

ANALYSIS AND COMMENTS

On

**Law of the Ukraine
On the Procedure of Coverage by the Mass Media of the
Performance of State Authorities and Local
Self-government Bodies in Ukraine**

by

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1. Introduction

The right to freedom of expression and its corollary freedom of information are some of the cornerstones of democracy. This was recognised by the United Nations from the very beginning of its existence, when the United Nations General Assembly in its first session in 1946 adopted Resolution 59(I), which stated:

“Freedom of information is a fundamental human rights and ... the touchstone of all the freedoms to which the United Nations is consecrated.”

A very substantial body of international human rights standards have been developed over the last fifty plus years, guaranteeing freedom of expression and information, hereunder freedom of the media. States, like Ukraine, which have ratified those standards are obliged to adhere to them in their national laws and practices.

The object of the following analysis is to determine to what extent provisions of the *Law of Ukraine on the Procedure of Coverage by the Mass Media of the Performance of State Authorities and Local Self-government Bodies in Ukraine* (hereafter: “the Law”)¹, is in compliance with such international human rights standards which the Government of Ukraine has committed itself to respect.

The analysis will provide an overview of the relevant international standards, and how those standards have been interpreted in practice by their implementing bodies. Following this, an overview of the main principles and provisions of the Law will be outlined, followed again by an analysis of whether the Law is in compliance with international human rights norms.

¹ Changed and amended according to Law of Ukraine #133-XIV (133-14) of 30 September 1998.

Finally, submissions and recommendations as to the compliance of the Law will be put forward.

As a disclaimer it must be noted that the author of this analysis has not been in the possession of other Ukrainian laws which are of relevance to this Law, for example the Ukrainian Constitution, the Law on State Secrets and the Law on News Agencies. Thus, any implications on the Law of these other statutes have not been taken into consideration. It should also be noted that some details of the Law may have become lost or distorted in the translation of the text into English, and consequently lead to findings which are not absolutely accurate.

2. International Standards on Freedom of Expression

There is an overwhelming body of international norms and recommendations regulating the area of expression and information. Every major human rights treaty or text contain provisions guaranteeing the right to freedom of expression. The *Universal Declaration of Human Rights* (UDHR) is generally considered to be the flagship statement of international human rights, and guarantees the right to freedom of expression in the following terms in Article 19:

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.

The *International Covenant on Civil and Political Rights*, which imposes legally binding obligations on States Parties, guarantees the right to freedom of opinion and expression in terms very similar to those found in Article 19 of the UDHR.

Article 10 of *European Convention on Human Rights* (ECHR) proclaims freedom of expression, including the right to hold opinions and to receive and impart information and ideas without interference by public authorities and regardless of frontiers. These rights and freedoms are to be enjoyed and exercised by everyone. The European Court of Human Rights has stated that

“Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man..., it is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no ‘democratic society’.”²

Political expression deserves particular protection under Article 10, since “freedom of political debate is at the very core of the concept of a democratic society which

² *Handyside v. United Kingdom*, 7 December 1976, 1 EHRR 737, para. 49. Statements of this nature abound in the jurisprudence of courts and other judicial bodies around the world.

prevails throughout the Convention.”³ Consequently, politicians must to a large extent accept criticism of themselves personally as well as of their actions.⁴

The guarantee of freedom of expression applies with particular force to the media, including the broadcast media. The European Court of Human Rights has referred to “the pre-eminent role of the press in a State governed by the rule of law.”⁵ The media as a whole merit special protection under freedom of expression in part because of their role in making public

*“information and ideas on matters of public interest. Not only does [the press] have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of ‘public watchdog’.”*⁶

The media’s role of ‘public watchdog’ was emphasized even further in another case where it was stated found that

*“[t]o exercise...control is not only the right, but may even be considered as a ‘duty and responsibility’ of the press in a democratic society.”*⁷

It is implicit that in order to perform its role as ‘public watchdog’ the media must enjoy a maximum degree of independence.

