY

GUIDELINE 4

The Government must make special efforts to investigate all acts, or threatened acts, of violence, intimidation or harassment directed against media personnel, or any act of destruction of the property or premises of a media outlet, particularly where there is any reason to believe that the act was motivated by an intent to interfere with media freedom, and to bring those responsible to justice.

Commentary: Recent UN declarations have stressed the obligation of governments to *protect* the media, and the UN's appointment in 1993 of a Special Rapporteur to receive and act upon complaints of attacks against media personnel underscores the special importance attached by the international community to their physical protection. This special emphasis is based upon the recognition that effective protection of media personnel, and

the premises of media outlets, is a prerequisite to the ability of the media to serve its public function of informing the public about matters of public interest.⁽¹¹⁾

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GUIDELINE 5:

LIMITS ON PRIOR RESTRAINT

GUIDELINE 5

There must be no government censorship of any election programme.

Guideline 5.1

The government should issue a clear statement to the public and all broadcast stations that the media are encouraged to broadcast election-related programmes, and that the media will not be penalized in any way for broadcasting programmes merely because they are critical of the government, its policies or the ruling party.

Guideline 5.2

The government or government media must not interfere with the broadcast of an election programme, unless it is absolutely certain that a restraint is necessary to prevent a substantial harm to a legitimate interest, such as an act of violence. Any decision to restrain a programme must be promptly reviewed by an independent body in order to determine whether the restraint was necessary or whether it constituted an act of censorship.

Commentary: Pre-publication censorship, especially concerning matters of political importance, is prohibited under international law except in narrowly-defined circumstances.⁽¹²⁾ Any restraint must be proportionate to a

legitimate aim. Given the fundamental importance to a democratic society of free political debate during election campaigns, an election broadcast may be subject to prior restraint only where it is "absolutely certain" that the broadcast would cause an immediate, irreparable and substantial harm.(13)

The experience of transitional democracies is that governments and government media have improperly refused to broadcast programmes of opposition parties.(14) The risk to free speech posed by government prior censorship outweighs the risk that programmes will incite violence or irreparably damage interests that the government is entitled to protect.

Broadcast channels are entitled to pre-screen programmes in order to ensure that they do not violate any law but this process should not be used as a pretext to delay transmission of any programme. In the case of government-controlled media, however, the internal review process often is tantamount to governmental pre-screening. This reality, coupled with the duty of balance and impartiality, imposes a strong obligation on government media not to refuse to broadcast election programmes.

Guideline 5.3

The standards used by the government, or by government media, in determining whether or not to broadcast an election programme must not be vague or broadly defined.

Commentary: Standards for prohibiting broadcasts must be narrowly drawn and clearly defined. The UN Technical Team on the Malawi Referendum urged that any limitations on freedom of expression

should not be so vague or broadly defined as to leave an overly wide margin of discretion to the authorities responsible for enforcing the law, since uncertainty over legal boundaries has a dampening effect on the exercise of this right [to freedom of expression] and may encourage discrimination in ... [the restrictions'] application.(15)

A number of courts have held that refusal to broadcast an election programme pursuant to vague standards was illegal. For instance, Germany's Federal Constitutional Court (FCC) ruled that, while a station manager may refuse to broadcast an election programme that is a "clear" violation of the criminal law, he or she may not refuse to broadcast a programme on the ground that its tone is hostile to the spirit of the Constitution; such a vague and speculative concern does not constitute a "clear" violation.(16) Guideline 13 deals with the need for a speedy review by an independent body of any decision not to broadcast an election programme.

Guideline 5.4

Any post-broadcast penalty must be proportionate to the harm inflicted. In particular, unless a broadcast actually and intentionally incites violence or hatred, a penalty must not include imprisonment or such an onerous fine as to force the political party out of operation; nor may it restrain all future broadcasts by the party or candidate.

Commentary: The right of political parties to function is one of the most fundamental rights since it is based on the rights to freedom of expression, association and political participation. It is impermissible to force a party out of operation by imposition of excessive fines or other indirect means.

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GUIDELINE 6:

LIMITS ON MEDIA LIABILITY

GUIDELINE 6

It is strongly recommended that the media be exempted from legal liability for unlawful statements made by candidates or party representatives and broadcast during the course of election campaigns, other than those which constitute clear and direct incitement to violence. The parties and speakers should be held solely responsible for any unlawful statements they make.

Commentary: This departure from the normal rules of liability is justified by the short duration of campaign periods and the fundamental importance to free and fair elections of unfettered political debate.⁽¹⁷⁾ It is recommended that the media be exempted for all speech that does not directly incite violence on the ground that all other speech can be redressed reasonably (though not necessarily entirely) by a post-broadcast remedy.

