



International Conference: QUALITY OF ELECTIONS: MAKING DEMOCRACY STRONG

CONFERENCE MATERIALS SUMMARY

2-3 July, 2009, Odesa

Introduction

Over the recent years, a number of important shifts have happened in adjustment of the Ukrainian legislation and the practice of its application to the standards of democratic, fair and transparent elections.

In 2006, the Ukrainian parliament passed the law on the state voter register aiming at implementation of the principles of universal and equal suffrage, and at amendment of the Criminal Code and the Code of Administrative Infringements in order to extend the grounds and strengthen the liability for the crimes against election rights and violations against the procedure established for the expression of public will. The media environment has also changed rather noticeably – during the parliamentary elections of 2006 and the early parliamentary elections of September 2007 no major violations have been registered in terms of access to the media, or restriction of the journalists rights for the coverage of the election campaign.

Today, the elections and referenda procedure is regulated by four different laws which were passed in different times and are often not coordinated with each other. The most obsolete is the law on all-Ukrainian and local referenda which is incompliant not only with the Constitution, but also international standards set for the expression of the people's will, and thus it cannot be used in practice. The law on local elections and the law on presidential elections are more progressive, however they take no note of the experience acquired during the 2004, 2006, and 2007 election campaigns. Thus, the most developed is the law on parliamentary elections which was set forth in a drastically new version in 2004, and then updated with due regard of the past presidential and parliamentary elections, as well as the some of the OSCE/ODIHR recommendations.

At the same time, in 2007, the OSCE/ODIHR election observation mission expressed a number of additional suggestions on its improvement, which have not been taken into account so far. Such suggestions, among other include the proposals to cancel the "against all" voting position, to introduce the voter education programmes, to decrease the number of voters at polling stations, to simplify the rules for the formation of polling station election commissions by political parties and blocs, to strengthen the independence of election commission members nominated by political parties and blocs (including through the proper remuneration of their work), to improve the quality of the commission members' training, to speed up the introduction of the State Voter Register, to introduce a requirement to publish the election income and expenditure sources, to define the notion of "campaigning", to strengthen the independence of the National TV and Radio Broadcasting Council etc.

The recommendations, that the OSCE/ODIHR mission developed upon observation of the 2004, 2006, and 2007 elections, should be without fail taken into account for the preparation of the new version of the presidential election law. As no active works has yet started on such new version, it is important to look into the main deficiencies of the current presidential election law (described in more detail below), including those that proceed from the content of the OSCE/ODIHR recommendations on the regulation of parliamentary elections and the Venice Commission opinion on the legislation aiming to improve the election legislation.

1. Territorial Organisation of Elections

The principles of the territorial organisation of the elections, defined by the presidential election law, do not correspond to the some provisions of the current parliamentary election law. Thus, according to Article 19 of the presidential election law, the elections of the head of state should be held in an integrated nationwide one-mandate constituency, which covers the entire territory of Ukraine. At the same time, according to Article 18 of the parliamentary election act, the nationwide constituency should include the entire territory of Ukraine and the foreign voting district.

Quality of Elections: Making Democracy Strong
Materials of an International Conference
Summary

Unlike the parliamentary election law, the one on presidential elections does not divide the polling stations into big, medium, and small ones; it is rather superficial when regulating the procedure for the establishment of special and foreign polling stations, which has resulted in numerous violations during the first two rounds of the 2004 presidential election. Such deficiencies should be cleared before the official beginning of the presidential election campaign.

Even though the law on the state voter register envisages division of polling stations into permanent and temporary, such division has not been introduced into the election legislation. The launching of the register should be closely coordinated with the amendment of such legislation (including the law on presidential elections) to define the notions of the permanent and temporary polling stations and to establish the procedure for their setup for each elections.

The legal regulation of the presidential and parliamentary elections should be improved with due regard to the OSCE/ODIHR recommendation which concerned the parliamentary elections, in particular to decrease the number of voters that can be included into a polling station voter list from 2,500 people to a smaller number.

2. Administration of the Election Process

The system of the election administration bodies is currently the same both for the presidential and parliamentary elections and includes the Central Election Commission (the CEC), the territorial election commissions (the TECs), and the polling station election commissions (PSECs). At the same time the procedure for the formation and operation of the election commissions, the status of their members, the grounds to terminate the powers of the commissions and their members, the principles for the interaction between the commissions and other subjects of the election process are regulated by the two laws in different ways. This calls forth the first object which needs to be achieved when upgrading the presidential election law – its provisions about the election commissions should be brought into compliance with the relevant clauses of the parliamentary election act.