The protection of the media’s right to freedom of expression also extends to protection of the right of the media to decide the manner in which it reports. The European Court of Human Rights has said that

*“The methods of objective and balanced reporting may vary considerably, depending among other things on the media in question. It is not for this Court, nor for the national courts for that matter, to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists. In this context the Court recalls that Article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed.”*⁸

International bodies have made it clear that these principles apply equally to the print and broadcasting media.⁹ Both the press and broadcast media are held to have two essential public functions: to inform the public about matters of public interest and to act as a watchdog of government. It should be noted that these public functions do not impose duties on individual journalist. Rather, the recognition in international law that the media serve public functions imposes a duty on governments to ensure the existence of conditions that enable the media to fulfil these functions. In particular, regarding publicly-funded broadcasters, governments must ensure that broadcasters

³ *Oberschlick v. Austria*, Judgement of 23 May 1999, Series A no. 204, para. 58.

⁴ See *Lingens v. Austria*

⁵ *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, 14 EHRR 843, para. 63.

⁶ *Thorgeir Thorgeirson v. Iceland*, *ibid.* para. 63.

⁷ Report of the European Commission of Human Rights para. 74 in *Lingens v. Austria*.

⁸ *Jersild v. Denmark*, ref. no. 36/1993/431/510, para. 31.

⁹ *Informationsverein Lentia and Others v. Austria*, Judgement of 24 November 1993, Series A no. 276, para. 38.

have complete editorial independence, and that they fulfil their public functions. The assumption must be that these obligations apply equally in the case of other kinds of public-funded media. Governments who fail to do so and who interfere with the editorial independence of public media are in breach of international legal standards.¹⁰

The right to freedom of expression in Article 10 of the European Convention, “since it carries with it duties and responsibilities”, is subject only to such restrictions as are prescribed by law and 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 rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.¹¹

The document adopted at the October 1991 Moscow Meeting of the Conference on the Human Dimension of the CSCE states that:

participating States reaffirmed the right to freedom of expression, including the right to communication and the right of the media to collect, report and disseminate information, news and opinions. Any restriction in the exercise of this right will be prescribed by law and in accordance with international standards. They further recognise that independent media are essential to a free and open society and accountable systems of government and are of particular importance in safeguarding human rights and fundamental freedoms.

The November 1991 CSCE Seminar of Experts on Democratic Institutions, Oslo, adopted a Report to the CSCE Council which had the following to say on the question of media regulation:

It was emphasised that a democratic form of government requires freedom of speech, without which its citizens cannot obtain the information necessary for participation in political and public life. A diverse and independent press and broadcasting system has a vital role to play in any democracy. The question of imposing certain regulation on the media was discussed. It was pointed out that some protection was required against excesses of the press. At the same time, it was underlined that freedom of expression should only be subject to such restrictions as are prescribed by law and are necessary in a democratic society (...)

Ideally, economic conditions should guarantee complete editorial independence. It was, however, pointed out that State intervention could sometimes be necessary in order to protect the diversity of the press. In this context, it was mentioned that one should also take into account that the press and broadcasting system are parts of the cultural identity of a country.

It was stated in the 1990 Copenhagen Document of the Conference on the Human Dimension of the CSCE Process, any restrictions on fundamental rights and freedoms

¹⁰ "Who Rules the Airwaves? Broadcasting in Africa", Article 19, 1995, pp. 24-26)

¹¹ Article 10(2), European Convention of Human Rights.

must be "*provided by law and relate to one of the objectives of the applicable law and be strictly proportionate to the aim of the law*". They must be shown to be necessary in a democratic society. A pressing social need for such restrictions must be demonstrated and the restriction must be proportionate to the legitimate aim pursued. The reasons given to justify such restriction must be relevant and sufficient.

The right to freedom of expression as it is defined and interpreted in international human rights law can be summarised as follows:

- Everybody has the right to express information and ideas of all kinds;
- This right can only be limited according to an exhaustive list of exemptions to the right, which must be interpreted narrowly;
- Any limitation must be “necessary in a democratic society” in the interest of one or more of the specific exemptions;
- The media has a particular role to play as public watchdogs;
- Discussion of political issues is within the core area of protection of the right to freedom of expression;
- Criticism of politicians must be accepted to a larger degree than criticism of private individuals;
- The right to freedom of expression encompasses the editorial independence of media outlets;
- The right to editorial independence of the media applies equally to print and broadcast media and to any state funded media outlets.

It is against these international standards on freedom of expression that the Ukrainian Law will be analysed in order to determine its compliance with them.

