Towards a Legal Framework That Protects Freedom of Expression in Electoral Processes

Bohdan Mokhonchuk
Pavlo Romaniuk

Yaroslav Mudryi National Law University
Pushkinska 77,
Kharkiv 61024, Ukraine
E-mail: mokhonchuk@ukr.net
E-mail: p.v.romanyuk@nlu.edu.ua

Abstract: *In democratic countries, attention is devoted to the issue of freedom of speech and freedom of expression and the role of public authorities during elections. Today, freedom of speech and freedom of expression are guaranteed at both the international and national levels. The international community has created a significant number of international agreements and acts of “soft law” on standards of freedom of expression. In particular, the Code of Good Practice in Electoral Matters establishes as the first general condition for democratic elections the respect for fundamental human rights, and particularly freedom of expression, assembly and association, without which there can be no true democracy. On the one hand, the problem of ensuring freedom of expression during elections is caused by the wider limits of permissible criticism of candidates and the importance of coverage of the election process. On the other hand, it is caused by restrictions on the conduct of election campaigning and the necessity to provide equal access to the media for the subjects of the electoral process. In this context, it is important to find a balance between the right to free elections, freedom of speech and other rights, freedoms and interests of the subjects of the electoral process. This article researches the modern problems of national legal guarantee of the freedom of speech and the freedom of expression and international electoral standards on the protection of freedom of speech and freedom of expression in the electoral process.*

Keywords: *defamation, elections, election campaigning, electoral processes, freedom of expression, freedom of speech*

1. Introduction

Democratic countries pay close attention to the freedom of speech and the freedom of expression as well as the role of public authorities during elections. On the one hand, the problem of ensuring freedom of expression during elections is caused by the wider limits of permissible criticism of candidates and the importance of coverage of the election process; however, on the other hand, it is caused by restrictions on election campaigning and the necessity to provide equal access to the media to all subjects of the electoral process.

We cannot but support A. A. Daibu and F. F. Abdulrazaq (2016), who claim that freedom of expression is *sine qua non* to sustainable democracy, advancement of human rights, promotion of civil liberty, accountability, good governance, economic freedom, political emancipation, and sustainable democracy in any society. Without free and transparent elections it will be difficult, and resistance to injustice and oppression almost impossible, thereby impeding society's development (Daibu & Abdulrazaq, 2016, p. 90).

In this regard, it is necessary to ensure fair, balanced and objective coverage of the elections, to set clear requirements for election campaigning, and to take effective measures to prevent offenses, as the latter may lead to the distortion of the will of the people and to question the legitimacy of the vote results. In addition, along with the development of modern technologies, new threats have emerged to the implementation of electoral rights. In this regard, it is important to find a balance between the right to free elections, freedom of speech and other rights, freedoms and interests of the electoral process subjects.

Freedom of speech and freedom of expression are guaranteed at both international and national levels today. In particular, at the national level, they are guaranteed by Article 34 of the Constitution of Ukraine and fixed as the principles of information relations by Article 2 of the Law of Ukraine 'On information'. These provisions, together with Article 15 of the Constitution of Ukraine, which guarantees political and ideological pluralism, reflect the general principles of freedom of expression in Ukraine.

The international community has created a significant number of international agreements and acts of "soft law" on the standards of freedom of expression. Freedom of expression is guaranteed by such complex international instruments as the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter ECHR), 1950, (Article 10) and the International Covenant on Civil and Political Rights (hereinafter ICCPR), 1966, (Article 19). This right shall

include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. However, this right is not absolute. The ICCPR and ECHR prescribe possibilities for its restriction in order to achieve legitimate goals (for the protection of health or morals, for the protection of the reputation or rights of others, etc.).

Therefore, the question of correlation and balance between freedom of expression and the right to respect for private and family life has been repeatedly brought to the fore and considered by the European Court of Human Rights and the United Nations Human Rights Committee. The rivalry of these rights is compounded by the shifting and continuous nature of the electoral process, which stipulates the necessity to ensure the principle of free elections through the implementation of subjective electoral rights.

The research is divided into five parts, each of which is pursuing a separate goal. Part One observes the correlation between the principle of free elections and freedom of expression. The principle of free elections cannot only include the expression of will on the voting day. The electoral process features various subjects, including voters, candidates and the media. Their tasks and the list of rights within the electoral process are under modification (for some subjects, such list of rights is becoming wider, for others—narrower). Part Two describes the requirements for election campaigning such as legitimate restrictions of freedom of expression. The need to ensure a level playing field leads to the application of a considerable number of restrictions in the conduct of election campaigning. Such restrictions are considered on the example of Ukraine. Part Three deals with the media activities as they play an important role in the shaping of voters' will. In Part Four, the authors attempt to determine the limits of permissible criticism of candidates for elective positions by examining the defamation disputes of the European Court of Human Rights (hereafter ECtHR). Part Five is focused on the analysis of the modern challenges of the use of global network for electoral purposes. The main objective of the article is to explore the limits of freedom of expression in the electoral process for different subjects (voters, candidates, and media), taking into account ECtHR practices and the current state of information technology development.