The major task for the improvement of the election administration process is that the preparation of the new version of the presidential election law should be based on the OSCE/ODIHR recommendations and the Venice Commission opinion on the election legislation which were/are considered by the parliament. In particular: 1) election commission members and candidates for the membership in such commissions should undergo a mandatory training on the organisation of the election process; 2) the procedure set for the formation of PSECs and TECs should be simplified and unified; 3) the remuneration of the election commission members should be increased; the number of individuals entitled to be remunerated should be extended in order to decrease the financial dependence of the commission members from those who nominated them; 4) the CEC should be granted the powers and provided with financial resources necessary to educate voters, in particulate about the voting procedure, the procedure for the registration on the voter list, and the civil rights in the election process; 5) the presidential election law should reflect all novelties of the parliamentary election law that concern the transparency of the election commissions' operation (provision of the documents to the public, rapid notification of the higher level commission on the voting results, publication of the polling station voting results on the CEC website etc); 6) the law should define an exhaustive list of grounds that can be used to recall an election commission member by the candidate or political party that has nominated such member; 7) election commission should be exempt from the obligation to arrange meetings of candidates or political parties with voters; 8) the law should clearly set the forms for the participation of public authorities and local self-governance bodies in the election process, define the notion of "interference" into the election process, the forms of such interference, and the liability for the relevant violations; 9) it would be reasonable to introduce mechanisms that would decrease the

functional burden on the members of all election commissions due to the acceptance, processing, and transfer of election documents (forms, protocols, bulletins etc), in particular the possibility to hire the staff to fulfil technical functions not related to the organisation of the election process (packing, laying out, transportation of documents etc); 10) it is expedient to strengthen the CEC's independence in the exercise of its powers (article 31-1 of the CEC law allows the head of state to request any time that the parliament terminate the powers of the entire CEC, while the parliament can do so any time on the request of the President).

3. Nomination and Registration of Presidential Candidates

It is advisable to unify the list of documents required by the presidential election law and the one on parliamentary elections to be submitted by the candidates for their registration, the grounds to deny registration, and cancellation of registration. The presidential election act should also be improved on the basis of the following OSCE/ODIHR recommendations prepared upon observation of the 2004 presidential elections: 1) the law should set the deadline after which a presidential candidate should not be entitled to quit the campaign; 2) the number of the voters' signatures to support a presidential candidate should be decreased to 1%; there should also be established a procedure for the signatures verification by the CEC; 3) the provisions of the law that define the grounds for the return of the monetary deposit made by a presidential candidate should be unified with the relevant grounds set forth by the parliamentary election law (the presidential candidate should be entitled to get back the monetary deposit only if not less than 3% of voters have supported such a candidate, which corresponds to the election threshold set for the parliamentary elections; 4) the right to nominate candidates should be granted not only to the political parties registered no less than one year before the elections, but also to those that were registered within a shorter period (e.g. six months before the elections) – introduction of this new provision into the presidential and parliamentary election laws would meet the relevant recommendations made by the Venice Commission; 5) the law should set forth the specific grounds for the CEC to submit the candidates' income and property declarations to the State Tax Administration – this will prevent the selective approach to the inspection of declarations and will ensure the candidates' equality before the law; and 6) the parties that nominate presidential elections should be deprived of the right to recall them upon their registration by the CEC.

4. Voter Registration

The current version of the provisions set forth in the presidential election law on the compilation and specification of the voter lists make it possible to commit essential violations in the relevant area, which consequently violates the principles of the universal and equal suffrage. Therefore, the relevant norms of the law should at least be coordinated with the parliamentary election law, and also with the law on the state voter register. In this case it is important to take into account a number of recommendations expressed by the Venice Commission after it analysed a number of election bills considered by the Ukrainian parliament. In particular, if an authorised body, which considers complaints about the violations related to the registration of voters, gets information on such violations from any third party, such body should notify the relevant individual about the receipt of such information and, upon having considered the complaint, - about the decision taken. It is also reasonable to envisage that any complaints about the violations related to the voters' registration should be submitted directly to the state voter register administrator, and not to a number of bodies at the discretion of the complainant (e.g. either to the register administrator, or to an election commission).