3. Summary of the Main Aspects of the Law

The subject of the Law is rather unusual, in that it seeks to establish particular procedures for how and when the certain types of media outlets can and, in many cases, must cover the activities of government bodies. Given the account above of how the right to freedom of expression encompasses editorial independence of the media and the right to cover political issues and criticise politicians, a Law which has as its stated objective to prescribe the way and conditions under which the media covers activities of government - which inevitably will be of a mostly political nature - will have to be very carefully drafted in order not to risk violating human rights standards.

It is not always clear from reading the translated version of the Law which type of media is subject to the different kinds of regulation. The title of the Law stipulates that it regulates the coverage by the 'mass media' of the Ukraine on the performance of government bodies. The Law defines 'mass medium of a state authority or a local

self-government body' as meaning a mass medium founded (co-founded) by a state authority or a local self-government body and funded fully or partly from the state or local budgets. While the Law most often refers only to 'mass media' and not 'mass medium of a state authority etc.' the analysis will proceed from the understanding that when the Law refers to 'mass media' it means media outlets where a government body has a role in the establishment and funding of such outlets.

However, there are other kinds of media referred to in the Law, which are not defined in any detail. Thus, an understanding of the nature of such media outlets will be determined from their names.

The provisions which refer to non-state mass media, while not defined in the Law itself, must be considered to be privately owned, independent media, to be distinguished from 'mass media' in terms of the Law by not being co-founded or co-funded by the state.

The Law also regulates coverage of government bodies by 'Ukrainian news agencies irrespective of their type' (article 8, para. 2). While not being familiar with the provisions of the Ukrainian Law on News Agencies (74/95-VR), it is assumed that this refers to both government funded (but not government founded) news agencies and privately funded news agencies.

It is not clear how 'state news agencies' (article 8, para. 2 and 3) are to be distinguished from 'mass media' as defined in the Law, although it may be that state news agencies are merely funded by the state, but that the state had not role in its establishment.

The National TV Company of Ukraine and the National Radio Company of the Ukraine is assumed to refer to public service broadcaster organisations, fully funded by the State.

'Audio-visual mass media' is assumed to refer to broadcasting media at least co-founded and at least co-funded by a government body.

The main provisions of the Law may be summarised as follows:

- The Law aims to prescribe the procedure for coverage by the mass media of the performance of all levels of state authorities, as well as to protect the mass media against influence by any branch of government.(See Preamble);
- The Law provides for the right of the media to cover all aspects to government activities, subject to the laws of Ukraine. The authorities must furnish full information about their activities, subject to the provisions of the Law of Ukraine "On State Secrets"(3855-12);¹²
- Official information may not be interrupted or distorted with comments from journalists. This appears to apply both to a mass medium and to other journalists;¹³

¹² Article 2(1) of the Law.

¹³ Article 2(2) of the Law.

- Mass media journalists and technical staff shall be accredited specifically to each branch of government they wish to cover. If they do not familiarise themselves with the procedures of the particular branch of government they cover (i.e. the procedures for admission to the building, access to information from that particular branch) or if such procedures are breached, their accreditation to the particular state authority may be terminated. It is not clear if this provision also applies to journalists of other media outlets;¹⁴
- Information reflecting the performance of state authorities shall only be disseminated in the official languages.¹⁵ The mass media is forbidden to translate official information from the official language into any other language on their own;
- The financing of coverage of government activities by state controlled media shall be determined in agreements between the relevant state authorities and the editorial boards of the relevant media.¹⁶ It is not clear from the Law to what extent the editorial boards have full autonomy to negotiate such agreements.
- State authorities shall within the funds allocated for the coverage of their activities order the following subjects to be covered by the mass media:
 - special reports on important events taking place in the state on activities and local self-government bodies (it is not clear who has the authority to determine which events are 'important');
 - live TV and radio coverage of their work;
 - continued (problem, topic) TV and radio programs and columns in print media;
 - creation and distribution of authorial expository materials about the performance of state authorities and local self-government bodies;
 - recording and storage of video- and audio materials reflecting the performance of state authorities and local self-government bodies.¹⁷
- Government bodies shall allocate in their cost statements funds to finance the coverage by the mass media of their activities.¹⁸
- Government bodies may found or co-found print or audio-visual media with a view to have such media cover their activities.¹⁹
- Ukrainian news agencies irrespective of their type shall on contract terms “collect, process, produce, prepare for distribution official information reflecting the performance of state authorities and local self-government bodies, issue and

¹⁴ Article 3 of the Law.

