



USAID
FROM THE AMERICAN PEOPLE

IFES REVIEW AND ANALYSIS OF THE 2010 LOCAL ELECTION LAW

June 2013

This publication was produced by IFES for the U.S. Agency for International Development.



IFES Review and Analysis of the 2010 Local Election Law

June 27, 2013



International Foundation for Electoral Systems



IFES Review and Analysis of the 2010 Local Election Law
© 2013 by IFES. All rights reserved.

Permission Statement: No part of this work may be reproduced in any form or by any means, electronic or mechanical, including photocopying, recording or by any information storage and retrieval system without the written permission of IFES. Requests for permission should include the following information:

- A description of the material for which permission to copy is desired.
- The purpose for which the copied material will be used and the manner in which it will be used.
- Your name, title, company or organization name, telephone number, fax number, e-mail address and mailing address.

Please send all requests for permission to:

International Foundation for Electoral Systems
1850 K Street, NW, Fifth Floor
Washington, DC 20006
E-mail: editor@ifes.org
Fax: 202.350.6701

This report is made possible by the support of the American people through the United States Agency for International Development (USAID). The contents are the sole responsibility of IFES and do not necessarily reflect the views of USAID or the United States Government.

Background

Following the 2010 local elections, observers were sharply critical of the Law on Local Elections (LEL), which seems to have caused, or at least facilitated, many of the irregularities that took place.¹ As a result, President Victor Yanukovich committed Ukraine to a course of electoral law reform and established a working group to “bring the national electoral legislation in compliance with the international standards and to accelerate its codification.”² That working group proceeded to contribute to the revision of the Parliamentary Election Law at the end of 2011. However, no changes have been made to the LEL since its adoption.

The LEL was adopted on July 10, 2010, shortly before the start of election process for the October 2010 local elections. Although it included certain changes intended to address weaknesses in the previous law, such as granting domestic nongovernmental organizations (NGOs) the right to observe elections throughout the country, the LEL has proven to be a deeply flawed instrument that does not provide a reliable legal framework for elections. This paper reviews the LEL and identifies important flaws that should be addressed before the next general local elections to be held in October 2015.

Analysis

1.1 Electoral System

Under the LEL, most local council representatives³ are elected through a parallel electoral system, which is similar to how members of the Ukrainian Parliament are elected. Deputies of village and town councils, as well as village, town and city mayors are elected through a first-past-the-post system.

While international standards do not prescribe any specific electoral system for local elections, Ukraine’s experience using a parallel electoral system in the 2010 local elections, as well as in the 2012 parliamentary elections, strongly suggest that Ukraine systems including single member districts (SMDs) are more open to fraud and abuse than systems using larger districts.

In addition, in large cities, such as Kyiv, the first-past-the-post system has resulted in the election of mayors supported by a relatively small portion (15%-30%) of the electorate. In some cases, this has resulted in conflict between mayors and local councils, with some councils forcing the early termination of elected mayors. In the past, experts and some members of parliament (MPs) have suggested the introduction of an absolute majority (two-round) system for the election of mayors of large cities.

Given these concerns, the Government of Ukraine should consider holding public consultations to determine whether a different system might be more suitable for local elections.

¹ See: European Parliament. *Report by Pawel Kowal, Chairman of the Delegation to the EU-Ukraine Parliamentary Cooperation Committee “Mission to Ukraine on the occasion of the local and regional elections of 31 October 2010”* (available at: http://eeas.europa.eu/delegations/ukraine/documents/press_releases/report_ep_en.pdf); Statement of the NDI and IFES Pre-Election Delegations to Ukraine’s 2010 Local Government Elections (available at: http://www.ifes.org/~media/Files/Publications/Papers/2010/20101008_ukraine_statement.pdf); Konrad Adenauer Foundation. *Country Report “Local elections in Ukraine: Yanukovich’s consolidation of power”* (available at: http://www.kas.de/wf/doc/kas_21063-1522-2-30.pdf?101109145329)

² Presidential Decree No 1004/2010, November 2, 2010, on Working Group for Improvement of Electoral Legislation.

³ Deputies of regional councils, *Verkhovna Rada* (regional council) of the Autonomous Republic of Crimea, rayon councils, city councils and councils of rayons in cities.