Neither defamation nor incitement to "discrimination, hostility or violence by means of national, religious, racial or ethnic hatred" are included in this Guideline's list of kinds of speech for which the media should be held liable even though it is recognized that these forms of speech may be unlawful and indeed that various UN guidelines state that the media should be held liable for broadcasting such speech.(18)

The recommendation that the media be exempted from liability for defamation is based upon considerable national case-law and experience supporting the conclusion that defamation in the political context is adequately, and perhaps even most effectively, redressed after publication, by a prompt reply, retraction or correction.(19) Publication of a reply, retraction or correction should preclude a lawsuit for all except the publication of knowingly false information.

Incitement to hatred presents a highly complex problem. It is recommended that it be exempt from media liability during campaign periods based on the fact that, in practice, the ban on incitement to hatred is widely used by governments to suppress legitimate political expression including, in particular, calls for national, religious or ethnic autonomy or other rights. A study undertaken by ARTICLE 19 of the law and practice concerning "hate speech" in 14 countries reveals that governments have often used the justification of banning hate speech to suppress the speech of only one side to a national, religious or ethnic conflict or else simply to silence government critics.(20) For these reasons it is recommended that, in the context of an election campaign, the media should not be held liable for broadcasting statements that constitute incitement to hatred or discrimination short of violence (so long as the media do not condone the incitement in any accompanying editorial content). Without an exemption, experience shows that the risk that legitimate debate may be discouraged or suppressed is unacceptably high.

This Guideline does not relieve political parties and other speakers of liability for their statements. The often heated nature of political debate should be considered, however, when assessing liability for comments by political contenders about their electoral opponents.

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GUIDELINE 7:

REPLIES, CORRECTIONS AND RETRACTIONS

GUIDELINE 7

Any candidate or party that makes a reasonable claim of having been defamed or otherwise injured by a broadcast should either be granted the opportunity to reply or be entitled to a correction or retraction by the broadcaster or by the person who made the allegedly defamatory statement. The reply or correction should be broadcast as soon as possible.

Guideline 7.1

The reply, correction or retraction should be approximately the same length, and should be broadcast in approximately the same time period, as the allegedly defamatory statement. This duty may be discharged by the allocation of direct access time pursuant to the normal allocation process.

Guideline 7.2

It is recommended that an impartial body be entrusted with deciding complaints that a programme violated the general laws, including laws against defamation and incitement to hatred or violence. This body should be empowered to order a right of reply, correction or retraction, and its decisions should be subject to review by the courts. (See Guidelines 13 and 14 below.)

Commentary: During election campaigns in democracies around the world, candidates and parties are afforded the right to reply to statements that misrepresent their views or activities.(21) The right of reply has also been endorsed by UN guidelines; in particular, the UN Transitional Authority in Cambodia (UNTAC) recommended that "[m]edia outlets should give parties, groups or individuals whose views have been misrepresented or maligned by a publication or broadcast the 'right of response' in the same media outlet."(22)

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GUIDELINE 8:

NEWS COVERAGE

GUIDELINE 8

Government media must be particularly scrupulous in complying with their obligation to provide accurate, balanced and impartial information in their reporting of news and current affairs.

Commentary: Of the various forms of election broadcasts, news coverage is generally accepted as the most influential. Accordingly, the duties to inform the electorate and to report with balance and impartiality are particularly strong concerning news programmes.(23)

Guideline 8.1

The duty of balance requires that parties or candidates receive news coverage commensurate with their importance in the election and the extent of their electoral support.

Commentary: It is recommended that a fair and equitable mechanism be established to determine the proportion of election news coverage to be allocated to the competing parties (which may correspond to the percentages assigned for direct access programmes) and that the broadcaster adhere scrupulously to the targets. If possible, agreement on the proportions to be allocated should be reached between the broadcaster and the political parties. If agreement is not possible, the proportions may be decided by an independent body.(24)

During the three weeks preceding polling day in the United Kingdom (UK), for example, the BBC keeps careful count of the amount of news coverage it devotes to the competing parties and takes measures to ensure mathematical parity among the parties. Moreover, detailed rules narrowly restrict the amount of coverage of political figures that may be counted as non-election broadcasts.

In Romania's 1992 presidential and parliamentary elections, a parliamentary commission determined the percentage of total election news time to which each party was entitled, and with which Romanian Radio (if not Romanian Television) generally complied.(25)

At a minimum, comparable events should be given comparable coverage. If a station covers a speech or election rally of one party's candidate, for example, it must give comparable coverage to other parties' speeches or rallies. Comparable coverage includes comparable length and comparable kind of coverage and, for television coverage, involves comparable footage of events or speakers. (Broadcasting unimportant statements or summarizing statements is not comparable to broadcasting the highlights of a candidate's speech that received the most applause or broadcasting the speaker's actual voice).

Guideline 8.2

Owing to the potential for editorial opinions to be confused with news, government media are urged not to broadcast editorial opinions at all. If a government channel broadcasts an editorial opinion, it is obliged also to broadcast the opinions of the major opposition parties. If a broadcaster presents his or her own views, these must be clearly identified as such, and it is recommended that they not be aired during news programmes.