The article finds its methodological grounds in the system of philosophical, popular scientific and scientific methods: dialectical, comparative law, analysis and synthesis, dogmatic, analogies, etc. The main method of investigation was the dialectical method of cognition of the phenomena and processes which allowed to determine the state, tendencies, and prospects of development of scientific researches, court practice and legislative developments concerning freedom of

expression in the electoral process. The comparative legal method was used in the process of comparative analysis of legislative regulation of freedom of expression in Ukraine and ECtHR practices. Methods of analysis and synthesis were applied to establish the essence and content of the principles of suffrage and various forms of freedom of expression. The analogy method enabled us to take into account the current state of information technology development and to make suggestions on the interaction of election administration bodies with corporations providing information services on the internet.

2. The correlation between the principle of free elections and freedom of expression

Loewy's idea seems fair and reasonable because the difference between the franchise and the freedom of speech is that freedom of speech is a more baseline right. The franchise needs to be limited to citizens because it is the ultimate determinant of how we are to be governed. Free speech is a step (or several steps) removed from the electoral process (Loewy, 1993, p. 437).

Meanwhile, the ECtHR made important conclusions in the case *Bowman v. the United Kingdom* [1998]. The Court determined that free elections and freedom of expression, particularly the freedom of political debate, though being interrelated and operating to reinforce each other, may nevertheless come into conflict. In order to overcome it, the Contracting States may impose reasonable restrictions, as they do mainly with regard to the organization of their electoral systems.

The Constitution of Ukraine guarantees free expression of will of the electors (Part 2, Art. 71). Hence, the implementation of a conscious and free choice on the voting day should take place in freedom and pluralism of views. The principle of free elections includes two components: formation of the will of the electors in conditions of freedom and its free expression during the vote (Kliuchkovskyi, 2018, p. 391). This approach was embedded in the national electoral legislation (Part 1, Art. 6 of the Law of Ukraine 'On the election of people's deputies of Ukraine'; Part 1, Art. 6 of the Law of Ukraine 'On the election of the President of Ukraine'; Part 2, Art. 6 of the Law of Ukraine 'On local elections').

Free expression during the vote directly correlates with the election results and the composition of representative bodies should as much as possible reflect the views of the electorate.

On the way towards proportional representation, the principle of free elections is closely linked to the principle of general elections, whose content is disclosed by paragraph I.1.1. of the Principles of Europe's electoral heritage of Code of Good Practice in Electoral Matters (Venice Commission, 2002) and prescribes to ensure the right to vote for anyone who meets certain requirements which in the theory and practice of electoral law are called electoral qualifications (censuses) (Constitutional Court of Ukraine, 2002). In Ukraine, all citizens of Ukraine who have reached the age of 18 and have not been declared legally incompetent by the court are entitled to the right to vote.

The search for a fair model of transformation of the electors' votes into representative mandates, conditioned by certain structural elements of the electoral system, is among the key aspects of ensuring the implementation of free expression of political views while voting. United Nations Commission on Human Rights taking account of the fact that freedom of opinion and expression is reflected in a democratic society through an electoral system which allows all tendencies, interests and feelings to obtain representation at the level of the executive and legislative power and, therefore, at all levels of power (UNCHR, 1995).

Freedom of expression is a complex right. However, its implementation during the elections is ultimately aimed at the formation of the representative bodies of authority under free will. At the same time, the electoral system and its particular elements may disregard the will of a certain part of the electors. In this case, the question will be how democratic the freedom of expression is if the votes of a certain part of the electorate are still not taken into account? Here we mean the effect of "wasted votes", which cannot be avoided in any electoral system and which was pointed out by ECtHR in the case *Mathieu-Mohin and Clerfayt v. Belgium* [1987].

For example, majoritarian electoral systems, in contrast to the systems of proportional representation, generate a large number of wasted votes, mainly due to the relative majoritarian formula. In such circumstances, the election results may not reflect changes or be insensitive to fluctuations in public opinion. The excessive waste of votes may also be provoked by a high level of a legitimate electoral threshold. In the case *Yumak and Sadak v. Turkey* [2008], which was about the application of a 10% electoral threshold, the ECtHR determined that the state has a wide margin of appreciation in the question about the level of electoral threshold. In this regard, the Constitutional Court of Latvia expressed an important legal position, that "in establishing the percentage of electoral threshold, the legislator shall keep in mind that it should not be too high, as

it is inadmissible when, as a result of its application, the elections cease to be democratic” (Constitutional Court of the Republic of Latvia, 2002). Therefore, we tend to support the conclusions of the Parliamentary Assembly of the Council of Europe (2007), which states that acceptable electoral threshold for transitional democracies should be from 3% to 5% and the task of the state is to find the balance between a fair representation of public views and the effectiveness of the parliament and the government. The type of electoral system can also significantly affect the form of campaigning of parties and candidates, as it is shown by Reilly (2002, pp. 158–168) and Grofman and Lijphart (2003, pp. 8–9).