¹⁵ Reference is made to such languages as provided by the Constitution of the Ukraine and Law of Ukraine “On Languages in Ukraine”(8312-11); Article 4 of the Law.

¹⁶ Article 5 of the Law.

¹⁷ Article 5 of the Law.

¹⁸ Article 5 of the Law.

¹⁹ Article 7 of the Law.

distribute relevant information products.²⁰ It is not clear whether news agencies have a choice in entering into such a contract with government bodies;

- On request from the President, the Chairman of the Parliament, the Prime Minister, the Chairman of the Supreme Court and the Chairman of the Constitutional Court, state news agencies must broadcast their special reports and statements on important matters of public life.²¹ It is not clear whether such request can be denied, although it is assumed that they can not be denied. It is also not clear whether “state news agencies” means only state controlled media.
- Coverage of the work of the Parliament (*the Verkhovna Rada*) shall be provided on the national broadcasting channel in the amount of 3 per cent of the total airtime per year. Procedure and forms for such obligatory coverage shall be determined by a separate Resolution of the Parliament.²²
- The National TV Company of Ukraine and the National Radio Company of Ukraine shall provide extensive coverage of the President’s work Article 10 of the Law provides a long list of obligatory coverage in audio-visual mass media of the Presidents activities.
- The mass media is also obliged to cover a vast range of activities of Cabinet ministers and central and local Executive bodies. The Prime Minister can make a decision about full TV and radio coverage of an event with a days notice, except for extraordinary situations when TV and radio broadcasts are aired immediately.²³ Activities of the courts and district councils shall be covered under agreements made between the authorities and the mass media.²⁴
- State-owned national audio-visual mass media is under the obligation to broadcast certain acts of State, such as the opening of the first sitting of the Parliament and the President’s public addresses.²⁵
- Article 16 contains a list of subjects which the National Television Company and the National Radio Company shall include in news programs issued on the day of the event. The list includes “crucial decisions” of the Parliament, the President or the courts; press conferences, important meetings with the public and speeches by the President, the Parliament or the courts. It is not clear who determines whether an event is 'crucial' or 'important'.
- When elaborating their program policies, state-owned audio-visual mass media shall envisage providing full and unbiased information on the principles of government mechanism, main directions of home and foreign policies of Ukraine and work of government bodies.²⁶

²⁰ Article 8 of the Law.

²¹ Article 8 of the Law.

²² Article 9 of the Law.

²³ Article 11 of the Law.

²⁴ Articles 12 and 13 of the Law.

²⁵ Article 15 of the Law.

²⁶ Article 18 of the Law.

- Particular quotas of total airtime on the national broadcasting channel are reserved for the coverage of activities of government bodies.²⁷
- State authorities and the editorial boards of print mass media shall agree the terms for coverage of the activities of government bodies. Regional and local print media shall public official information prepared and sent to them by the DINAU State News Agency.²⁸
- State-owned print mass media must allocate maximum 20 per cent of the space to the coverage of government activities. In non-state print mass media, information with respect to government bodies may be published on a contract basis in line with the laws of Ukraine.²⁹
- Anyone breaching the Law shall incur disciplinary, administrative and criminal liability.³⁰

4. Determination of Compliance with International Law

4.1. General Observations

It is submitted that the Law in its entirety gives rise to very considerable concerns in respect of its compliance with human rights standards on freedom of expression. The Law appears to reflect a fundamental misunderstanding of the role of the media in a democratic society: it would appear that at least the state funded media and the public service broadcaster is required to provide a platform for government bodies, as opposed to act as 'public watchdogs'.

Given the fundamental role of the media in underpinning democracy, media legislation in a democratic society must be based on the presumption of freedom, rather than on the presumption of control. However, control appears to be the aim of this Law. While the preamble proclaims the aim of the Law to be to protect the media from interference by state authorities, virtually all sections of the act seek to regulate who can cover what and how, when it comes to activities of government bodies, as outlined above in section 3. This is very problematic from the point of view of freedom of expression, regardless of whether much of the media referred to in the Law is at least partly funded by government bodies.