5. Regulation of the Campaigning

Regulation of the presidential election campaigning should be reconciled with the relevant rules established by the parliamentary election act and coordinated with the recommendations partially done by OSCE/ODIHR and by the Venice Commission: 1) the notion of the "campaigning" should be clearly defined; 2) assignment of printed media advertising quotas runs counter the common European practice; therefore, such quotas should not be introduced, and if introduced, they should be cancelled; 3) establishment of audio- and visual media political advertising quotas does not help to ensure equal possibilities for the candidates in the campaign and is not common for the European practice; therefore, there is no need to introduce quotas for political advertising in such media, and where they are introduced, the relevant legal provisions should be cancelled; 4) an independent body should be set up to oversee the application of the election legislation as concerns the regulation of the election campaign, as well as to ensure the campaigning equality of all participants; 5) there is a need to narrow the state regulation of the private media during the election process, as such regulation does not promote the exercise of the freedom of expression – private media should only be obliged to ensure equal access for all candidates; 6) it is advisable to cancel the prohibition on the dissemination of "intentionally untrue information on any election participant", as it is impossible to establish the criteria of the "intentionality"; it is not the media that should be liable for the dissemination of any intentionally untrue or defamatory information (in particular, if such information has been disseminated on air), but rather the individual guilty of such dissemination; 7) likewise, it is not the media that should be made liable, but rather an individual guilty of disseminating the information calling on the abolishment of Ukraine's independence, forced change of the constitutional system, violation of the sovereignty and territorial integrity of the state etc; 8) the deadline set for the public announcement of the results of public opinion polls should be moved from 15 days before the elections to the date when the campaigning is prohibited (which will bring the relevant national legislation closer to the common European practice); 9) the provisions prohibiting the media and their employees to disseminate information containing any features of political advertising should be clearly specified, so that such prohibition does not violate the editorial independence of the media; 10) regulation of the right to a reply should be brought into compliance with the European standards, in particular it should be envisaged that a reply should be provided at the discretion of the relevant medium or on the basis of a decision issued by a competent public authority (e.g. a court), but not on the basis of a subjective candidate's wish, as it is currently foreseen by the presidential and the parliamentary election acts; 11) the law should not contain provisions that would prohibit commenting on a political advertising and assessing its content 20 minutes before or after its broadcasting; 12) the prohibition for the foreign media or the media with foreign investment registered in Ukraine to participate in the campaigning contradicts the international standards and thus limits the campaigning rights of the voters living abroad; thus, no such prohibition should be envisaged by the election legislation; 13) the law should not restrict the individuals below 18 years old, foreigners, and stateless individuals in terms of their participation in the campaigning, as such restrictions contradict the democratic standards; 14) the powers and independence of the National TV and Radio Broadcasting Council should be strengthened in terms of its oversight of the observance by the media of the legislative provisions on campaigning; 15) the sanctions for the campaigning violations should meet the principles of the proportionality, preventiveness, and efficiency.

6. Funding of the Presidential Elections

There is a need to unify the legal provisions that regulate the funding of the presidential and parliamentary elections from the State Budget and election funds. Such legal regulation should be

improved with a particular focus on the transparency of the election finance, in particular the following should be envisaged: 1) there is a need to unify restrictions on the funding of political parties and election campaigns (by the size of contributions from one individual during a certain period of time and by the contribution source); 2) the reports on the receipt and use of election finance should be submitted not only after the election day, but also before it (and better even a number of times before the election day in certain periods of time) and timely (within the dates established by law) announced by the CEC; 3) the financial reports should contain information on the individuals that made a contribution exceeding a certain amount; 4) the financial reports should be accompanied by an auditor opinion confirming their correctness; 5) the CEC should have sufficient powers to check the information contained in the financial reports and be empowered to impose administrative penalties for the violations in the area of the election finance; 6) in the future, it should be advisable to establish requirements for the election fund administrators (availability of the economic education, completion of a special training etc); 7) violation of the legislative provisions on election finance should result in proportional, efficient, and effective sanctions; 8) the limitation period for the liability to be incurred for the violation of the election finance provisions should be extended from 6 months to 4 years, which will meet a better European practice.

7. Observation of Elections

The procedure set for the observation of elections by official observers, the media, the status of observers and the procedure of their accreditation is regulated differently by the presidential election and the parliamentary election laws. Thus, the primary task is to unify the relevant legal regulation. At the same time, the presidential election law should contain certain provisions which are currently not present in the parliamentary election legislation: 1) it is advisable to increase the number of representatives from one media entitled to be present at the meetings of election commissions; 2) official observers from non-governmental organisations should be allowed to be present at the CEC meetings; 3) representatives of the presidential candidates should be entitled (and the CEC should be obliged) to be preliminary notified of any planned CEC meetings; 4) official observers should be entitled to be present at the preparation meetings of a PSEC conducted before the opening of a polling station on the election day; the law should establish the mechanisms for the exercise of this right; 5) all official observers should be accredited in a centralised way by the CEC, which will allow all observers to freely move all over the territory of Ukraine and observe the preparation and conduct of the elections; 6) the law should limit official observers in their right to make photo- and video surveillance as this may violate the secret of the voting; the Venice Commission recommends to grant the relevant right only to the media representatives („a rule allowing limited use of cameras by accredited representatives of the mass media would be more appropriate”).