Another component of the principle of free elections is the formation of the will of the voters in conditions of freedom prior to the voting day. Freedom of expression in this context is reflected through the implementation of electoral rights for electioneering by candidates, voters, as well as through the activities of the media. With this in mind, Frank La Rue, UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, has said:

In the context of elections and political communications, dedicated attention is to be afforded to the free expression rights of main actors: the voters, who depend on the right to freedom of expression to receive full and accurate information, and express their political affiliation without fear; candidates and political organizations, who need to exercise their right through campaigning and communicating their political messages freely without interference or attacks; and the media, which relies on the right to freedom of expression to play its essential democratic role of informing the public, scrutinizing political parties and platforms, and provide checks and balances on the electoral process (La Rue, 2014, p. 5).

Differences in legal regulation of the information spread by these three groups are stipulated by different tasks (roles) they have in the electoral process. The media, on the one hand, should provide objective and impartial coverage of election-related information; on the other hand, the media provides opportunities for the exchange of ideas and campaigning by all candidates in line with the principle of equal opportunities. Candidates (parties) are entitled to freely generate ideas during the electoral competition for power; nonetheless, they shall observe legal requirements on election campaigning. Voters, in their turn, have a guaranteed opportunity of free communication and discussion, which is expressed in the support or critique of certain candidates

and converted to the result of expression of will in the election of members of representative bodies.

Restrictions in terms of the forms, means, subjects, and time of election campaigning, which are established by electoral legislation, are in fact restrictions of freedom of speech. Nevertheless, such restrictions are permissible in a democratic society since they pursue a legitimate goal which is to ensure equal electoral rights and free expression of will by the electors. However, the Code of Good Practice in Electoral Matters notes that such restrictions should not introduce any censorship regarding the criticism of the government or constitutional changes. Criminalization of insults and slander of officials and candidates does not correspond to European standards, either (Venice Commission, 2002).

Ukrainian electoral legislation is uncoded, which determines the peculiarities of legal regulation depending on which specific law is applied: 'On the election of people's deputies of Ukraine', 'On the election of the President of Ukraine' or 'On local elections'. However, the researched subject is covered with the emphasis on the parliamentary type of elections, in particular, because of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms of March 20, 1952, which protects the free expression of the opinion of the people in the choice of the legislature.

3. Requirements for election campaigning as legitimate restrictions of freedom of expression: the Ukrainian context

The legal regulation of election campaigning in Ukraine uses a dispositive approach (it is allowed to implement campaigning in any form and by any means which are not prohibited). Despite this, the legislation prescribes a significant number of restrictions for political advertising, forms, means, subjects, terms, and sources of financing for election campaigning, as well as requirements for the use of mass media.

1. Political advertising. Specific electoral laws introduce the concept of political advertising which implies placement or distribution of election campaign materials through advertising. Political advertising must comply with all restrictions on election campaigning.

According to Davor Glavaš, paid political advertising in the broadcast media has traditionally been prohibited in many countries, whilst it has been accepted in others. One of its major advantages is the opportunity

which it provides for all political forces to widely disseminate their messages/programmes. On the other hand, as mentioned, it may give an unfair advantage to those parties or candidates who can purchase important amounts of airtime. Most of the countries which allow paid political advertising also foresee certain legal restrictions to avoid the discriminatory character of the practice (Glavaš, 2017).

In its high-impact decision (*Animal Defenders International v. United Kingdom* [2013]) regarding paid political advertising, the ECtHR concluded that minimum impairment of the right of expression in the form of restrictions on paid political advertising may exist in a democratic society, since access to such advertising is limited to the financial capacity of the candidates.

In Ukraine, the possibility of using political advertising by candidates in parliamentary elections is limited by the maximum size of the election fund. In presidential and local elections, only the amount of contributions made by one person is limited; meanwhile, the size of the election fund is not.

