

European Platform for Democratic Elections

ELECTORAL REFORM IN UKRAINE CHALLENGES AND PROSPECTS

Electoral Reform in Ukraine - Challenges and Prospects

Summary

Electoral reform is a crucial component of a strong and sustainable democracy in Ukraine. However, the Ukrainian election legislation ranks among the least stable in Europe. Six out of the last eight parliamentary elections in Ukraine were held under different electoral legal frameworks. Moreover, four different electoral systems were in place. In most cases, either new wording or major changes to the electoral legal framework were introduced shortly before the elections. This prevented experts, political parties, and other stakeholders from engaging in an open, fully-fledged debate on the amendment bills. Both parliamentary and local elections shared the same set of problems. This paper outlines the most important challenges of the current electoral reform process in Ukraine. With the next parliamentary elections scheduled for 2019, international actors should take action and encourage the Ukrainian government to overcome the prevailing reform fatigue and push for the implementation of the following reform steps: a proportional electoral system with open regional electoral lists, the right to vote for IDPs, a proper legal framework for the prosecution of violations of the electoral law, and a new composition of the Central Election Commission.

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AUTHORS: *Serhiy Tkachenko*

Steffen Halling

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The electoral system and the instability of electoral legislation

Since the collapse of the Soviet Union and Ukraine's independence, the country passed and/or inherited six different laws on parliamentary elections (Nov. 27, 1989; Nov. 18, 1993; Sept. 24, 1997; Nov. 18, 2001; and Mar. 25, 2004, as amended on July 7, 2005, and Nov. 17, 2011). To date, this electoral framework has been amended almost 40 times. It should be stressed that these frequent legal changes were one of the reasons why elections have not become a transparent and strong component of Ukraine's fledgling democracy. Frequent and inconsistent amendments to the electoral law pose a threat to the country's legal security, constitutional tradition, and legal continuity. Moreover, these various electoral systems precluded the development of a stable multiparty system. Also, they did not advance an effective modus operandi between voters and people's deputies in the political decision-making process. A majoritarian electoral system was in effect during the national parliamentary elections in Ukraine several times. Most recently, this was the case in 2014, when a mixed system was used, with half of the deputies of the Ukrainian Parliament elected by majority voting in single-member constituencies and the other half by proportional voting with closed party lists. Yet the majoritarian electoral system in Ukraine is known to have numerous shortcomings. First, the first-past-the-post voting entails a high number of "wasted votes", i.e. votes with no representation in the Ukrainian Parliament. Second, majority voting in single-member constituencies in the past proved to be highly vulnerable to vote buying. Third, majoritarian deputies in the Ukrainian Parliament are prone to switch factions and parliamentary groups frequently. This not only reduces voters' confidence in the Parliament but also contributes to frequent shifting parliamentary majorities. Over time, the proportional system based on closed party lists in a single national constituency has also proved to be unfavorable in the Ukrainian case. First and foremost, closed party lists facilitate business lobbying in politics. In the past, oligarchs were able to utilize closed party lists to place their own "cronies" and, therefore, to maximize their political influence. Oligarchic proxies in mid-range positions on party lists were especially unlikely to be covered by the media or scrutinized by the voters.

International opinions and Ukraine's commitment

Both national and international experts widely agree that a proportional electoral system in regional constituencies with open lists is ideal to remedy the above-mentioned deficiencies of the electoral system in Ukraine. Accordingly, in its resolution 1755 (2010), the Parliamentary Assembly of the Council of Europe (PACE) declares that the electoral reform in Ukraine "should not only entail the adoption of a new electoral code, but also of a new electoral system". In addition, it reiterates its previous recommendation "that an electoral system be adopted that consists of a proportional system based on open electoral lists and multiple regional constituencies".¹

This view is shared by the Venice Commission and the OSCE Office for Democratic Institutions and Human Rights (ODIHR) in their joint opinion from 2011: "During the discussions on electoral reform, the Venice Commission proposed to introduce a proportional system based on multiple regional constituencies which could avoid the disadvantages of both the single proportional system and the

¹ Parliamentary Assembly of the Council of Europe: Resolution 1755 (2010): The functioning of democratic institutions in Ukraine: <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17899&lang=en>.