Guideline 8.3

News coverage of press conferences and public statements concerning matters of political controversy (as opposed to functions of state) called or made by the head of government, government ministers, or members of parliament should be subject to a right of reply or equal time rules. This obligation acquires even greater force when the person making the statement is also standing for office.

Commentary: Undeniably, broadcasters have greater editorial discretion in deciding what events to cover in news programmes and how to cover them than over allocation of time for direct access programmes. Nevertheless, they remain subject to overall obligations of balance and impartiality. The experience of transitional democracies, and indeed of some established democracies, demonstrates that principles of balance and fairness are most often violated in the context of news programmes.

This is by no means always motivated by malicious intent. Various factors enter into legitimate decisions regarding news coverage. The reality is that the ruling party, by using the apparatus of state power, are more likely, and

can more easily manoeuvre, to be part of newsworthy events than can non-incumbents. Despite the difficulties, broadcast policies requiring fairness and balance must be diligently implemented owing to the high credibility a large portion of the public attaches to information broadcast on radio and television.

Precedent for regulation is strongest concerning news coverage of ministerial announcements and press conferences. In the UK, for example, an *aide-mémoire* representing an agreement among the parties and the BBC provides for an automatic right of reply by the opposition party to ministerial broadcasts on matters of prime national or international importance.(26) In practice, the BBC carries its duty of balance one step further by directly following any controversial ministerial broadcast with a response by the opposition, and then by a discussion among all major parties.(27) In France, a law introduced in 1986 grants the opposition a right of reply to declarations of government.

Press conferences called by incumbents who are running for office often closely resemble government announcements in significant ways and thus it is important to adopt some form of a right of reply or correction to statements made at press conferences as well as to government announcements.

The 1990 election in the Czech and Slovak Federal Republic, conducted during the Civic Forum-led interim government of President Havel, offers an impressive example of a new democracy's efforts to redress imbalance in news coverage by granting reply time. When the government television station devoted news coverage to President Havel (who was standing for election) during a campaign trip and at a party rally, several parties lodged formal complaints. The station compensated the parties with additional direct access time.

The existence of a large number of political parties or of shifting coalitions, more common in transitional than in established democracies, poses clear difficulties for the implementation of right of reply or equal time rules. Nevertheless, in many, if not most, transitional democracies, a few parties or coalitions clearly are the leading contenders and in such cases replies to governmental statements and press conferences should be granted to them as a matter of right.

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GUIDELINE 9:

DIRECT ACCESS PROGRAMMES

GUIDELINE 9

Government media must grant political parties or candidates air time for direct access programmes on a fair and non-discriminatory basis. For the first multi-party election, it is strongly recommended that all major parties or candidates receive equal time.

Commentary: International norms discernible from a wide range of state law and practice confirm that governments have an obligation to ensure that parties and candidates have access to government media to broadcast their views during election campaign periods. Such access is an essential aspect of the right to freedom of political communication in light of the tremendous impact of radio and television on public opinion and the public service nature of government-owned media.

Direct access programmes have a number of features which justify requiring government channels in transitional democracies to broadcast them in the discharge of their duty to inform the public about the candidates and parties.⁽²⁸⁾ They provide an opportunity for political parties and candidates to express their positions in their own words; for small parties and independent candidates to broadcast their views; and for parties to respond to negative statements or comments made about them. Because of the candidates' or parties' control, direct access programmes convey the style and other intangible information about the candidates and parties as well as the flavour of unfettered political communication.

Direct access programmes are particularly important where the media are in reality, or are widely perceived to be, under some measure of government control. In such circumstances, denying political parties the opportunity to present their own programmes runs an unacceptable risk of interfering with their right to communicate their messages and of undermining public confidence in the fairness of the election process.

In virtually all Western democracies, public broadcasting channels are required to make time available for direct access programmes. Sweden is the major exception.⁽²⁹⁾ It may be argued that special information programmes are able to incorporate all the benefits of direct access programmes, or even that broadcaster-directed programmes, such as interviews and debates, are generally more informative than programmes produced by the political parties or candidates themselves, and that it is therefore legitimate to deny direct access programmes. However, this would only be possible if the channel is both in fact and perceived to be wholly independent of government and the ruling party, which is unlikely in a transitional democracy.

Direct access must be granted on a fair and non-discriminatory basis to all parties registered for an election or to all candidates in the case of presidential elections.

Allocation of more than 50 per cent of campaign broadcast time to the government or any other party constitutes a prima facie violation of the duty of balanced coverage.

a) Allocation of Time to the Parties

Guideline 9.1

All parties or candidates that are formally registered must be granted access to some amount of air time for a country's first multi-party election.

Commentary: In the first election of a transitional democracy, it is particularly important that election broadcasts be perceived to be fair and inclusive, as well as to be so in reality.