The Law also appears to be based on the assumption that when government bodies are closely involved with the establishment and funding of media outlets (presumably by using tax funds to do so), such involvement allows the government bodies to stipulate the content of such media outlets. In other words, as if the government was a privately owned media company, exercising influence over the editorial content. However, this presumption is not in compliance with international standards. The standards imposes obligations on governments not to interfere with the right to freedom of expression, and they do not distinguish between the rights of privately owned and publicly funded media when it comes to government interference. The right to freedom of expression

²⁷ Article 19 of the Law.

²⁸ Article 20 of the Law.

²⁹ Article 23 of the Law.

³⁰ Article 24 of the Law.

applies to all media equally, and thus any limitation by government in their exercise of the right to freedom of expression has to be within the parameters of the narrowly defined limitations clause. The desire of the government to keep the public informed about its activities is not in itself enough justification under international law to impose such comprehensive limitations on the editorial independence of at least certain sections of the media as is present in this Law.

Impartiality is closely related to independence. It is inappropriate for the government to use public funds to promote its particular viewpoint. Thus, for example, when article 5, para. 4 of the Law provides that government bodies shall 'within the funds allocated from state or local budgets for the coverage of their activities *order*' (emphasis added) the media to cover a range of specific government activities, this must be considered to be undermining not just principles of editorial independence, but also political pluralism in the country; It enables the sitting government at any given time to buy extensive media access – a privilege which it must be assumed is not granted to opposition parties by other legal instruments.

4.2. Issues Which Give Rise to Particular Concern

While the general approach of the Law to freedom of expression is problematic, there are a number of provisions of the Law which are particularly harmful to freedom of expression:

i. Accreditation of Journalists

Of particular concern is the rule on accreditation of journalists and technical staff in article 3. While the language of the article is very unclear, at least in its translated version, the gist of the provision appears to be that mass media journalists shall be accredited individually to each government body s/he wants to cover. If that understanding of the provision is correct and the effect is that a journalist can only cover the activities of the particular government bodies to which s/he has been accredited, it represents a very substantial limitation of the rights and freedoms of the media. In practical terms it means that any given journalist is very limited in the subject matters s/he can work on. It means that journalists are not free to follow stories wherever they lead which is a very grave violation of their editorial independence. Such limitation on the freedom of expression of the media does not seem to be justified according to any of the legitimate criteria for limitations on the right to freedom of expression.

It is not entirely clear whether this requirement of accreditation applies only to journalists working for the 'mass media' as defined in the Law, or if it applies to journalists working for other media outlets as well. But even if it only applies to the first group, it constitutes a violation of the right to freedom of expression of that group of journalists.

It is also not clear who grants the accreditation, or if such accreditation is a right or granted as a privilege. As everybody has the right of freedom of expression and information, unless subject to the specific limitations allowed under international law, accreditation must be granted as a right, if it is to be in compliance with those international standards.

If the accreditation procedure allows for state interference in the decision of which journalist gets permission to cover what, it can potentially be abused to stifle critique of government officials or government policies. This would be contrary to the human rights norms providing for independence of the media in order for it to play a role as public watchdog.

It does not appear to be a justified limitation of the right of the media that the accreditation under article 3 can be withdrawn if any of the procedures of admission to the government bodies are breached. It appears a disproportionate sanction, particularly in the case of minor breaches. Although in particular instances such a sanction could be justified under international law if the sanction seeks to protect any of the interests mentioned in ECHR article 10 (2), the blanket provision for withdrawal of accreditation for any breaches appears to be unjustified and disproportionate.

ii. Editorial Independence

It bears repeating from section 2, that the basic principle of freedom of expression and, by extension, freedom of the media, is that it is a fundamental right which applies to everybody and about any subject matter, which can be limited only when such limitations are prescribed by law and necessary in a democratic society in the interests of an exhaustive list of particular objectives, all of whom must be narrowly interpreted. The freedom of the media also covers the methods and techniques of reporting. It also bears repeating that whether or not a media outlet is partly or fully funded by government bodies, it is still entitled to complete editorial independence.