mixed system used in the 1998 and 2002 elections.”²

In its resolution on the state of democratic institutions in Ukraine from February 2017, the Parliamentary Assembly of the Council of Europe underscored the urgency for the Ukrainian government to adopt “a unified Election Code that introduces a proportional election system and is fully in line with European standards.”³

Despite continued and unequivocal international calls for reform of the electoral legal framework, both the Ukrainian Parliament (Verkhovna Rada) and the Ukrainian Government remain vague about concrete steps in this direction. Since the “Revolution of Dignity” in 2014, the only document defining guidelines for the reform of the electoral law is the coalition agreement “European Ukraine” from November 2014, which lays down the following objectives:

- the introduction of a proportional electoral system with open lists for both parliamentary and local elections (except for village and city district councils);
- the provision of effective accountability mechanisms for violations of the electoral law.⁴

In addition to the coalition agreement, the Strategy for Sustainable Development “Ukraine-2020”, approved by President Poroshenko in January 2015, refers to a reform of the electoral legislation. However, the document does not contain any detail thereof.

The Verkhovna Rada was supposed to adopt a new electoral legal framework by the year 2015. However, until today no serious efforts have been made to address the process of electoral reform by the Parliament. In fact, contrary to this declaration of intent, Ukrainian authorities tend to ignore these issues and delay reform.

Registered draft laws

The only steps taken so far were to register the following draft laws on parliamentary elections (in November and December 2014) and on the Election Code (in September and October 2015):

- the Draft Electoral Code of Ukraine, №3112 (submitted by V. Pisarenko) which advocates a proportional electoral system with closed party lists for 450 electoral constituencies;
- the Draft Electoral Code №3112-1 (submitted by A. Parubiy, O. Chernenko, L. Yemets) which advocates a proportional electoral system with open regional lists;
- the Draft Law “On elections of deputies of Ukraine”, №1068 (submitted by Y. Miroshnychenko) which advocates a proportional electoral system in a nationwide constituency with closed party lists;
- the Draft Law “On Elections of People’s Deputies of Ukraine (Open Party Lists)”, №1068-1 (submitted by Y. Tymoshenko and others) which advocates a proportional

² European Commission for Democracy through Law (Venice Commission) and OSCE/Office for Democratic Institutions and Human Rights (OSCE/ODIHR): Joint Opinion on the Draft Law on Elections of People’s Deputies of Ukraine, Opinion no 635/2011, CDL-AD(2011)037: [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2011\)037-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)037-e).

³ Parliamentary Assembly of the Council of Europe: Resolution 2145 (2017): The functioning of democratic institutions in Ukraine: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=23453&lang=en>.

⁴ Coalition Agreement “European Ukraine”, 27.11.2014 [in Ukrainian]: <http://zakon2.rada.gov.ua/rada/show/n0001001-15>.

- electoral system in a nationwide constituency with closed party lists;
- the Draft Law “On elections of deputies of Ukraine”, №1068-2 (submitted by V. Chumak, N. Agafonova, V. Novak, P. Rizanenko, L. Yemets) which advocates a proportional electoral system with open regional lists and a reduction of the electoral threshold from 5% to 3%.

These draft laws were reviewed by the Parliamentary Committee on Legal Policy and Justice only as late as 22 February 2017. Certainly, by its decision to finally review these draft laws the committee gave a renewed impetus to the reform process. At the same time, the Parliament has been hesitant to advance the existing draft laws in the legislative process.

The Working Group on Electoral Reform of the Verkhovna Rada

In April 2016, the Chairman of the Verkhovna Rada Andriy Parubiy established a working group tasked with promoting electoral reform. This working group initiated a systematic, transparent and inclusive dialogue among politicians and experts on key objectives to be achieved in the transition to a proportional parliamentary electoral system with open lists. Moreover, the working group was meant to identify key steps and constituent elements for the implementation of such an electoral system in Ukraine. Among others, these include the size of electoral constituencies, the electoral threshold, the opportunity for self-nomination of parliamentary candidates, the composition of the voting ballots, the voting procedures as well as the procedure for the conversion of electoral votes into parliamentary seats.