In a transitional democracy, particularly in the first multi-party election, allocation of air time to political parties on anything other than an equal basis poses great difficulty because the two most objective indicators of support — the party's performance in past elections and the number of seats held in parliament — clearly are unavailable. For that reason, equal air time for all major parties is strongly recommended.

Romania's 1990 elections illustrate both the need for inclusiveness and its disadvantages. In those elections, several dozen political parties were registered, and all were given equal time. While the blocks of time for direct access programmes were announced in advance, the times for particular parties were not. Because the broadcasts of the major parties were buried among those of the smaller parties, many voters paid little attention to the broadcasts. Nevertheless, there was general agreement that equal time had the virtue of providing the opportunity for all parties to communicate their messages and promoted confidence in the fairness of the election process. Moreover, it was recognized that it would have been virtually impossible to have established a process and set of criteria for allocating different amounts of time to different parties that would have been widely viewed as fair. (30)

Guideline 9.2

Following the first election in a transitional democracy, and if there are objective criteria for establishing the levels of support for the different parties, air time may be allocated on a proportional basis. All parties should receive some air time, unless the parties are so numerous that allocation of time to all parties would seriously dilute the broadcasts' effectiveness in informing the electorate about the parties that are likely to form the government.

Guideline 9.2.1

It is recommended that the allocation of air time be carried out by an independent body in consultation with, and with the agreement of, all the parties.

Guideline 9.2.2

Where air time is allocated on the basis of rough proportionality, some amount of time must be allocated to small parties, parties with strong support in only a few regions, parties without parliamentary seats, new parties and independent candidates.

Guideline 9.2.3

If time is allocated on a proportional basis and the government media broadcast regional programmes, parties that have strong support in only a few regions should be given air time on regional programmes proportional to their strength in those regions.

Commentary: In subsequent elections where a small number of parties compete, the continued allocation of air time to the major parties on an equal basis poses little problem and is recommended. However, where a large number of parties compete, granting equal time to all may dilute the messages of the parties that are most likely to form a government. For this reason, allocation of an equal amount of time to each of the leading parties and of a lesser amount of time to each of the smaller parties may improve the informative value of the broadcasts while maintaining the public's confidence in the fairness of the allocation process.⁽³¹⁾ Allocation of time on a proportional basis may be appropriate in transitional democracies where the first election was held to be fair and therefore give a good approximation of the relative strengths of the parties or where there is general agreement as to which are the leading parties (even if there is dispute about their relative strengths).

It is important that, if possible, allocation on a proportional basis is achieved with the agreement of all parties as such agreement lends considerable legitimacy to the system of election broadcasts. It is recommended that an independent body be responsible for this allocation.

If agreement cannot be reached, at least among the major parties, or if the first multi-party elections were not regarded as giving a good indicator of levels of support, continued allocation of air time to the major parties on an equal basis is recommended. Whichever approach is taken, all parties and independent candidates should receive air time which is adequate to communicate their central policies to the electorate.(32)

The proportional approach was taken during Bulgaria's first multi-party elections held in 1990, whereby the parties which were generally conceded to command the greatest support reached agreement about the amount of time to be allocated to them.(33) In Germany, the Parties Law requires that small parties with representation in the *Bundestag* (Federal Parliament) be given the opportunity to use 50 per cent of the broadcast time allotted to the larger parliamentary parties.

In nearly all Western countries surveyed in a 1991 study of election broadcast policy, time was allocated to parties on a roughly proportional basis.(34) While most allotted some time to non-parliamentary parties, they applied varying criteria for determining which parties qualified for air time. The German Constitutional Court has devoted more attention to the question than any other;(35) it concluded that even small parties participating in elections for the first time are entitled to some broadcast access.(36) Factors to be considered include the length and continuity of the party's existence, the size of its membership, the extent and strength of its organization, and its representation in government at both the state and federal levels.(37) The Court gave its view that the number of candidates fielded by a party is irrelevant since it is relatively easy for a party to nominate candidates.(38)

As one expert observed, "the approach of the German courts strikes a nice balance between the demands of fairness and equality of opportunity on the one hand, and a sensible appreciation of the functions of elections on the other. ... [D]isparate treatment ... [may be] explained in terms of the interests of the electorate in greater exposure to the arguments of the groups which might form a government."(39)

In the UK, by contrast, parties may be entirely excluded from direct access and debate programmes if they have not fielded candidates in a certain number of constituencies or polled a certain percentage of the vote in a preceding election.(40)

The Swedish experience directly confirms the importance of air time for non-parliamentary parties. Although party direct access programmes have not been allowed for several years, parliamentary parties previously were entitled

to air time. When parties without parliamentary representation but with significant support over the years were also granted air time, several of them won seats in parliament.

b) Decisions Regarding Amount of Time to be Allocated

Guideline 9.3

The amount of time allocated to the parties or candidates must be sufficient for them to communicate their messages, and for the voters to inform themselves about the issues, party positions, and qualifications and character of the candidates.