However, the Law which is the subject of this analysis prescribes in numerous articles what the media, be it state-funded or not, 'shall' cover and how. To mention by a few examples:

- Article 2, para. 2: "When being made public, official information may not be cut in with a mass medium's or journalists' comments'.
- Article 4: 'The mass media shall be forbidden to translate official information from the official language into any other language on their own authority'
- Article 8: 'State news agencies shall continuously inform the public on activities of state authorities ..'.
- In Article 8, last paragraph, it would appear that state news agencies cannot refuse the requests of the President and the other bodies of government listed to broadcast certain matters.
- Article 9 talks of obligatory coverage which shall be provided on the national broadcasting channel in the amount of 3 per cent of the total airtime per year.
- Article 8, para. 2 provides that Ukrainian news agencies irrespective of their type shall, on contract terms produce information reflecting the performance of government bodies.
- Article 11, para. 2, stipulates that 'information on the activities of the Cabinet of Ministers of Ukraine, central and local executive bodies shall be diffused by way of official statements, reports, comments and interviews of the Cabinet members and heads of central and local executive bodies, press-conferences, briefing, "round tables", information and analytical weeklies'.

- Article 20, para. 2: "Regional and local print media shall publish official information concerning the performance of state authorities having been specially prepared and sent to them by the DINAU State News Agency.."

This non-exhaustive list of provisions which dictate when and what the media must cover, thereby allowing for interferences with the editorial independence of the media, be it state-funded or not, cannot be considered to be in compliance with the international human rights commitments of the Ukraine.

The violation of the right to freedom of expression in article 2, para. 2 could be somewhat alleviated by article 2, para. 3, which provides that the right to provide the coverage of and comment on the performance of government bodies is guaranteed in the Constitution, 'this law' and other laws of Ukraine. Without having had access to the Constitution or any other relevant laws, it is not possible to determine whether the right to coverage and comment is provided for elsewhere. However, the extent to which the right of coverage and comment on government activities is provided for in the present Law does not fulfill the criteria in the international provisions on freedom of expression.

The sections which make reference to agreements between the government authorities and mass media editorial boards, be it for financing or for broadcasting of government information and performance,³¹ do not state to what extent the media have the right to refuse demands from the government. It is also not clear whether the media editorial boards are independent of government. If the media are not able to resist entering into such agreements with government bodies they are not independent and thus unable to realise the full potential of the right to freedom of expression.

iii. The National Television Company and National Radio Company

It is assumed from the name that the National Television Company and National Radio Company has the role as the national public service broadcaster in the Ukraine. It is not clear, however, how in practice they are to be distinguished from state-owned news agencies.

National broadcasters funded out of the public purse have historically formed a vital component of the broadcasting section. One important rationale for such national broadcasters is that they can offer alternative programming to that provided by the commercial sector. These broadcasters have the potential to ensure that quality programmes covering a wide range of interests, and responding to the needs of all sectors of the population, are broadcast. They can provide an effective complement to commercial services, satisfying informational needs and interest that the market does not respond to. However, it is only when the independence of these broadcasters is guaranteed – in law and in practice – that they can truly operate as servants of the public interest, providing high quality information from a variety of sources to the public.³²

³¹ See for example article 5, para. 2: 'Non-state mass media shall cover the performance of state authorities and local self-government bodies on the terms and conditions specified in agreements made between these authorities and mass media editorial boards.'

³² Toby Mendel, "Public Service Broadcasting Organisations", Article 19, July 2000.

Another of the key rationales behind public service broadcasting organisations is that they make an important contribution to pluralism. For this reason, a number of international instruments stress the importance of public service broadcasting organisations and their contribution to promoting diversity and pluralism. Although not all of these instruments are formally binding as a matter of law, they do provide valuable insight into the implications of freedom of expression and democracy for public service broadcasting.

For example, a Resolution of the Council and of the Representatives of the Governments of the Member States, passed by the European Union, recognises the important role played by public service broadcasting organisations in ensuring a flow of information from a variety of sources to the public. The protocol notes that public service broadcasters are of direct relevance to democracy, social and cultural needs, and the need to preserve media pluralism. For the same reasons, the 1992 *Declaration of Alma Ata*, adopted under the auspices of UNESCO, calls on States to encourage the development of public service broadcasters.³³

Resolution No. 1: Future of Public Service Broadcasting of the 4th Council of Europe Ministerial Conference on Mass Media Policy, Prague 1994, promotes very similar principles. This Resolution notes the importance of public service broadcasting to human rights and democracy generally and the role of public service broadcasting organisation in providing a forum for wide-ranging public debate, innovative programming not driven by market forces and promotion of local production. As a result of these vital roles, the resolution recommends that member States guarantee at least one comprehensive public service broadcasting organisation, accessible to all.