The working group includes leading Ukrainian experts, representatives of all factions of the Parliament, academics, and representatives of international organizations. The group held seven meetings in the course of which all registered drafts on the electoral law and the electoral code were discussed. The working group was set up by the Chairman of the Verkhovna Rada, but to date the Chairman has failed to grant official status to the working group. Therefore, recommendations of the working group are non-binding and without obligation to be reviewed by the factions and groups of the Parliament. Nevertheless, the Chairman has followed up on some recommendations of the working group and addressed the Parliament with a request to indicate its support for one of the existing draft laws. However, only the faction “Self-Help” (*Samopomich*) managed to come up with a decision on this matter.

The main outcome of the working group—its last working session was held in October 2016—was to keep electoral reform on the parliamentary agenda. However, due to a lack of political will of the factions and groups of the Parliament for cooperation, the working group could not proceed to elaborate an effective draft law.

In addition, there were other reasons besides the passivity of the parliamentary factions and groups why the Parliament so far could not agree on the basic parameters of the electoral system and, subsequently, on the introduction of a new electoral system for parliamentary elections: As already mentioned above, under the current electoral law half of the deputies of the Verkhovna Rada were elected in 2014 by majority voting in single-member constituencies. Accordingly, these deputies (198 members of the parliament in total) are hardly interested in an elimination of “their” single-member electoral districts.

Electoral reform on hold

Two scenarios for the further pursuit of the electoral reform are possible: The first option is that the registered draft electoral laws will be debated in the Verkhovna Rada without achieving a majority. Consequently, a rejection of the draft laws would imply that all activities to promote electoral reform would have to be relaunched from the very beginning. In the event of this scenario, civil society, national experts as well as the international community would need to be prepared to start working on a solution “from scratch”. The second scenario is that the Parliament will refrain from voting on any electoral law for a considerable period in the future. This, however, would not preclude deputies and the political leadership from publicly voicing their general support of a proportional voting system with open lists for parliamentary elections. And indeed, blocking reforms by delaying decisions would be nothing new to Ukraine and its political elite. A negative precedent in this regard has already been set by failing to appoint new members of the Central Election Commission in the course of the last three years.

The Central Election Commission

Early June 2017 will mark three years since the end of the official term of office of 13 out of 15 members of the Central Election Commission of Ukraine (CEC). However, the Verkhovna Rada amended the law on the CEC prior to the last presidential elections in 2014. Due to this legal amendment, the duties and responsibilities of the CEC members do not automatically cease upon the expiration of their seven-year mandate anymore. Instead, the commission stays in office until the appointment of new members. The purpose of this decision was to avert potential threats to the proper conduct of the 2014 presidential elections. At the same time, the legal amendment now virtually grants the CEC members the right to remain in office for an indefinite period of time.

Neither the Parliament nor the President of Ukraine has managed to implement an effective and legitimate mechanism to appoint a new CEC over the last few years. Consequently, it should be assumed that the current situation is acceptable for all parties. Yet with this negligence authorities undermine the voters’ trust in the legitimacy of the highest election body in Ukraine.

There have been some developments aimed at changing the composition of the CEC in 2016, when the President, after protracted consultations, proposed to replace 11 CEC members. The Parliament, however, purposefully delayed the review of the president’s proposal.

The appointment of a new CEC is a complex, multi-stage process that requires major coordination efforts involving both the various parliamentary factions and groups of the Parliament and the President.

To appoint new members of the Commission, it is necessary:

- for factions and groups of the Parliament to nominate candidates for consultations;
- for the President to hold consultations with the factions and groups of the Parliament;
- for the President to indicate the current CEC members to be dismissed and to nominate new members;
- for the appropriate committees in Parliament to consider these nominations;
- for the Parliament to vote on each candidate separately.

In sum, a decision can only be achieved by assuring that the interests of each parliamentary faction

and group are taken into consideration, whereas the President may, but is not obliged to, consider candidates proposed by the factions and groups of the Parliament. The authorities were not able to deliver any tangible results on this issue. Therefore, it must be assumed that proper consultations among the stakeholders involved are still to be held.

Prosecution of violations of the electoral law

In Ukraine, violations of the electoral law—in particular minor procedural violations—are widespread. Moreover, there have been numerous cases of large-scale electoral fraud. The most striking example was the presidential election in 2003-2004. Another example was the inability of the CEC to tabulate the election results in five constituencies during the parliamentary elections in 2012.