Commentary: The amount of time required for effective communication is influenced by a variety of factors, including the number and importance of the offices at issue; the number of candidates; the familiarity of the population with the parties, the candidates, and elective politics generally; the length of the campaign period; the amount of time devoted to special information programmes; and the number and complexity of pressing issues.

c) Scheduling of Direct Access Broadcasts

Guideline 9.4

Direct access programmes should be aired throughout the campaign period and at times when the broadcasts are likely to reach the largest audiences. The government media violate their duty of balance if they air the programmes of some parties or candidates at hours (such as past midnight or during the working day) when it is inconvenient for large segments of the population to view or hear them.

Commentary: The primary purpose of direct access programmes is to allow political parties to communicate their messages to the electorate. Thus, in furtherance of the government's obligation to inform the population about election matters, the government media are obliged to take reasonable measures to ensure that the largest audiences are reached.(41)

d) Process for Assigning Time Slots

Guideline 9.5

Time slots for direct access programmes must be assigned to each of the registered political parties or candidates pursuant to an equitable process.

Commentary: Once the amount of time to be allotted to each party for direct access programmes has been determined, there remains the question of how to assign specific time slots to the various parties. Clearly, slots during prime viewing or listening time are preferable. Where there are a small number of parties, it may be possible to assign prime-time slots to all of them but this may not be feasible where a large number of parties compete. It then becomes crucial to have a fair process by which slots are allocated. The preferred method is to incorporate some form of rotation (so that every party has the same number of prime-time slots). A random element may also be incorporated in allocating the first slots.(42) Random assignment may play a larger role where there is no agreement as to which slots fall within prime time and which fall outside it.(43)

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e) Financing of Direct Access Programmes

Guideline 9.6

Whatever air time is available to a political party or candidate, it must be made available on financial terms equal to those granted to other parties or candidates. At least for the first several elections of a transitional democracy, the government media must provide an amount of time adequate for effective political communication to

registered parties or candidates free of charge or else for a nominal sum.

Guideline 9.6.1 If parties or candidates are to be allowed to purchase additional air time, they must be allowed to do so on equal terms. Rates for such time and the amount of time that may be sold to any one purchaser may be regulated in order to limit the advantage that richer parties clearly have in this area. Stricter regulation may be warranted during the first several elections of a transitional democracy, especially where opposition parties had previously been proscribed and thus did not have the opportunity to raise party funds.

Commentary: In most established democracies, public broadcast channels make some amount of time available to registered political parties free of charge for direct access programmes.(44) In most of these countries, paid political advertising is prohibited throughout the campaign period and, in a few, it is entirely prohibited.

The prohibition, or strict regulation, of paid political advertisements during campaign periods is generally justified on several grounds, including that it is necessary: (1) to safeguard the integrity of the political system in light of escalating costs of buying air time and the concomitant increase in the susceptibility of candidates and political parties to corruption and undue influence by major contributors; (2) to help create a 'level playing field' for parties regardless of resources;(45) and (3) to end the trivialization of political debate resulting from the transmission of very brief political advertisements.

Those who support paid political advertising during campaign periods urge that its prohibition violates freedom of expression and that less onerous means are available to promote interests such as those listed above.

The imposition of limits on charges that may be levied for air time and the amount of time that may be sold to any one party or candidate should strike a reasonable balance between freedom of expression on the one hand and equality of opportunity for media access on the other.(46)

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GUIDELINE 10:

SPECIAL INFORMATION PROGRAMMES

GUIDELINE 10

The media should broadcast programmes that provide an effective opportunity for journalists, current affairs experts and/or the general public to put questions to party leaders and other candidates, and for candidates to debate with each other.

Commentary: Special information programmes include candidate forums and debates, interview programmes, and programmes that provide an opportunity for audience members to pose questions.

Guideline 10.1

While broadcasters have greater editorial discretion in deciding which parties, candidates and commentators should appear on such programmes than on news broadcasts, their discretion is subject to the general obligations of fairness and impartiality. At the least, representatives of all major parties should be invited to participate in such programmes.

Commentary: The German Constitutional Court, for example, upheld an order in 1990 that restrained a public channel from broadcasting an election debate which excluded the Green Party.(47) While the Green Party was not viewed as one of the three major parties, nevertheless it exercised influence in Parliament. The Court also considered the fact that the debate was to take place three days before the election.

Guideline 10.2

Journalists, experts and other questioners should be selected so as to ensure balance among the questions.

Guideline 10.3

Special information programmes should be aired during prime viewing or listening hours.

Commentary: These Guidelines are based on the duty of the media to inform the electorate and to provide information in a balanced fashion.(48) At least several hours of national television time should be devoted to debates among presidential candidates or other party leaders. It is generally most effective to invite experts on various campaign issues (especially independent experts commanding respect among the public) to formulate some of the initial questions and ask follow-up questions.