1.2 Territorial Organization of Local Elections

Under the LEL, SMDs must be established by the respective territorial election commissions (TECs) no later than 32 or 37 days (depending on the type of local election) prior to the day of voting. Unfortunately, the LEL does not establish clear criteria for SMD boundaries, providing only that SMDs must be established by TECs with approximately the same number of voters and that existing administrative boundaries must be respected.

Unlike the Parliamentary Election Law, the LEL contains no requirement that the deviation in the number of voters between SMDs not exceed a certain level, an oversight that opens the door to unreasonable variance in the number of voters in various districts. The LEL also includes no provision for public consultations on SMD boundaries and does not require district boundaries to be drawn with existing communities of interest in mind. The weakness of the rules governing the drawing of district boundaries creates the possibility that boundaries will be manipulated for partisan purposes. Even if no such manipulation takes place, the absence of clear criteria reduces the transparency and credibility of the process.

Under Article 18 of the LEL, the number of voters assigned to an election precinct generally should not exceed 2,500 voters. However, the law does allow this limit to be exceeded if voters cannot be assigned to another precinct; 2,500 is already an unusually high number of voters for single precinct to handle efficiently. The LEL should include a hard limit on the number of voters that can be assigned to a single precinct to prevent crowding and long lines.

The LEL also provides for the establishment of special election precincts at medical institutions where voters with limited capacity to vote are staying. It is unclear why special election precincts should not also be established at other institutions, such as pre-trial detention centers.

1.3 Election Commissions

The LEL provides for a three-tier system electoral administration comprising the Central Election Commission (CEC), TECs and precinct election commissions (PECs). Certain types of elections – such as elections to the *Verkhovna Rada* of the Autonomous Republic of Crimea; councils of oblasts and rayons; and elections to councils of cities divided into rayons – are administered by a four-tier electoral administration that includes two types of TECs: those that establish election results, and lower-level TECs that tabulate election results and submit respective protocols to higher-level TECs.

The LEL grants the right to nominate TEC members to three groups: (1) local organizations of political parties that have registered parliamentary factions; (2) local organizations of political parties that created blocs in parliamentary elections, which then established their factions in the legislature; and (3) local party organizations that have nominated candidates for the respective local elections. The first two groups can nominate no more than three commissioners each, while the third group can nominate one commissioner each.

In the 2010 elections, parties that formed their own factions in parliament (Party of Regions, Communist Party and People's Party) in many cases received a majority (nine) of seats on TECs. The 12 opposition parties united in opposition factions (Yulia Tymoshenko Bloc and Our Ukraine – People's Self-Defense) were represented on TECs by no more than six members. The reordering of parliamentary factions following the 2012 parliamentary elections should prevent that kind of unbalanced representation from recurring.

The first two groups may nominate no more than 15 TEC members between them, while the third group may nominate three, who must be selected by a lottery. Like the Parliamentary Election Law, the LEL does not prescribe a procedure for drawing lots to select TEC commissioners. In the 2010 elections, the CEC decided that representatives of the third group would be selected by a single lottery, not by separate lots for each TEC.

Under Article 23 of the LEL, TECs select PEC members from among those nominated by local organizations of parties that have nominated candidates in single mandate and multi-member constituencies, as well as by SMD candidates. However, the LEL does not specify a clear procedure for selecting PEC commissioners from among those nominated, giving the TECs that form the PECs a potentially problematic discretion in selecting PEC members.

Article 27 of the LEL provides that commission decisions may be adopted only if the majority of commissioners are present, and only if the majority of commissioners present vote in favor. In practice, this formula allows the adoption of decisions by a minority of commission members. For Election Day, the quorum requirement is even softer – no less than three commissioners (out of an average of roughly 18 members) must be present to adopt PEC or TEC decisions. These quorum rules could prove problematic, given the low levels of trust between election participants.

Article 29.4 of the LEL allows organizations that nominate election commission members to recall their members at any time. As IFES and others have observed with respect to a similar rule in the Parliamentary Election Law, this provision has the potential to undermine the independence and professionalism of the election commissions and should be reconsidered.