2. Restrictions on forms and means of election campaigning. Ukrainian legislation establishes a significant number of restrictions on the forms and means of campaigning. In particular, it is prohibited to distribute in any form materials containing calls for the abolition of Ukraine's independence, the change of the constitutional order by violent means, violation of the sovereignty and territorial integrity of the state, etc. At the same time, the legislation permits parties and candidates to distribute certain materials with the party symbols and program. However, such actions should not be transformed from the means of the expression of one's ideas and views aimed at motivating voters and encouraging them to vote for a party or candidate into an unlawful fact of bribing voters.
3. Restrictions on the subjects eligible for election campaigning. According to the Ukrainian legislation, participation in election campaigning is prohibited for foreigners and stateless persons, executive bodies and local self-government bodies, law enforcement bodies and courts, officials and officers of these bodies during working hours (except when the relevant official or officer is a candidate for deputies), members of election commissions. Such restrictions, in particular, are directed towards minimization of foreign influence and threats to state sovereignty, malpractice on the part of the candidates or their supporters, and so on
4. Restrictions on the time of campaigning. Ukrainian legislation links the emergence of right for campaigning with the fact of registration of a candidate or party as an electoral subject to the relevant election. However,

the Ukrainian legal system lacks regulation of premature campaigning, as far as all restrictions on election campaigning are applied towards the candidate only the following day after their registration as a candidate. Thus, it obviously creates unequal competitive conditions for participation in the election campaign and can be considered as a violation of the principles of free elections and equal electoral rights.

In Ukraine, the election campaign ends at 12 p.m. on the last Friday before the voting day. Election campaigning on the so-called “days of silence” (on the eve of election day and on election day itself) is strictly prohibited.

5. Restrictions stipulated by the requirements towards the materials of election campaigning. Printed campaign materials must contain information about the publishing, circulation, individuals responsible for the issue and the customer of the relevant materials. A party or candidate may issue printed materials for the election campaigning using their own equipment, which also must be stated on such materials. The aim of such marking of printed materials is to monitor the financing of election campaigning.
6. Requirements for the sources of financing of election campaigning. Election campaigning in Ukraine is implemented at the expense of the state budget and costs from election funds of candidates and parties. The state budget provides for the possibility of reimbursement for election campaigning, but only in parliamentary elections and for those parties that have gained at least 2% of votes in the latest elections. However, in all types of elections, only indirect funding for campaigning is foreseen. It takes place in the form of payment for airtime (for presidential elections it is 30 minutes on television and 30 minutes on the radio) and print space in official editions for the publication of the election program.

In the case of private financing of election campaigning, there is a strict requirement for its implementation. Legislation regulates the procedure for the formation of an election fund and the procedure for the use of costs from this fund. However, only the Law of Ukraine ‘On the election of people’s deputies of Ukraine’ restricts the size of the election fund (90,000 minimum wages). After the elections, all subjects submit reports on the use of funds, which are audited by a special body—the National Agency for the Prevention of Corruption.

4. Mass media in the electoral process and the limits of their activity

The legal regulation of media activity in the electoral process serves several purposes. On the one hand, the media shall observe all existing restrictions on the election campaigning (including both the general restrictions, which have been mentioned above, and the special ones), but in the coverage of information, media shall be as objective and impartial as possible.

In its recommendation, the Committee of Ministers of the Council of Europe (1999) requires equal application of the principles of fairness, balance, and impartiality in the coverage of election campaigns by the media, regardless of the type of election. On the other hand, in the case *Grinberg v. Russia* [2005] it was determined that journalistic freedom covers possible recourse to a degree of exaggeration, or even provocation. The need for any restrictions must be established convincingly.

One of the threats to the freedom of expression is censorship. Shveda (2015) points out that censorship allows influencing or tightly controlling information processes and flows, as well as manipulating public opinion. Authoritarian regimes or states with authoritarian regimes, officially declaring the freedom of expression, in fact, indirectly put economic and administrative pressure on journalists and publishers (censorship). Another important issue related to political advertising in the media is the coverage of incumbents (Shveda, 2015, pp. 178–179). That is why the media should cover various political views, create opportunities for political discussion, including for fierce debate, respecting at the same time the principle of equal conditions of participation. The ultimate goal of the legal regulation of media activities is the free formation of the will of voters based on the spread of diverse information, ideas, and views. Therefore, the legislation requires that the mass media and news agencies aim for fair and balanced coverage of all parties' and parliamentary candidates' comments on election-related events.

On the other hand, Pavlovic (2017) rightly points out that if those who place a lie (in the author's example, a party in power) also own the media as a platform from which it is placed, and the opportunity to deny the same media to the other party for retraction, there is an obvious example of suppression of media freedom and spinning, all happening during the election campaign (Pavlovic, 2017, p. 39). For that very reason, despite the necessity to comply with general restrictions on election campaigning (terms, subjects, forms, means, etc.), the

legislation is to establish a significant number of special requirements for the activities of the media. The main purpose of these requirements is to ensure compliance with the principle of equal opportunities and conditions for the participation of candidates in the election process.

Thus, in Ukraine, mass media are obliged to establish prices for their services 100 days before the voting day; the prices cannot change during the election process and should be the same for all candidates. By providing services to one candidate, the media cannot refuse to provide similar service under similar conditions to the others. Providing any benefits (for example, in the payment for services) or privileges (in particular, more airtime) to someone of the candidates is a violation. At the same time, failure to provide such benefits or privileges to other candidates would violate the principle of equality (equal opportunities) in relation to passive electoral law.