However, the State's obligation to promote pluralism and the free flow of information and ideas to the public, including through the media, does not permit it to interfere with broadcasters' freedom of expression. Recommendation No. R(96)10 on the *Guarantee of the Independence of Public Service Broadcasting*, passed by the Committee of Ministers of the Council of Europe, notes that the powers of supervisory or governing bodies should be clearly set out in the legislation and these bodies should not have the right to interfere with programming matters. Governing bodies should be established in a manner which minimises the risk of interference in their operations, for example through an open appointments process designed to promote pluralism, guarantees against dismissal and rules on conflict of interest.³⁴

Several Declarations adopted under the auspices of UNESCO also note the importance of independent public service broadcasting organisations. The 1997 *Declaration of Sofia* notes the need for state-owned broadcasters to be transformed into proper public service broadcasting organisations with guaranteed editorial independence and independent supervisory bodies.³⁵

Resolution No. 1: Future of Public Service Broadcasting of the 4th Council of Europe Ministerial Conference on Mass Media Policy, noted above, reiterates these principles, including the need for independent governing bodies and for editorial independence and adequate funding. These recommendations, particularly the

³³ Clause 5.

³⁴ Articles 9-13.

³⁵ Clause 7.

requirement of effective independence from government – including financial independence – are reiterated in a number of resolutions and recommendations of the Parliamentary Assembly and other Ministerial Conferences on mass media policy of the Council of Europe.³⁶

It may be noted that the obligation to respect freedom of expression lies with States, not with the media *per se*. However, these obligations do apply to state-funded broadcasters. Because of their link to the State, these broadcasters are directly bound by international guarantees of human rights. In addition, state-funded broadcasters are in a special position to satisfy the public's right to know and to guarantee pluralism and access and it is therefore particularly important that they promote these rights.

By stipulating what government functions and activities the national broadcasters must cover and how, the Law interferes with their independence and thereby it does not fully allow for the Ukrainian national broadcasters to fulfill the potential of being independent public service broadcasters.

The Law, while already making very substantial inroads into the editorial independence of the national broadcasters, also undermines the political pluralism, which is otherwise one of the main justifications for a public service broadcaster. It imposes numerous obligations on the public service broadcaster to broadcast activities of the sitting government, thus providing a prominent platform for the existing powers.

If it is inappropriate for the government to use public funds to promote its particular viewpoint, it is equally inappropriate, given its public mandate, for a public service broadcasting organisation to promote a certain position or support a particular political party. But under the Law, the public service broadcaster does not appear to be given much choice in that matter, by being put under such heavy obligations to broadcast the activities of state bodies, particularly the President and the Parliament.

5. Concluding Recommendations

While it is legitimate to want to ensure that the public is well-informed about the activities of all branches of government, the Law seems to reflect a fundamental misunderstanding of the role of the media in a democratic societies: it would appear that at least the publicly funded media and the public service broadcaster is required to provide a platform for government bodies, as opposed to act as 'public watchdogs'.

It is submitted that the Law on the Procedure of Coverage by the Mass Media of the Performance of State Authorities and Local Self-government Bodies in Ukraine in its entirety raises very serious doubts about its compliance with international human rights standards on freedom of expression. It is therefore recommended that **the Law in its entirety be repealed**

It is furthermore submitted that the Law interferes with the independence of the public service broadcaster. It is therefore recommended that **the regulation of the public**

³⁶ For the former, see Res. 428(1970), Rec. 748(1975) and Rec. 1147 (1991) and for the latter see Res. No. 2 (1st Conference, 1986) and Res. No. 2 (5th Conference, 1997).

service broadcaster be amended to reflect international standards on the role and independence of a public service broadcaster.

It is finally recommended that **any public funds set aside to fund the coverage of the activities of government bodies be used to promote media plurality and independence.**

LW
Geneva
27 November 2001