



Council of Europe
Agency for Legislative Initiatives
Venice Commission
Central Election Commission of Ukraine
Committee on State Building and Local Self-Governance
of Verkhovna Rada of Ukraine

International Conference:
QUALITY OF ELECTIONS: MAKING DEMOCRACY STRONG

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STUDY CONCLUSIONS AND RECOMMENDATIONS



QUALITY OF ELECTIONS FOR STRENGTHENING DEMOCRACY

STUDY CONCLUSIONS AND RECOMMENDATIONS

(Lviv, 24-25 September 2009)

- 1. The Law amending certain legislative acts related to the presidential elections is an essential step back away from improving the legal regulation of the elections of the head of state. Despite of a number of positive innovations, it mainly does not meet the Ukrainian constitution and is not compliant with the Venice Commission and OSCE/ODIHR recommendations on the improvement of the election legislation. In its current form, the new version of the Presidential Election Law can hardly become the basis for the next presidential elections to be held in accordance with the European standards.**
- 2. In our opinion, the main drawbacks of the above Law include the following:**
 - Election constituencies are established on the basis of an equal number of voters, rather than an equal number of polling stations in the constituencies, which will result in an unequal division of labour between district election commissions (some district election commission will deal with 40-50 polling station election commissions, while others will have to work with up to 300 of them);
 - The cap number of voters that can be assigned to a polling station is kept at the level of 3000 voters, which is not compliant with the Law on Parliamentary Elections and contradicts the recommendations of the Venice Commission and OSCE/ODIHR on the results of observation of 2004, 2006, and 2007 elections;

The procedure for the establishment of special polling stations and polling stations abroad is rather general;

- The terms set for the establishment of polling stations are inconsistent with the terms set for the establishment of district election commissions;
- Lack of correspondence between the minimal composition of the district election commission (DEC), polling station election commission (PSEC), and the scope of labour assigned to the relevant commissions (the number of polling stations in a district that a DEC is supposed to deal with; the number of voters at one polling station that a PSEC has to deal with);
- The procedure set for the establishment of DEC and PSECs features a number of gaps and contradictions;
- The maximal number of DEC and PSEC members is not limited, which, in case of many presidential candidates nominated, may result in an essential increase of their composition and complication of their work;
- Only residents of the relevant territorial constituencies or towns/cities may become members of election commissions in such constituencies;
- Only an absolute (simple) majority of the present members of the relevant commission may decide on expulsion from a commission meeting;
- The amount of the election deposit (a voter with an average salary needs to work for 113 years to accumulate the money necessary to make an election deposit) and the grounds of its return are unreasonable;
- The CEC is in charge of regulating practically all issues related to the access to the State Voter Register database, which enhances the CEC's discretion powers;

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- Provisions of the new version of the Presidential Election Law are not reconciled with the Law on the State Voter Register; a number of important clauses have been excluded from the Law on the State Voter Register, in particular as concerns the primary formation of the Register database;
- The right to vote in a foreign election constituency is granted only to the voters registered with the consulate, which can be seen as a violation of Articles 22, 24, 64 and 70 of the Constitution;
- Absentee voting slips have been cancelled, and at the same time no efficient guarantees have been offered to ensure the exercise of the voting right at the voter's election address (which can be seen as violation of Article 22 of the Constitution);
- There is no clear procedure for the cooperation between the authorities that have the right to change the voter lists (courts, the Register maintenance bodies, election commissions), in particular as concerns the exchange of information on the voters' complaints accepted for consideration by any of them (especially, on the voting day);
- The voter lists can be changed on the voting day, in particular on the decisions of different authorities, which contradicts the Code of Good Election Practices;
- A PSEC may hold meetings to consider complaints during the voting process, which may paralyse the voting as such;
- The campaigning rules established by the Law on Presidential Elections and by the Law on Parliamentary Elections are inconsistent; the Law on Presidential Elections preserves a number of norms that do not meet the European standards and are not compliant with the previous recommendations made by the Venice Commission and OSCE/ODIHR;
- NGOs are not entitled to observe elections, which contradicts the democratic election standards;
- The CEC may establish the election results only on the basis of those PSEC protocols that are available on the 10th-11th day after the voting, which enables election commissions, influenced by political forces, to adjust the results of the public will expression on the nationwide scale;
- Election of the President is formalised not through adoption of a decision, but through issuance of a protocol, which does not promote proper protection of the citizen's election rights;
- The official publication of the election results is replaced by the official announcement, which does not meet the world practice;
- The subject of the extrajudicial contestation is narrowed, which may increase the workload for the courts and thus weaken the possibilities to defend the violated election rights;
- The election commissions, which have committed a violation, preserve a possibility to consider complaints, which contradicts the generally recognised legal principles of "nemo iudex in causa sua";
- The law has established an exhausted list of issues that can be contested in the court (which contradicts Article 124 of the Constitution);
- There is a possibility to leave administrative lawsuits, that have not been considered within the terms established by law, without consideration (which contradicts Article 55 of the Constitution and Article 6 of the European Convention on Protection of Human Rights and Fundamental Freedoms);
- It is prohibited to issue rulings to secure administrative lawsuits in the disputes that concern announcement, preparation, and conduct of elections (which contradicts Articles 22 and 55 of the Constitution); and
- There is criminal liability envisaged for election commission members for the evasion of their work in the commissions without serious grounds (which does not meet the principle of efficiency, adequacy, and efficiency of sanctions); the formulation of Article 158-1 of the Criminal Code of Ukraine needs to be improved.