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GUIDELINE 11:

VOTER EDUCATION

GUIDELINE 11

Government media are obliged to broadcast voter education programmes unless the government has undertaken other information initiatives which are likely to reach as many voters as would the broadcast programmes.

Guideline 11.1

The programmes must be accurate and impartial and must effectively inform voters about the voting process, including how, when and where to vote, to register to vote and to verify proper registration; the secrecy of the ballot (and thus safety from retaliation); the importance of voting; the functions of the offices that are under contention; and similar matters.

Guideline 11.2 The government media are obliged to broadcast programmes that will reach the greatest number of voters feasible. Broadcasts should include programmes in minority languages and programmes targeted for

groups that traditionally may have been excluded from the political process, such as ethnic or religious minorities, women and indigenous groups.

Commentary: The government's duty to inform voters about the process as well as the substance of elections is noted in the commentary to Guideline 1. Governments may discharge this obligation by distributing leaflets and posters with voting information, or by other methods (such as model voting stations and simulation techniques), if these other methods can reach as many voters, and can be as readily understood, as programmes broadcast on radio and television. However, it is not reasonable to assume that people with low literacy can be adequately informed about the voting process solely through printed materials. Thus, if other feasible methods would not be as effective in educating the public, the government media are obliged to broadcast voter education programmes. The government is free to pursue additional methods of education, and in fact would be obliged to do so if the broadcasts would not be expected to reach all potential voters.(49)

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GUIDELINE 12:

OPINION POLLS AND ELECTION PROJECTIONS

GUIDELINE 12

If a broadcaster publishes the result of an opinion poll or election projection, it should strive to report the results fairly and, in particular, to publish all readily available information that would assist the listeners in understanding the poll's significance.

Guideline 12.1

A broadcaster which publishes the results of an opinion poll should identify the organization that conducted the poll, the organization or party that commissioned and paid for the poll, the methodology employed, the sample size, the margin of error, and the fieldwork dates. In addition, the broadcaster should state that the poll reflects public opinion only at the time that the poll was taken.

Commentary: Opinion polls can have a significant impact on voting patterns, especially where their significance is not adequately understood. Thus, as part of the duty to inform voters, media channels that broadcast the results of opinion polls are obliged to furnish sufficient information for their significance to be understood. In the UK, for instance, BBC staff are instructed to remind viewers and listeners that polls are a snapshot of opinion on the day the fieldwork was carried out, and that they are not a reliable predictor of future opinion or voting.(50)

There is debate about whether opinion polls should be published right up to election day. Some observers have expressed concern that the impact of polls is greatest in the days immediately preceding election day and that, for instance, a prediction that one candidate will win by a large margin may incline voters who are primarily concerned about that one candidate to stay home and not participate in other votes on the same ballot. Similarly, voters may decide to vote for the apparent favourite, on the theory that it is better to side with a winner, especially if voters are not convinced about the integrity of the ballot's secrecy. For these and other reasons, several Western and Central European countries prohibit publication of the results of opinion polls during the last several days before an election including: Bulgaria (1990 election - eight days), Czechoslovakia (1990 election - seven days), France (seven days), Hungary (eight days), Italy (one day), Poland (seven days), Spain (five days), Sweden (one day), UK (voluntary abstention on election day).(51)

In other countries, however, it is believed that such restrictions would constitute an unacceptable interference with the free flow of information about the election campaign. In the US, for example, there are no guiding policies with regard to publishing polls and only in recent years have the broadcast media agreed not to publish early election returns from the East Coast before polling stations close (three hours later) in the West.

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GUIDELINE 13:

MECHANISMS FOR REGULATING BROADCASTS AND TAKING ACTION ON COMPLAINTS

GUIDELINE 13

Election broadcasts must be monitored and regulated by an independent, impartial body.

Guideline 13.1

This body should be responsible for allocating time to political parties or candidates. It should also hear and take action promptly on complaints concerning broadcast-related violations by the media, and by political parties and candidates. The body should receive complaints from parties, candidates and citizens. It should be empowered to order prompt rectification, retraction or a right of reply and to seek enforcement of its orders, including through the courts.

Guideline 13.2

The body must make all of its decisions promptly. In particular, any claimed violation that has the result of preventing or delaying the airing of a direct access programme must be reviewed with due speed.

Guideline 13.3

If there is a regularly constituted broadcast-monitoring body that is independent of government, it may carry out these functions; otherwise, a body should be established especially to handle election-related matters.

Guideline 13.4

This body may include representatives or appointees of government and political parties, but it should not be able to take decisions only upon the strength of the votes of the appointees of the government or of one party. If any parties are represented, it is recommended that the body include representatives of at least all major parties. It is recommended that the body include independent media professionals.