8. Procedures for Voting, Vote Counting, and Establishment of Results

The procedure set by the presidential election law for the production of bulletins, their transfer from the CEC to the election commissions of the lower level, organisation of voting, counting of votes, and establishment of the voting results should be brought into compliance with the relevant provisions of the parliamentary election law. When improving such norms of the legislation on presidential elections, it is also important to taken into account the following recommendations made by OSCE/ODIHR and the Venice Commission: 1) there is a need for such a bulletin production procedure that would prevent the need of making any changes to it by a "Quit" stamp; 2) it is advisable to eliminate the "against all" voting position, as the vote cast for this option express no clear political choice; 3) the vote counting protocols should envisage two types of invalid

election bulletins, in particular (a) unstamped and unsigned by the PSEC members and (b) those that are considered invalid due to the impossibility to establish the will of the voters; 4) the CEC should become in charge of issuing instructions on the completion of the vote counting protocols and establishment of election results in the districts, and the study of such instructions should be included into the training programmes for the members of the election commissions; 5) there should be special groups to accept documents so that members of the election commissions would not be distracted from their direct duties on the organisation of the election process; 6) there should be an exhaustive list of grounds to send PSEC members back to their polling stations to amend the PSEC voting results protocols (it is also advisable to envisage that technical errors in should protocols may be corrected at the TEC meeting; 7) it is important to establish the deadline for the acceptance and transfer of the election documentation from a PSEC to a TEC (the CEC) and from a TEC to the CEC; 8) it is advisable that a PSEC should hang out all variants of its protocols (the initial one, the corrected one etc); 9) the content of all protocols should be published on the CEC website in full, and not partially; 10) there is a need to reconsider the grounds for invalidation of elections at a certain polling station, in particular as concerns the 10%-threshold (when the number of illegal votes exceed 10% of the number of voters that have participated in the elections; when the number of bulletins in the ballot boxes exceeds the number of voters that have participated in the elections by 10%; destruction or damaging of the ballot boxes which makes it impossible to establish their content if the number of bulletins in such ballot boxes exceeds 10% of the voters that have participated in the election) – such an arbitrary standard of impermissible abuse serves no useful purpose and, in effect, it establishes a tolerance level for fraud which cannot be compatible with the proper conduct of elections; therefore, there is a need to establish a legislative rule whereby an election result should only be invalidated if the extent of any fraud or misconduct makes it impossible to determine the true result of the election; 11) elections should be recognised valid independently of the turnout at any given polling station.

9. Settlement of Election Disputes

The procedure envisaged for the settlement of disputes related to the organisation and conduct of presidential elections should be reconciled with the provisions of the Code of Administrative Procedures, while the pre-trial dispute settlement procedure should be brought into compliance with the relevant provisions of the parliamentary election act. In addition, it would be reasonable to take into account certain recommendations made by OSCE/ODIHR and the Venice Commission: 1) there should be a possibility to extend the time span set for the contestation of the election violations from five to days to a longer period – consideration should be given to providing an exception to these time limit and extending the deadline where the complainant could not learn of the violation through the exercise of reasonable diligence and where the interest of justice and the public requires the deadline be extended; 2) the provision of the current law which allows complainant to file complaint in either a court or a higher election commission should be revised in order to ensure that the same issues are not being decided by different election appeals bodies at the same time.

10. Liability for the Violation of Election Legislation

The current legislation does not always impose sanctions for the violation of election legislation. Thus, it seems advisable either to cancel the relevant restrictions and prohibitions, to introduce efficient, proportional, and effective sanctions (to this respect, it should be noted that the fines established by the Code of Administrative Infringements are far too low to be considered efficient, proportional, and preventive). The law also establishes no liability of legal entities for the

Quality of Elections: Making Democracy Strong
Materials of an International Conference
Summary

violations in the area of elections (e.g. those related to the funding of election campaigns). Since the Criminal Code and the Code of Administrative Infringements concern only individuals, the presidential election law (and other election laws) should be supplemented with a special section that would establish sanctions for the restrictions and prohibitions envisaged by such laws, including for legal entities. Such a sanction as a CEC warning for a presidential candidate hardly meets the principle of preventiveness and efficiency, therefore its application from the point of view of violation of legislation is rather doubtful – a warning may be issued for minor violations, while other offense should result in the cancelation of a candidate's registration (in the cases clearly defined by law, and only for particularly dangerous violations in the area of campaigning, election finance etc) or administrative fines.