3. Further improvement of the legal regulation of elections may envisage the following:

- There is a need to ensure further stability of election legislation – the election campaign rules should not be reconsidered before each elections, in particular at the beginning of the election process, as it happens in Ukraine;
- Provisions of different election laws should be reconciled through adoption of an Election Code, which should take into account the following OSCE/ODIHR and Venice Commission recommendations:
 - a) the provision recognising any elections validity only if no less than 50% of voters have participated in them, should be cancelled;
 - b) independent candidates should get a possibility to register for elections;
 - c) there should be mechanisms established to promote gender balance in the representative bodies;
 - d) proper remuneration guarantees should be envisaged for election commission members;
 - e) the procedure for the acceptance and transfer of election documents and processing of election should be reviewed in order to improve their efficiency.
- There is a need to return to the previous version of the Code of Administrative Justice which was valid before the election-related amendments came into force;
- The election territorial organisation should be reviewed, in particular:
 - a) polling stations should be divided into permanent and temporary in accordance with the principles reflected in the Law on the State Voter Register; there should be a procedure established for their set up, liquidation, change of details etc; and
 - b) the optimal number of territorial constituencies should be established depending on the type of the election system that will be used for parliamentary elections;
- The number of voters per polling station should gradually go down from 2,500 to 1,500 voters;
- The CEC's independence from political influences should be strengthened, including through definition of an exhaustive list of grounds for preterm termination of powers of the entire CEC;
- Members of election commissions (DECs and PSECs) should undergo a mandatory training; any powers should be granted to them only upon completion of such a training;
- Independence of election commission members from their nominators and other political influences should be strengthened, including through the following:
 - a) election laws (the Election Code) should contain an exhaustive list of grounds for recalling election commission members; and
 - b) election commission should not be obliged to arrange meetings between candidates and voters;
- further measures should be taken to improve the voters' legal culture;
- the time constraints set for the political parties registration (1 year before elections) as a condition for their participation in elections should be reviewed;
- the size and grounds for the return of the election deposit should be reviewed, so that the circle of potential candidates in the election is not unjustifiably restricted:
 - a) the presidential election deposit should make up 500,000 UAH,
 - b) the deposit should be returned to all presidential candidates (their nominators) if they get no less than 3%-support from the voters that have participated in the elections (which complies with the OSCE/ODHIR recommendations);
- The rules for the check-up of income and property statements submitted by the presidential candidates should make it impossible to hold selective inspections of individual candidates;
- The grounds for the cancelation of any candidate's registration should be limited to the candidates incompliance with the established requirements;

