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PRELIMINARY COMMENTS ON THE PROPOSED LAW ON NATIONAL REFERENDUMS

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International Foundation for Electoral Systems



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This paper provides a general summary of and preliminary commentary on the Law on National Referendums (the “Law”) recently passed by the Ukrainian Parliament.

Background

Currently, the procedure for holding national and local referendums is governed by the 1991 Law on National and Local Referendums (as amended).

Two referendums have been held under this current law: one in 1991 to approve Ukraine’s Declaration of Independence; and another in 2000 to consider a proposal to, *inter alia*, or amend the constitution to reduce the number of members of parliament (MPs) from 450 to 300, create a second chamber of parliament and restrict of the scope of MPs’ immunities.

On April 29, 2010, MP Dmytro Shpenov (Party of Regions) submitted a draft Law on National Referendums to parliament to replace the current law. Shpenov’s proposal was widely debated and a large number of amendments were proposed. On November 6, 2012, parliament adopted the Law as proposed by Shpenov without adopting any of the proposed amendments.

The Law has yet to be signed by President Yanukovich.

Key Provisions and Analysis

1.1. Issues that can be Decided by National Referendum

The Law allows the people to directly decide on key issues by referendum, except for matters relating to taxation, state budgets, criminal amnesty or a proposal that would result in restriction of human or citizen rights and freedoms. Multiple questions can be included in a single referendum proposal.

The almost unlimited scope of questions that can be put to a referendum under the law is problematic from the perspective of international standards, which make it clear that referendums should not be used to undermine constitutionally-mandated division of powers.¹ There is nothing in the law that would prevent a referendum on a matter reserved for either the President or parliament in the constitution, such as the appointment or dismissal of high officials.

The Law contemplates changes to the constitution by referendum. However, as discussed later, it makes a confusing distinction between the procedure for adoption of a new constitution and that for amendment of the existing constitution.

1.2. Constitutional Change by Referendum

For a new constitution to be adopted under the Law, any group, with the support of at least 3,000,000 adult citizens, may initiate a referendum on the question of whether a new constitution is needed in principle. If the referendum passes, then a second referendum must be held to consider a proposed new constitution. If the second referendum passes, the new constitution is adopted. The Law is silent on how, by which body and by which date the proposed new constitution is to be drafted, and on the length of the interval between the two referendums.

¹Venice Commission, Code of Good Practice on Referendums, III.1.

The Law also applies to referendums relating to proposed amendments to certain provisions of the constitution according to the amendment formula set out in Chapter XIII of the constitution.²

Importantly, the Law fails to clearly explain what difference, if any, there is between a *new* constitution and an *amended* constitution. This lack of definition is crucial, as there are different mechanisms for approval of each type of constitutional change. As worded, the Law appears to provide an avenue for changing the constitution without complying with the formula for amendments set out in the constitution, particularly the requirement that any amendment must be supported by two-thirds of the People's Deputies.

1.3. Constitutionality of the Law

Given that the Constitution includes detailed provisions on steps that must be taken for the Constitution to be amended, provisions in the Law allowing for adoption of a new constitution by referendum only are of questionable legality.

While the Constitutional Court has previously stated that a new constitution could be adopted by referendum, it has not said whether adoption of a new constitution would also have to satisfy the other requirements for amendment set out in Chapter XIII (i.e., approval by the President and two-thirds of MPs).³ However, it would be a surprise if an entirely new constitution could be adopted more easily than a change to the existing one.

It seems possible that if the referendum law were challenged in court, it might be found unconstitutional and struck down.

1.4. Formulation of Referendum Questions

With regard to the wording of referendum questions, the Law provides only that they must be "clear and precise" (Article 19 of the Law).

Under the Venice Commission Code of Good Practice on Referendums, referendum questions should satisfy three basic criteria:

1. Unity of Form – the proposal should not combine a specifically-worded draft amendment with a generally-worded proposal or question of principle
2. Unity of Content – except in the case of total revision of a text (such as a constitution or law), there should be an intrinsic connection between the various parts of each question put to the vote, in order to guarantee free suffrage of the voter, who must not be called to accept or refuse whole provisions without this intrinsic link

² Under Chapter XIII of the constitution, amendment of basic provisions of the constitution (such as the provision requiring popular election of the President) requires approval by two-thirds of the People's Deputies and the President, followed by a referendum. Other, less foundational provisions may be amended based on a vote of two-thirds of the People's Deputies and approval of the President, without approval in a referendum.

³ See Decision of the Constitutional Court of Ukraine No 6-rp/2008, April 16, 2008 (on the adoption of Constitutions and laws by referendum), and Decision of the Constitutional Court of Ukraine No 6-rp/2005, October 5, 2005 (on popular participation in decision making).

3. Unity of Hierarchical Level – the same question should not simultaneously apply to legislation of different hierarchical levels

These criteria provide important safeguards against referendum questions that are phrased in a manipulative or misleading way. It would be helpful if they were adopted into the Law.

1.5. Administration of Referendums

The Law provides for a three-tier referendum administration comprising the Central Election Commission (CEC), territorial referendum commissions (TCs) and precinct referendum commissions (PCs).