Commentary: Central to the integrity of the election process is the existence of a body to monitor and regulate broadcasts that is both perceived to be and is, in fact, impartial.(52) It must act promptly and fairly, and its decisions must be subject to prompt review by the courts. Recognizing this obligation, the UN Technical Team on the Malawi Referendum noted the importance of "a recourse mechanism ... providing for independent review of cases where restrictions on this right [to freedom of expression] have been applied."(53)

A practical model is provided by the Party Political Broadcasting Committee of Great Britain which comprises representatives of the three major political parties, the two Nationalist parties (of Scotland and Wales), and the two (independent) broadcasting authorities. It regulates election broadcasts and allocates air time based on criteria it has established. Where the parties cannot agree, as happened concerning allocation of air time for the 1987 general election, the broadcasting authorities make the decisions themselves.(54) The Federal Republic of Germany has followed a similar approach whereby broadcasters make decisions in agreement with the political parties.

In Australia, Sweden and Switzerland, the broadcasting authorities, which are independent of government, make decisions regarding election broadcasts.(55) Several countries (including Italy and Luxembourg) have entrusted regulation to parliamentary commissions, although in Italy this system has not worked well.(56)

Guideline 13.5

It is recommended that the election broadcast regulatory body monitor all campaign-related broadcasts to assess their compliance with laws and regulations.

Guideline 13.6

Government media should facilitate media monitoring by non-governmental, non-partisan organisations, including by making tapes of election broadcasts available free of charge or at minimal cost.

Commentary: Non-governmental organizations (NGOs) can play a crucial role in promoting the fairness of election broadcasts by monitoring the amount of air time devoted to, and the nature of coverage of, election programmes. Monitoring broadcasts systematically and documenting perceived violations is, however, often prohibitively expensive for NGOs,

because of the high cost of recording and other necessary equipment. The broadcast media, which have such equipment, should make available tapes of election programmes on request either for free or at cost.(57)

Guideline 13.7

The election broadcast regulatory body should be empowered to recommend, subject to judicial review, that an election be postponed, suspended or annulled if it can be established that there have been breaches of international or national law which might significantly affect or have affected the outcome of the election.

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GUIDELINE 14: JUDICIAL REVIEW

GUIDELINE 14

Actions and decisions of a body charged with regulating election broadcasts must be subject to judicial review, which must be carried out on an expedited basis.

Guideline 14.1

Any decision that has the effect of prohibiting the transmission of a direct access programme must be reviewed in a particularly speedy fashion.

Commentary: Judicial review of the decisions of election broadcast bodies is important to the reality as well as the appearance of fairness. In Italy, for example, where decisions of the Parliamentary Commission are not reviewable by the courts, this absence of accountability has enabled the Commission to exclude minor parties and independent candidates from air time and has been the subject of considerable criticism.(58)

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GUIDELINE 15:

PLEBISCITES AND REFERENDUMS

GUIDELINE 15

In plebiscites and referendums, where the voters have the choice only of voting "yes" or "no" to a particular proposition, equal air time must be allocated to each side. This formula stands even if more parties support one side of the issue than the other. Guidelines 1-14, to the extent relevant, are also applicable.

Commentary: Equal allocation of air time is required in order to meet the duties of balance and fairness. Sound reasoning in support of this proposition was provided by a Scottish court of first instance in a case concerning a referendum on devolution. The court ruled that time was to be allotted equally between the two sides, even though three of the four parties supported devolution.(59)

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GUIDELINE 16: LOCAL ELECTIONS

GUIDELINE 16

The preceding Guidelines should be appropriately modified and applied by local and regional government media in local, municipal and regional elections.

Commentary: Local elections are important elements of democratic transitions. True democracy may be experienced most directly at the local level. Political parties should be provided with broadcast time to present their

programmes for local development and other important issues affecting localities throughout the country. Local broadcast media should make time available for direct access programmes, and should broadcast news and special information programmes. Their coverage should be monitored to ensure implementation of election regulations and policies.(60)

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ENDNOTES

1. See Chapter 1 above for elaboration of the varied circumstances of transitional democracies. It should be noted that the transitional phase can last for a number of years, even decades.
2. The Guidelines refer to "parties or candidates" to take account of the type of election (parliamentary or presidential, for example) and the electoral system.
3. For sources of international law, see Art. 38(1) of the Statute of the International Court of Justice and Section 7.1.1 above. For an examination of relevant international and comparative law and practice, see Chapter 7 generally.
4. Most of the examples in this chapter of the practice of well-established democracies are drawn from European countries. This is due to the availability of information and not to a devaluation of the democratic experience in other parts of the world.
5. Art. 25 of the International Covenant, and language (in brackets) from Art. 2, reproduced in Appendix I. See discussion of the pertinent international standards in Section 7.1.1-.2 above.
6. European Court of Human Rights in several judgments, quoted in Section 7.1.3 above.
7. See Section 7.1.5 above.
8. Report of the UN Technical Team on the Conduct of a Free and Fair Referendum on the issue of a One Party/Multiparty System in Malawi (15-21 Nov 1992), para. 27, quoted at greater length in Section 7.2 above. See also UN Transitional Authority in Cambodia, Media Guidelines for Cambodia (1992) also discussed in Section 7.2, and reproduced in Appendix I.