The ECtHR repeatedly emphasized the special role of the media as a “public watchdog” (the cases of *Editorial Board of Pravoye Delo and Shtetel v. Ukraine* [2011], *Observer and Guardian v. the United Kingdom* [1991], *Grinberg v. Russia* [2005]), which not only has the right to spread information but should also be able to receive the information which can be of public interest. However, in the electoral process, in order to ensure the principle of free elections and equal electoral rights, the media should refrain from campaigning on their own behalf or on behalf of their employees. Therefore, in the electoral process, the media, instead of “public watchdog”, should act as an objective mediator and spread information about the subjects of the electoral process equally.

Consequently, so as to obtain objective and impartial coverage of information by mass media during the election process, it is forbidden for their staff and creative workers in their materials and programs, not stipulated by agreements with the subjects of the electoral process, to canvass to vote or not for a party or a candidate, or distribute information which has signs of political advertising. In case of violation of these requirements, the court may take a decision on a temporary (until the end of the election process) suspension of the activity (license) of the media.

5. The limits of permissible criticism of candidates for the elected office

The ECtHR has made a number of important conclusions regarding freedom of expression in the case *Handyside v. the United Kingdom* [1976] where it was stated that pluralism, tolerance and broadmindedness require distribution of even those views that offend, shock or disturb the State or any sector of the population.

Defamation disputes are difficult to resolve even during the inter-election period. However, when any statements or claims are made towards candidates for elected office during the electoral process, such rights as the right to free elections (Art. 3 of the First Protocol), freedom of expression (Art. 10 of the Convention), and the right to respect for private and family life (Art. 8 of the Convention) come into competition. Considering this situation (competition of different rights), implementation of the freedom of expression implies consideration of the following factors: a specific period of information spread, the content of the spread information, and the person, information about whom is spread.

1. The person about whom information is spread. The Parliamentary Assembly of the Council of Europe (1998, para. 6), stated that the special status of public persons automatically increases the level of pressure on the privacy of their lives. Certain facts relating to the private lives of public figures, particularly politicians, may indeed be of interest to citizens, and it may, therefore, be legitimate for readers, who are also voters, to be informed of those facts (Council of Europe, 1998, para. 9). Similar conclusions are made in the ECtHR decision (*Kwiecień v. Poland* [2007]), where the Court emphasizes that a politician must consequently display a greater degree of tolerance. Thus, the electoral process receives a special category of individuals, i.e., candidates for elective office. Such persons may be acting representatives of state authorities and local self-government bodies. However, persons who have never worked in public service may also become candidates. In any case, their common feature is participation in the electoral process with the aim to gain power.
2. The specific period of information dissemination. Freedom of expression in the form of election campaigning leads to the use of a large number of restrictions prescribed by law. However, particularly during this period, the dissemination of socially important information is gaining particular importance, as it will make the basis for the expression of will on the

voting day and will help to determine the personal composition of the representative body. In the case *Bowman v. the United Kingdom* [1998], the ECtHR stated that for this reason, it is particularly important in the period preceding the election that opinions and information of all kinds be permitted to circulate freely. In the case *Lingens v. Austria* [1986], the ECtHR stresses the need to take into account the peculiarities of the electoral process and the probability of existence of hard-fought tussles of politics, even despite the fact that the expression was made after the national elections.

3. The content of the disseminated information. If we analyze the content of statements and expressions during the election process, it is necessary to take into account the public interest in their spread and the existence of actual data or value judgments in such information.

In the case *Karakó v. Hungary* [2009], the ECtHR have not found any violation of Article 8 and relied on Article 10 of the Convention, when on the complaint of the applicant refused to open a criminal proceeding on the defamation statements made by his political opponent (leaflets with the information that the applicant regularly voted against the interests of his constituency). Given the overall range of circumstances (the applicant was a politician, the statement was made during an election campaign and constituted a negative opinion regarding the applicant's public activities) the Court stood up for the freedom of expression. Thus, the social significance of the disseminated information about the activities of candidates increases. Indeed, during the elections, we can say to some extent that the "assessment" of the work of representative authorities is provided. With the aim of making this assessment objective, it is important to ensure that even critical and unpleasant views about politicians in the electoral process are expressed.

As for the value judgments, common approaches of the ECtHR on freedom of speech are applicable, in which the Court has distinguished between statements of fact and value judgments (while the existence of facts can be demonstrated, the truth of value judgments is not susceptible to proof) (*Feldek v. Slovakia* [2001]). Where a statement amounts to a value judgment, the proportionality of interference may depend on whether there exists a sufficient factual basis for the impugned statement, since even a value judgment without any factual basis to support it may be excessive (*Kwiecień v. Poland* [2007]).