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- The State Voter Register IT system should be made fully operational;
- The new procedure for the compilation and specification of the voter lists for nationwide and local elections should be introduced, which should envisage in particular the following:
 - a) election commissions should not be entitled to consider the complaints related to the registration of voters, compilation and specification of voter lists; such powers should be passed on to the State Voter Register maintenance bodies; there should be a possibility to contest the decisions of such bodies should on the basis of an administrative or judicial procedure;
 - b) complaints about relevant violations should be submitted only to one body, and not to one of a number of bodies at the discretion of the complainer;
 - c) there should be a deadline established after which no changes should be done to voter lists (such deadlines should take into account the terms of administrative and judicial contestation of decisions, actions, and omission of action by the Register maintenance bodies and the terms set for the consideration of relevant cases);
 - d) it should be political parties (independent candidates), and not factions, that should be entitled to exercise public control over the maintenance of the State Voter Register;
 - e) the election laws (the Election Code) should set clear mechanisms for the cooperation between the Register maintenance bodies, courts, and other authorities that are in charge of the proper voter registration;
- The campaigning rules should be brought into compliance with European standards, including by the following means:
 - a) political advertising quotas in audiovisual and printed media should be cancelled;
 - b) the notion of the "campaigning" and its correlation with political advertising should be specified;
 - c) regulation of commercial media should be liberalised, including through cancellation of a number of restrictions established for such media by the current election laws;
 - d) the election laws should contain no provisions that establish liability of the media for dissemination of intentionally untrue information on the candidates;
 - e) provisions prohibiting campaigning in foreign media should be excluded from the election laws;
 - f) there is a need to repeal the provisions prohibiting the media, their officials and staff to assess the candidates' election programmes and to express their candidate-related preferences in their materials and programmes not contracted by the relevant agreements;
 - g) the election laws should contain no provisions prohibiting the media to comment on or assess an election programme 20 minutes before and 20 minutes after its broadcasting on radio or TV, as well as to disseminate any other information on a political party, bloc, or election candidate;
 - h) the regulation of the right to a reply should be improved through definition of the cases in which the media should be entitled to refuse to ensure the right to a reply; there should also be a possibility to contest such a refusal in the court;
 - i) there should be a rule under which the social polling results can be made public before midnight of the last Friday before the voting;
 - j) termination of the media state ownership should be sped up; transparency of the media ownership relations should be improved; independence of the National TV and Radio Broadcasting Council should be strengthened; there should be adequate sanctions established for the violation by the legislation by the media;
- political party and election finance rules should be brought into compliance with European standards, including Recommendation of the CoE Committee of Ministers to member states on common rules against corruption in the funding of political parties and electoral campaigns;
- Improvement of the election observation should envisage the following:

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- a) official observers from NGOs should be entitled to present at the CEC meetings;
 - b) there should be a uniform centralised approach to the accreditation of all official observers, so that they are able to observe election within the entire nationwide constituency, and not only in individual territorial constituencies;
 - c) the number of representatives from one media that can be present at the meetings of election commissions should be increased; and
 - d) photo- and video surveillance should be restricted on the election day (in order to ensure the privacy of voting);
- the election bulletin production procedure should allow for their rapid reproduction in case any candidate quits the campaign, so that members of the election commission do not have to stamp the election bulletins;
 - the "against all" option should be cancelled;
 - the 10% defect thresholds, the excess of which can be used as the grounds to invalidate the voting, should be cancelled; the voting should be invalidated only on the basis of the grounds that have had an essential impact on the voting results;
 - the procedures of the judicial and extrajudicial (administrative) settlement of election disputes should be regulated on the basis of the relevant provisions of the current Parliamentary Election Act (the administrative contestation procedures should be defined by election laws (the Election Code), while the judicial contestation procedure should be set by the Code of Administrative Justice) with due consideration of the following Venice Commission recommendations:
 - a) there should be a possibility to extend the terms set for the contestation of the election violations from 5 days to a longer term only in the cases when the complainer did not know and should not have known about the fact of violation;
 - b) the procedure established for the consideration of complaints should make it impossible that one complaint is considered both by a court and by an election commission at the same time;
 - Legal entities should also be made liable for the violation of election legislation (such liability should be envisaged by the election laws or the Election Code); the current system of sanctions for election violations (crimes) should be reviewed in order to ensure their adequacy and efficiency.
4. The role of the media in ensuring democratic, fair and transparent elections can be improved through revision of the legal basis of their activities, broader introduction of self-regulation; voters should be guided not so much to the understanding of problems, as to their solutions.
 5. Political parties should be turned into a real instrument for support and expression of the public political will, which requires the following:
 - a) a clearer division of powers and responsibilities between the head of state and the government;
 - b) enabling independent candidates to participate in the parliamentary and local elections;
 - c) personification of election systems used in the parliamentary and local elections;
 - d) introduction of the mechanisms that would encourage political parties to participate in elections on their own, and not in blocs (including through establishment of higher election thresholds for bloc, than for political parties);
 - e) restriction of private funding of political parties;
 - f) introduction of public funding of political parties; and
 - g) ensuring transparent functioning of public authorities which will make it possible to exercise efficient public control over the activities of representatives elected from political parties into such authorities.
 6. The role of NGOs in ensuring democratic, fair, and transparent elections should be strengthened through revision of the legislation regulating activities of non-profit organisations in Ukraine. NGOs should get the right to observe all election campaigns in the country and be more actively involved in the public policy-making and control of public authorities.