9. See Chapter 4 above for a survey of problems encountered in news coverage of election campaigns.
10. UN Technical Team on the Malawi Referendum, note 8 above at para. 28. See Sections 2.1 and 7.1.13 above for relevant discussion.
11. See Sections 2.2 and 7.1.12 above for further discussion of these points.
12. See Section 7.1.7 above.
13. See Section 7.1.8 above.
14. See Section 2.1 above.
15. UN Technical Team on the Malawi Referendum, note 8 above at para. 29.
16. 47 FCC 198 (1978).
17. See Section 7.1.4 above for a discussion of relevant international law principles.
18. See Section 7.1.7 above.
19. See Sections 7.1.6 and 7.1.9 above and Guideline 7.
20. ARTICLE 19, ed., *Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination* (London: 1992).
21. See Section 7.1.6 above for a discussion of international law and national cases that support this point.
22. Media Guidelines for Cambodia, note 8 above at Guideline 8. See Appendix I for relevant text.
23. See Guidelines 2 and 9. See Section 7.1.4-.5 above for a discussion of the duty of balance under international and comparative law and Chapter 4 above for a discussion of the problems encountered in news coverage of election campaigns in transitional democracies.
24. For factors that may be relevant in assessing electoral support, see commentary to Guideline 9.2.

25. European Institute for the Media, *The 1992 National Elections in Romania: Coverage by Radio and Television* (Manchester/Dusseldorf: 1992); interview with Dragos Seuleanu, Programs Department, Radio Romania, regarding radio coverage.

26. E Barendt, *Broadcasting Law: A Study of Regulation in Europe and the United States* (Oxford University Press, 1993) at note 63.

27. *Ibid.* at note 68.

28. See Guideline 1 and Sections 7.1.1-.4 above.

29. In Sweden, where public broadcasting is controlled by a body independent of government, no direct access broadcasts are allowed and the only exposure of candidates is on interview and debate programmes. K Jakubowicz, "Electoral Campaigns on Radio and Television: General Principles", in A Pragnell and I Gergely, eds, *The Political Content of Broadcasting* (Dusseldorf: European Institute for the Media, 1992), 54. A substantial amount of the country information provided in the commentaries to these guidelines is based upon the results of this highly informative study.

30. The proliferation of parties stemmed from the very low qualification threshold of 251 signatures to register a party.

31. See Sections 3.5 and 3.6 above for relevant discussion. Factors relevant in assessing a party's support may include the party's performance in past elections; the number of seats held in the parliament; length and continuity of the party's existence; size of its membership; extent and strength of its organization; and its representation in government at federal, regional and/or local levels. The number of regions or constituencies in which the party is contesting the election may also be a relevant factor; however, it should not be given significant weight in countries where it is easy for a party to put up candidates in regions even where the party has little support.

32. See Guideline 9.3 below.

33. See Section 3.5 above.

34. See Pragnell and Gergely, note 29 above.

35. See Barendt, note 26 above.

36. 48 FCC 271 (1978).
37. 14 FCC 121 (1962).
38. Ibid.
39. Barendt, note 26 above at 176-7.
40. *Lynch v. BBC* [1983] 6 NIJB 1. See also Barendt, note 26 above at 177.
41. See Section 3.3 above for relevant discussion.
42. As noted by the UN Technical Team on the Malawi Referendum: "Once the spots allocated for [direct access programmes] are identified, most legislation prescribes a random choice for the allocation to each side." Note 8 above at para. 42.
43. See Section 3.5 above for relevant discussion.
44. See, for example, Jakubowicz, note 29 above at 54, regarding Western democracies.
45. As stated by the UN Technical Team on the Malawi Referendum: "In the case of commercial, privately-owned media, it is ... customary to prescribe that there should be no discrimination in the case of paid advertising." Note 8 above at para. 27.
46. See Section 3.4 above for further discussion.
47. 82 FCC 54 (1990), discussed in Barendt, note 26 above at 173.
48. See Guideline 1 and Sections 7.1.4-.5 for a discussion of the relevant international law principles. See also Section 4.4 above for further relevant discussion.
49. See Chapter 5 above for further relevant discussion.
50. Letter from Alan H Protheroe, CBE, former Assistant Director General of the BBC, dated 31 Aug. 1993. See Section 4.5 above for further relevant discussion.
51. Jakubowicz, note 29 above at 50.
52. See Section 7.1.11 above for further discussion.

53. See Report of the UN Technical Team on the Malawi Referendum, note 8 above at para. 29.

54. Barendt, note 26 above at note 12.

55. Jakubowicz, note 29 above.

56. Ibid. at 52-53.

57. See Section 6.3 for further relevant discussion.

58. Barendt, note 26 above at note 13.

59. *Wilson v. Independent Broadcasting Authority*, 1979 SLT 279.

60. See Section 5.3 above for relevant discussion.