Thus, we may conclude that defamation disputes during the electoral process may obtain the features of a sharp political debate. This does not preclude the necessity to respect for private and family life (Art. 8 of the Convention).

However, the degree of permissible critique of candidates and the “tone” of discussion may be much higher. Therefore, it is important to assess not only the semantic use of words that may be unpleasant or even somewhat offensive but also study the ultimate goal of the dissemination of such information. Article 8 can be considered violated only when the content of the information does not constitute a public interest, and disseminated value judgments result in nothing but insults or defamation.

Ukrainian legislation provides for special procedures for appealing against actions on dissemination of false information about a candidate. The legislation enables candidates and parties to demand the publication of a response to information disseminated about them, which they consider unreliable. The media are obliged to disseminate information in the same amount at their own expense.

Yurii G. Barabash (2012) writes that in addition to the issues of “evidence” of the unreliability of information, experts raise questions about the form of legal proceedings, according to which such disputes should be considered—either administrative or civil (as traditional disputes on the protection of honor and dignity). The jurist emphasizes that, in this case, it is not about proving the unreliability of information and its disproof in court, but about the guarantees of the candidate’s right for a response, as a component of the principle of equality of rights and opportunities of candidates provided by the current legislation. This dispute should be considered in the administrative procedure, and the courts should only verify the fact that the airtime or print space in official editions for the “response material” were not provided. As to the reliability of information widely spread about a candidate, this is a matter of the candidate’s discretion. (Barabash, 2012, p. 6)

6. Freedom of expression and modern challenges of the use of the global network for electoral purposes

Global informatization of society has significantly increased the speed of the spread of information, which has affected voters in an ambivalent way. On the one hand, internet use promotes political pluralism and prevents or minimizes the use of censorship by states, on the other hand, there are hybrid wars, the fakeness of mass consciousness that take over democratic countries and cause rigging of modern electoral processes. In this regard we could mention the activities of the private English company Cambridge Analytica, which used technologies of deep data analysis (in particular, of data from a social network)

to develop strategic communication on the internet during electoral campaigns and is suspected of illegal influence on the will of the voters during the 2016 United States presidential election and the 2016 United Kingdom European Union membership referendum, also known as the Brexit referendum.

It is no secret that nowadays candidates have access to technologies which by means of a large number of algorithms can track the behavior of users in the network and segment them by various features and interests (the concept of ‘big data’). Particular companies, for example, Google Adwords (Advertising Policies, 2019) and Facebook (Ad Policies, 2019a), completely legally use a variety of marketing opportunities for political purposes in the global network. This enables candidates to be more sensitive to the voters’ preferences and to build their election campaign accordingly.

In this light, the key problem for Ukraine is the absence of a legal framework in this area. It leads not only to a significant number of “gray” technologies aimed at creating fake news, comments, and accounts, and advertising platforms not registered officially (the so-called “teaser networks” working as intermediaries between site owners and advertisers), but also to conscientious information managers on the internet operating fully or partially out of a legal framework. Along with this, there is a problem of how to identify the information manager, since they can be located in any country in the world.

Another challenge in this field is the protection of the voters’ personal data during the dissemination of information about the subjects of the electoral process. In this regard, freedom of expression intersects with the right to protection of personal data. With the intention to reach a larger electoral base, the subjects of election campaigning may violate both of these rights. As a consequence, in 2016, in order to protect the personal data of EU citizens, the European Parliament and the Council of the European Union adopted the General Data Protection Regulation (Directive 95/46/EC).

Obviously, there are some positive steps in this area. In particular, Facebook has obliged advertisers to disclose sources of funding for political advertising, which is a significant step to increase transparency of election campaigning (Ad Policies, 2019b) and exercises a policy on verification of Facebook Pages. Google has also begun enforcing its policy for election ads in the EU since March 21, 2019.

The first step towards the formation of a legal framework in this area may be the establishment of effective communication between representatives of corporations and the authorized state authorities. For example, Estonian media

reported on cooperation between Facebook and The Political Party Funding Supervision Committee. Moreover, deputy chairman of the Committee Kaarel Tarand believes that other internet resources could follow this example (*ERR News*, 2018). In this respect, Ukraine is one of the first countries for which Facebook has created a library of political advertising, which contains advertising on elections, representatives of public authorities and candidates for elected positions. Facebook has been collecting such ads for Ukraine since March 15, 2019 and plans to store it for 7 years (Ad Library, 2019).

As a consequence, communication with large corporations (such as Facebook, Twitter, Google, etc.) that have own online marketing platforms will promote a high-speed transfer of information about political advertising and sources of its funding and enable states to respond to offenses effectively. At the same time, the state will be able to provide its own explanations or to examine political ads for compliance with applicable law, as advertising platforms cover a large number of countries with different regulatory legislation.