1.4 Voter Lists

Under Articles 30 and 31 of the LEL, TECs are required to submit preliminary voter lists to their PECs no later than 13 days before the day of election. PECs must make preliminary lists available for public scrutiny on the day following the day of their receipt from the TECs. However, 12 days may not provide enough time for voters to review and, if necessary, update, the voter lists. The Parliamentary Election Law, however, allows voters to check their names on the lists 19 days prior to the day of voting.

The LEL empowers PECs to make changes to preliminary voter lists before the day of voting. By way of comparison, changes to voter lists under the Parliamentary Election Law can only be made upon decision of the Voter Register Maintenance Body or court decision. This allows PECs to change voter lists in local elections, which may be problematic, as PECs do not have direct access to the database of the State Register of Voters to check whether a voter is already included on another voter list.

1.5 Nomination and Registration of Candidates

Article 35 of the LEL provides that independent candidates may be registered only in elections of village and town deputies and village and town mayors. In all other local elections, the right to nominate candidates, including candidates in SMDs, is granted only to local party organizations. This restriction may be inconsistent with international standards. In particular, paragraph 7.5 of the 1990 Organization for Security and Co-operation in Europe (OSCE) Copenhagen Document calls on OSCE participating member states to respect the right of citizens to seek political or public office, individually or as representatives of political parties or organizations, without discrimination. The respective provisions in the LEL should be reviewed to allow independent candidates to appear on the ballot for elections held in SMDs, including all mayoral elections.

Article 35.4 of the LEL provides for the possibility of simultaneous nomination of a candidate in both an SMD and in a multi-mandate election district in the same type of local election. For instance, a candidate for oblast council can be nominated under both first-past-the-post and proportional components of the parallel system used for elections of oblast councilors. The constitutionality of this provision is doubtful, given the 2012 Constitutional Court decision declaring a similar provision in the Parliamentary Election Law was invalid because it violated the constitutional principle of equal suffrage.⁴

The LEL provides for narrow timelines for registration of candidates in local elections. In particular, registration documents must be submitted by party organizations and candidates no earlier than 32 days before Election Day and no later than 24 days prior to Election Day (no earlier than 29 days and no later than 24 days for registration of SMD candidates). The TEC must adopt a decision on registration of candidate(s) within three days of receipt of registration documents, but no later than 23 days before voting day. If the TEC detects any inaccuracies in registration documents, such inaccuracies cannot be grounds for refusal of registration and can be corrected, but updated documents must be filed with the TEC no later than 23 days before the day of voting. Hence, if the TEC detects inaccuracies on the 23rd day prior to the day of voting, the electoral subjects most likely would not be able to correct them on the same day. Therefore, the timelines for candidate registration in local elections should be reconsidered to provide candidates and local party organizations appropriate time for preparation of registration and, if needed, correction of documents.

Under Article 45 of the LEL, registration of candidate(s) can be canceled by a TEC if a political party or candidate continues to contravene the provisions of the LEL after having been warned. Given that some TECs will be inexperienced and/or dominated by one political faction, there is a very real possibility the power to cancel candidate registrations will be misused. A wider range of sanctions for violations, including administrative fines, should be considered instead of cancellation of registration. If cancellation of registration is retained as a sanction, that power should be exercised only by the CEC.

Further, although a decision canceling a candidate's registration is subject to appeal, the LEL allows TECs to cancel the registration of candidates any time before 10:00 p.m. of the day preceding Election Day. Candidates whose registrations have been canceled at the last minute might, therefore, be unable to have such a decision overturned by a court in time to participate in the election.

1.6 Election Campaigning and Media Coverage of Elections

In 2010, IFES noted that compression of the entire campaign period into 50 days, with only three weeks to campaign, leaves insufficient time for electoral authorities to make administrative preparations, candidates to campaign and voters to become informed about their choices.⁵

In contrast to the Parliamentary Election Law, the LEL does not contain a separate chapter that regulates media coverage of elections. Clear rules for media coverage of elections could help ensure voters receive balanced, unbiased information on the elections and that provisions governing election campaigning and respective sanctions for violations do not stifle the ability of media to report on the election and election-related events.

⁴ Paragraph 2.2 of Decision of the Constitutional Court of Ukraine No 8-rp/2012, April 5, 2012, on nomination of MP candidates under the parallel electoral system.