A thorough analysis by the Ukrainian civil network OPORA demonstrated that out of 422 instances in which law enforcement authorities launched criminal proceedings concerning electoral violations during the local elections in 2015, only 69 cases resulted in suspended sentences, while not a single defendant was given a prison sentence.⁵ Hence, it is advisable that the Criminal and Criminal Procedural Codes of Ukraine be reformed, too.

The protection of electoral rights of IDPs and other internal migrants

The annexation of Crimea and the military aggression by the Russian Federation in the Donetsk and Luhansk regions caused massive internal displacement of Ukrainian citizens. According to the Ministry of Social Policy, as of February 2017, Ukraine had registered more than 1.6 million internally displaced persons (IDPs).

That implies that about 4% of Ukrainian voters are IDPs, who are not able to fully exercise their political rights and to vote in local elections and in single-mandate constituencies in national parliamentary elections. This constitutes an evident violation of the principle of non-discrimination to ensure equal rights, freedoms, and opportunities. Moreover, it hampers the integration of IDPs into their new communities.

Given the need to remove existing obstacles for IDPs to take part in elections at the place of their current residence, experts from civil society dealing with the electoral law reform in Ukraine proposed that the Parliament amend the law “On the State Register of Voters,” “On Local Elections” and “On the Rights and Freedoms of Internally Displaced Persons” with the aim of improving the current procedures for determining voters’ registration, and therefore voting addresses. At last, in March 2017, a bill was registered under the number 6240, which aims to protect the voting rights of IDPs as well as of so-called internal “labor migrants”. The bill tackles the problem of granting both IDPs and other Ukrainian citizens the right to vote who currently do not reside in their original place of registration (i.e. the address indicated in their passports). If the bill was adopted by the Parliament, the situation of several million Ukrainian citizens who are currently deprived of their political rights due to intricate bureaucratic procedures for changing their election addresses would be significantly alleviated.

⁵ OPORA: Violations reported during 2015 local elections in Ukraine - Infographics, 22.03.2017: <https://www.oporaua.org/en/news/44205-violations-reported-during-2015-local-elections-in-ukraine-infographics>.

Conclusion and Recommendations

So far, there is considerable evidence that both the Ukrainian government and a vast majority of members of the Verkhovna Rada are satisfied with the current electoral system as well as with the existing electoral legal framework and the composition of the CEC. Only a small number of deputies has demonstrated a visible interest in reforming the electoral legal framework in line with the recommendations of domestic and international organizations. Nevertheless, there are two draft laws (№1068-2 and №3112-1) already registered with the Parliament that do justice to these recommendations as well as to the coalition agreement. Therefore, the main thrust of the efforts of international actors should be less to promote the elaboration of additional draft bills, and much more to support and advocate the already existing appropriate drafts. This also applies to the Draft Law №6240, which would protect the electoral rights of IDPs and other internal migrants.

Only a stable and transparent Ukrainian electoral system can provide the groundwork for the improvement of democracy in the country. This process includes the renewal of the political elite, the development of a strong party system, the prevention of excessive factional fragmentation in the Parliament and, finally, the diminution of the political influence of oligarchs. International actors, therefore, should insist on the following core elements of electoral reform in Ukraine:

Electoral system

- Introduction of a proportional electoral system with open lists in regional constituencies for parliamentary elections

Prosecution of violations of the electoral law

- Introduction of an effective system of legal liability for violations of the electoral law, which eliminates loopholes for vote-buying and curtails the illegal use of administrative resources
- Due prosecution of violations of electoral laws

Central Election Commission

- Immediate appointment of a new CEC taking into consideration the interests of all groups and factions in the Parliament
- Elimination of the prerogative of members of the CEC to stay in office for an indefinite period of time
- Institutionalization of the cooperation between experts and the public with the CEC by establishing a CEC Public Council
- Improvement of the capacities of the staff of the CEC and the quality of its decisions

Protection of the electoral rights of IDPs and internal migrants

- Ukraine's compliance with its international obligations, European principles, and standards regarding the protection of electoral rights
- Analysis of the Draft Law №6240 in order to provide legal regulations for IDPs and internal migrants to take part in future parliamentary and local elections