7. Conclusions

Freedom of expression and the right to free elections are the foundations of the democratic system. The principle of free election includes such components as the formation of the will of the electors in conditions of freedom and its free expression during the vote.

Free expression of the will of the electors is ensured by the principle of the secret ballot, fair procedures of counting and establishing of election results. At the same time, individual electoral systems or their elements may disregard the will of a certain part of the electorate. Nonetheless, the effect of “wasted votes” to a certain degree is inherent to any electoral system. Therefore, despite the wide margin of discretion for states, it is important that this effect have reasonable limits and not violate the essence of the principle of free expression of will.

Another component of the principle of free elections is the formation of the will of the electors in conditions of freedom. However, this is only possible if there is a free exchange of views and all participants of the election process, which include candidates, voters, and the media, have equal opportunities for expression. Differences of legal regulation on the spread of information by these three groups are stipulated by the different tasks (roles) they have in the electoral process.

In order to ensure equal conditions for participation in the elections, including the exercise of freedom of expression, states establish requirements for election campaigning, first of all, for political advertising, forms, means, subjects, time, sources of funding for election campaigning, as well as restrictions on the use of the media. However, if such restrictions level out the possibility of expressing views by voters and do not comply with the principle of legal certainty, elections in such a state cannot be considered democratic.

The media should cover different political views and create conditions for a multisided political discussion. However, during the election process, in order to ensure the principle of free elections and equal electoral rights, the media must refrain from campaigning (as far as the media are not the press service for candidates).

In case of defamation disputes in the electoral process, it is important to take into account three factors expression of views: the specific period of information dissemination, the person, information about whom is disseminated, and the content of the disseminated information (which may be of public interest to be a value judgment). Therefore, in spite of the existing restrictions on election campaigning, the limits of permissible criticism of candidates for an elected office are to be wider during the electoral political discussion.

Currently, another challenge to the global community is the legal regulation of freedom of expression on the internet. Modern technologies, which use ‘big data’, make it possible to exercise significant influence on voters and to adapt informational messages to the needs of a certain segment of internet users. Despite some positive developments in this field, for the states, it is more beneficial to maximize cooperation with corporations that provide advertising services, and thus to monitor the observance of electoral legislation. The requirements for campaigning for candidates and political parties on the internet shall be met, including the transparency of funding.

Bohdan Mokhonchuk, PhD in law, is a lecturer at the Department of Constitutional Law of Ukraine, and head of the student scientific society of Yaroslav Mudryi National Law University Ukraine. In 2017, he defended his thesis *The Electoral System of Ukraine as a Constitutional-Legal Institution*. He has authored more than 40 scientific works. His working areas are the democracy, electoral systems, electoral process, constitutional and legal responsibility.

Pavlo Romaniuk, PhD in law, is a lecturer at the Department of Constitutional Law of Ukraine, and vice chairman of the Council of Young Scientists of Yaroslav Mudryi National

Law University Ukraine. In 2016, he defended his thesis *Constitutional Foundations of Representative Mandate Institute in Ukraine*. He has authored about of 40 scientific works. He was also the author, reviewer and compiler of 9 monographs on election issues published in 2019. His working areas are the democracy, representative mandate, electoral law and process.

References

- Ad Library (2019), Facebook. Retrieved from https://www.facebook.com/ads/library/?active_status=all&ad_type=political_and_issue_ads&country=UA [accessed Nov 2019]
- Ad Policies (2019a), '10.a Ads Related to Politics or Issues of National Importance,' Facebook. Retrieved from https://www.facebook.com/policies/ads/restricted_content/political [accessed Nov 2019]
- Ad Policies (2019b), '10.b Disclaimers for Ads Related to Politics or Issues of National Importance,' Facebook. Retrieved from https://www.facebook.com/policies/ads/restricted_content/disclaimers [accessed Nov 2019]
- Advertising Policies (2019), 'Political content,' Google. Retrieved from <https://support.google.com/adspolicy/answer/6014595?hl=en> [accessed Nov 2019]
- Animal Defenders International v. United Kingdom* [2013], ECtHR, no. 48876/08, 22.4.2013.
- Barabash, Yu. H.** (2012), 'Okremi pytannia rozghliadu sudamy vyborchych sporiv' [Some issues of consideration of electoral disputes by courts], *Viche*, vol. 14, pp. 5–9.
- Bowman v. the United Kingdom* [1998], ECtHR, no. 24839/94, 19.2.1998.
- Constitutional Court of Ukraine (2002), Rishennia Konstytutsiinoho Sudu Ukrainy u spravi za konstytutsiinym podanniam 63 narodnykh deputativ Ukrainy shchodo vidpovidnosti Konstytutsii Ukrainy (konstytutsiinosti) polozhen statti 43 Zakonu Ukrainy "Pro vybory narodnykh deputativ Ukrainy" (sprava pro vyborchu zastavu) [Decision of the Constitutional Court of Ukraine], no. 1-18/2002, 30.1.2002
- Constitutional Court of the Republic of Latvia (2002), Reshenye ot ymeny Latviyskoi Respublyky [Decision of the Constitutional court of the Republic of Latvia], no. 2002-08-01, 23.9.2002.
- Council of Europe (1998), *Right to Privacy*, Resolution of the Parliamentary Assembly of the Council of Europe, no. 1165, 26.06.1998.
- Council of Europe (1999), On measures concerning media coverage of election campaigns, Recommendation of the Committee of Ministers of the Council of Europe, no. R(99)15, 9.9.1999.