⁵ See: Statement of the NDI and IFES Pre-Election Delegations to Ukraine's 2010 Local Government Elections, page 4 (available at: http://www.ifes.org/~media/Files/Publications/Papers/2010/20101008_ukraine_statement.pdf)

Article 53.5 of the LEL explicitly prohibits the dissemination of deliberately false or defamatory information about candidates, parties and their local organizations. Lack of clear definition of the concepts “deliberately false” and “defamatory” could result in arbitrary or unfair application of respective provisions in the LEL.

Article 53.3 of the LEL identifies certain kinds of speech (e.g., speech that advocates violence or incites inter-ethnic hatred) that are contrary to law during an election campaign. However, it is always possible that such speech may be accidentally broadcast, such as from a live event. The LEL should include some protection for media that inadvertently broadcast prohibited speech, such as is included in the Parliamentary Election Law.

Article 53.6 of the LEL gives local party organizations and candidates a right of reply to information published about them that they consider “untrustworthy.” Such rules are not uncommon in international practice. However, this provision could be strengthened by including clearer explanations of the circumstances under which the right of reply may be exercised.

While the Parliamentary Election Law establishes severe sanctions for violations of campaigning restrictions by media organizations (*viz.* a temporary ban on further publication by a printed media outlet or suspension of media license of a broadcasting company), the LEL does not provide any sanctions for media at all. The LEL should ensure any violation of its provisions is subject to effective, proportional sanctions, possibly including administrative fines.

1.7 Campaign Finance

The LEL includes provisions requiring record keeping and disclosure of campaign contributions and expenditures. While these provisions suggest intent to bring transparency to campaign finance, they are weak and unlikely to produce any significant progress toward that goal.

Under the LEL, TECs are tasked with supervising the receipt and use of electoral funds of local party organizations and candidates. It is questionable whether the TECs have the expertise and/or resources to exercise effective, independent control of campaign contributions and spending. Additionally, the LEL empowers TECs to conduct periodic checks of the receipt and use of electoral funds, which, in the absence of guidelines for when such checks should be carried out, could open the door to abuse and selective enforcement of the respective provision.

In contrast to the Parliamentary Election Law, there is no requirement in the LEL that TECs analyze financial reports submitted by local party organizations and candidates.

Article 63.4 of the LEL requires electoral fund managers to file financial reports on the receipt and use of electoral funds with the respective TEC within five days of the election, while TECs must publish them in local printed media outlets within five days of receipt. However, the LEL contains no minimum requirements as to the content of financial reports or guidance as to where the reports are to be published. Further, the absence of any sanction for failure to submit financial reports to TECs within the legally-established timeframes – as well as for submitting incomplete or untruthful reports – means electoral fund managers have little incentive to respect rules on disclosure of campaign incomes and expenses.

In short, the disclosure rules are too weak to be effective. As IFES and others have pointed out, a genuine move toward transparency of campaign funding will require comprehensive reform of the

campaign finance sections of the LEL and other election laws as well as the Law on Political Parties in Ukraine.

1.8 Voting, Vote Counting and Tabulation of Voting Results

The LEL does not provide the safeguards against fraud with respect to the printing of ballot papers that one would expect in an important electoral process. In particular, while the PEL states that ballot papers must include certain standards and must be printed by a single public enterprise under the supervision of representatives of factions in parliament, the LEL leaves decisions about which ballot security measures to use, if any, to individual TECs. TECs also are expected to contract out printing ballots to local printers, who operate without supervision by electoral contestants. Finally, the LEL also does not require the election precinct number to be printed on the ballot paper, which might increase the risk that ballot papers will be improperly used.

Under the LEL, the names of local party organizations must be printed on the ballot papers according to the sequence of their registration by the respective TECs (i.e., those parties whose lists were registered earlier are granted higher positions on the ballot papers). In the 2010 local election, some TECs advantaged certain parties by choosing to register their candidates first, thereby ensuring their higher positions on the ballots.⁶ The respective provisions of the LEL should be reviewed to eliminate any possibility of bias for or against political parties while printing ballot papers.

In contrast to the Parliamentary Election Law, the LEL provides that voters should be given the option of voting against all the candidates and parties on the ballot. Similar provisions in the PEL and Presidential Election Law were repeatedly criticized by the OSCE's Office for Democratic Institutions and Human Rights (ODIHR), which has recommended eliminating the "against all" option.