Referendum commissions are much smaller than election commissions: the number of members in TCs must not exceed 15, while PCs have 11 members, regardless of the number of citizens assigned to that precinct. This smaller size is actually an improvement on election commissions for parliamentary elections, which are significantly larger than they need to be for operational reasons.

Unlike the parliamentary election law, which provides the right to nominate members of lower level election commissions to factions in parliament and electoral participants, the Law grants the right to suggest candidates for membership on TCs and PCs to chairpersons of regional councils and executive committees of local councils or mayors. If those local authorities do not nominate commission members, members are nominated by the Head of the State Administration, who is appointed by the President. It is unclear from the Law how candidates suggested by nominating entities will be selected by the CEC or TCs, and how managerial positions in the commissions will be distributed between nominating entities.

There is no requirement in the Law providing that members of the TCs or PCs receive training.

1.6. Initiation of Referendums

A referendum may be initiated under the Law by any “initiative group” registered with CEC. However, the procedure for establishing and registering an initiative group is complicated, with an unhealthy degree of discretion granted to the CEC and President in considering issues related to the initiation of the referendum by citizens.

Once registered, an initiative group can initiate a referendum if it collects the signatures of 3,000,000 citizens. The law does not establish a time limit for collecting signatures, but says only that the time frame must be defined by the CEC in the certificate of registration of the initiative group (Article 31.6 of the Law), a rule that would seem to allow unequal treatment.

Under Article 28 of the Law, the President is obliged to call for a referendum if a proposal to hold a referendum has 3,000,000 signatures in support and complies with the constitutional requirements and laws of Ukraine. It is unclear how the President is to reach a determination on the constitutionality or legality of a proposal, especially in cases when the proposal is for constitutional change.

1.7. Funding of Referendum Campaigning

Under the Law, referendum campaigning can be funded from the State budget of Ukraine; referendum funds established by initiative groups either for or against a referendum proposal; and from the bank accounts of political parties and nongovernmental organizations (NGOs).

The rules governing the establishment and use of referendum funds of initiative groups are similar to the rules governing the electoral funds of parties and candidates in parliamentary elections. In particular, the Law does not limit the amount of money that can be spent for campaigning and provides that referendum funds will be administered by fund managers who are required to file financial reports on the receipt and use of funds with the CEC no later than on the 15th day following the day of the referendum. Donations to referendum funds can be made by individual citizens, political parties and NGOs. Individual citizens may donate no more than 400 times the minimum monthly wage (\$56,000 USD). The law places no limit on the amount political parties and NGOs may donate. Unlike the Parliamentary Election Law, the Law does not oblige the CEC to analyze financial reports on the use of referendum funds, or to make such reports public.

The Venice Commission Code of Good Practice on Referendums states that referendum campaign funding should be transparent. However, the provisions governing the funding of referendum campaigns, like those governing election campaigns and political party funding, are too weak to create any real transparency.

1.8. Referendum Campaigning

According to the Law, referendum campaigning starts the day the decision to hold the referendum is published through midnight on the last Friday before the day of voting.

The Law does not include provisions intended to ensure equality of media coverage and ability to reach voters, such as those in the Parliamentary Election Law. For example, there are no rules requiring media organizations to provide equal access to both supporters and opponents of a referendum proposal. The Venice Commission Code of Good Practice on Referendums recommends supporters and opponents of referenda proposals receive equal coverage in the news media and have access to radio and television advertising on equal terms.

As in the Parliamentary Election Law, the Law allows a court to suspend the broadcasting license or temporarily prohibit printing of the media outlet that repeatedly violates the Law or commits a one-time gross violation of the law.

1.9. Voter Registration

The Law is also vague on the way in which voter lists are created. Preliminary voter lists are to be compiled by the voter register maintenance bodies (RMBs) and submitted to the TCs no later than 20 days before the day of referendum, while the TCs are required to submit lists to the respective PECs no later than 17 days prior to the day of voting.

The Law allows voters to file complaints against inaccuracies on the lists with TCs, RMBs, PCs and courts no later than one day prior to the day of voting. However, one day does not provide sufficient time for such cases to be dealt with effectively. By contrast, the Parliamentary Election Law allows voters to file complaints against inaccuracies on the voter lists no later than five days prior to the day of voting.

Unlike the Parliamentary Election Law, the Law allows TCs and PCs to make changes to the voter lists for a referendum, even on the day of voting. Allowing last minute changes to the voter list by local election commissions reduces transparency and may open the door to fraud and abuse. The Law should follow the approach of the Parliamentary Election Law, which places jurisdiction over voter list-related cases solely in the hands of the courts.

Conclusion

The Law on National Referendums shares many of the flaws found in the Parliamentary Election Law. It also includes some defects, such as the provisions allowing last minute changes to the voter list, that were corrected in the most recent amendment of the Parliamentary Election Law.

Given these weaknesses, there is reason for concern about the fairness and competence of any referendum conducted under the Law.

The Law also raises complicated constitutional questions. The lack of clarity over the kind of proposal that would constitute a “new” constitution rather than a simple amendment creates considerable uncertainty, as does the question of the constitutionality of a law allowing adoption of a “new” constitution by referendum alone. This uncertainty is troubling, given the widespread speculation that the ruling party is interested in changing the constitution so the next President will be elected by parliament rather than directly by voters.



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