- Council of Europe (2007), State of human rights and democracy in Europe, Parliamentary Assembly of the Council of Europe resolution no. 1547, 15th Sitting, 18.4.2007.
- Daibu, A. A. & Abdulrazaq, F. F.** (2016), 'Legal and practical challenges to the enforcement of the right to freedom of expression in Nigeria,' *Yonsei LJ*, vol. 7, pp. 87–126.
- Directive 95/46/EC of the European Parliament and of the Council 'On the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing,' (General Data Protection Regulation), *OJ L* 119, 4.5.2016, pp. 1–88.
- Editorial Board of Pravoye Delo and Shtekel v. Ukraine* [2011], ECtHR, no. 33014/05, 5.5.2011.
- ERR News* (2018), 'Za reklamoi estonskikh politikov i partii v facebook budut sledit,' 29.11.2018. Retrieved from <https://rus.err.ee/880986/za-reklamoi-jestonskih-politikov-i-partij-v-facebook-budut-sledit> [accessed Nov 2019]
- Feldek v. Slovakia* [2001], ECtHR, no. 29032/95, 12.7.2001.
- Glavaš, D.** (2017), *Political Advertising and Media Campaign During the Pre-election Period: A Comparative Study*, Organization for Security and Co-operation in Europe, Commissioned by the OSCE Mission to Montenegro. Retrieved from <https://www.osce.org/mission-to-montenegro/346631?download=true> [accessed Nov 2019]
- Grinberg v. Russia* [2005], ECtHR, no. 23472/03, 21.7.2005.
- Grofman, B. & Lijphart A.**, eds. (2003), *Electoral Laws and Their Political Consequences*, Agathon Series on Representation, New York: Agathon Press.
- Handyside v. the United Kingdom* [1976], ECtHR, no. 5493/72, 7.12.1976.
- Karakó v. Hungary* [2009], ECtHR, no. 39311/05, 28.4.2009.
- Kwiecień v. Poland* [2007], ECtHR, no. 51744/99, 9.1.2007.
- La Rue, F.** (2014), *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, Human Rights Council, A/HRC/26/30, 30.05.2014.
- Lingens v. Austria* [1986], ECtHR, no. 9815/82, 8.7.1986.
- Loewy, A. H.** (1993), 'Freedom of speech as a product of democracy,' *University of Richmond Law Review*, vol. 27, no. 3, pp. 427–439.
- Kliuchkovskiy, Yu. B.** (2018), *Pryntsypy vyborchoho prava: doktrynalne rozuminnia, stan ta perspektyvy zakonodavchoi realizatsii v Ukraini: monohrafiia* [Principles of electoral law: doctrinal understanding, status and prospects of legislative implementation in Ukraine: monograph], Kyiv: Vaite.
- Mathieu-Mohin and Clerfayt v. Belgium* [1987], ECtHR, no. 9267/81, 2.3.1987.
- Observer and Guardian v. the United Kingdom* [1991], ECtHR, no. 13585/88, 24.10.1991.

- Pavlovic, M.** (2017), 'Legal limitations of freedom of expression in media,' *Int'l J. Econ. & L.*, vol. 7, no. 21, pp. 33–42.
- UNCHR (1995), Resolution of the United Nations Commission on Human Rights 'Ways and means of overcoming obstacles to the establishment of a democratic society and requirements for the maintenance of democracy,' no. 1995/60, 59th Meeting, 7.03.1995.
- Reilly, R.** (2002), 'Electoral systems for divided societies,' *Journal of Democracy*, vol. 13, no. 2, pp. 156–170. <https://doi.org/10.1353/jod.2002.0029>
- Shveda, Yu. R.** (2015), *Vybory vid A do Ya: Nastilna knyha menedzhera vyborchoi kampanii* [Elections A to Z: campaign manager's board book], Lviv: Astroliabiiia.
- Venice Commission (2002), Code of Good Practice in Electoral Matters, adopted by the Venice Commission at its 51st Plenary Session (Venice, 5–6 July 2002).
- Yumak and Sadak v. Turkey* [2008], ECtHR, no. 10226/03, 8.7.2008.
- .