Article 69.16 of the LEL states that only those voters present at a polling place at the time the polls close shall be allowed to vote. An extension of voting hours is explicitly prohibited. Since it is possible that an unusually high number of voters will arrive at polling stations in the final hour(s) of voting, voters who are outside the polling place, but in the queue, should be provided the opportunity to vote, as is the case under the Parliamentary Election Law.

The LEL provides for a "home voting" system, which allows voters to have a ballot brought to their home without providing any documentation that would demonstrate sickness, disability, old age or other justifying reason. While home voting is an important way of accommodating those who are disabled or otherwise unable to travel to a polling place, it should not be provided to those who would prefer to vote from home for personal convenience. By not requiring documentation from those wishing to vote from home, the risk that home voting will be used to support fraud is increased. For this reason, consideration should be given to restricting home voting to those who can provide documentation that would demonstrate a need to do so.

Article 73.1 of the LEL allows a PEC to recognize voting in a precinct as valid, provided that certain discrepancies and irregularities in polling, such as multiple voting or ballot stuffing, do not affect more than 10 percent of votes cast. This level of tolerance is arbitrary and could potentially allow fraudulent votes to influence results, especially in single-mandate constituencies. Additionally, the LEL does not

⁶ European Parliament. *Report by Pawel Kowal, Chairman of the Delegation to the EU-Ukraine Parliamentary Cooperation Committee "Mission to Ukraine on the occasion of the local and regional elections of 31 October 2010"*, page 9 (available at: http://eeas.europa.eu/delegations/ukraine/documents/press_releases/report_ep_en.pdf)

provide for the possibility of invalidation of election results in a single-mandate or multi-member constituency. The respective TEC is obliged to determine and certify election results regardless of the number of precincts declared invalid. This is contrary to international standards, which call for the invalidation of elections in cases where voters' collective intent is impossible to determine.⁷

The provisions relating to vote counting, tabulation and completion of protocols in the LEL are less detailed than those in the laws governing national elections. In particular, the LEL does not require protocols to specify the number of voters included in the "at home" voter list, nor does it require the number of ballot papers used for voting at the election precinct to be recorded. The absence of this information will make the count and results less transparent and could make it more difficult for observers and electoral authorities to identify and deal with irregularities in the count process.

1.9 Election Dispute Resolution

In contrast to the Parliamentary Election Law, the LEL does not allow official observers and electoral commissions to file complaints with electoral commissions against electoral subjects. Additionally, NGO observers are not entitled to file election-related lawsuits with administrative courts. These rules reduce the likelihood that mistakes and fraud will be identified quickly and brought to the attention of appropriate authorities. They should be reconsidered to ensure that NGO observers are entitled to challenge election-related violations.

Under Article 86 of the LEL, complaints against election-related violations can be filed with election commissions within two days of the day on which the violation occurred. Election disputes must be resolved by election commissions within two days of receipt of a complaint. While the quick filing and adjudication of complaints is important for the timeliness of election processes in general, two days may not provide enough time for either filing or adjudication, especially in complex cases requiring supporting documentation. This shortened timeline could undermine the ability of voters and others to assert their rights in the electoral process. The Venice Commission recommends three to five days for both filing and deciding electoral appeals at the first instance.⁸

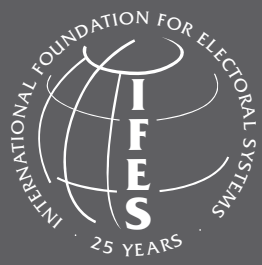
Summary

The 2010 local elections, and the occasional local elections held since then, were all marred to a degree by irregularities. Many of these irregularities resulted from, or were at least facilitated by, weaknesses in the LEL. Although the flaws in the LEL are readily apparent, no progress toward reforming this important piece of legislation has been made since the President committed Ukraine to a course of electoral law reform in November 2010.

Given that the next nationwide local elections will be held in October 2015, and the government's stated desire to amend election legislation at least one year before an election, the time remaining to address the problems outlined in this paper is short.

⁷ Venice Commission. *Code of Good Practice in Electoral Matters*. October 2002. II.3.3.e.

⁸ Venice Commission. *Code of Good Practice in Electoral Matters*, page 30.



Global Expertise. Local Solutions.
Sustainable Democracy.