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IFES REVIEW AND ANALYSIS OF 1999 PRESIDENTIAL ELECTION LAW

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Review and Analysis of 1999 Presidential Election Law

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Background

The current Presidential Election Law (the “Law”) was adopted in 1999 and has been amended a number of times since then, most significantly in 2004 and 2009.¹ Since then, the Law has been criticized by international organizations and domestic experts.

In 2010, the President Victor Yanukovich established a working group to bring the national electoral legislation in line with international standards and accelerate its codification.² That working group contributed to the revision of the Parliamentary Election Law, but made no effort to review the Law.

This paper reviews the Law and identifies a number of flaws that should be addressed before the next presidential elections, which are to be held in March 2015.

Analysis

1. Election Administration

The Law provides for a three-tier system electoral administration comprising the Central Election Commission (CEC), the district election commissions (DECs) and precinct election commissions (PECs).

The Law grants each presidential candidate the right to nominate two candidates for each DEC and PEC.³ The Law establishes a minimum number of members of PECs and DECs (no less than 12 members) but, unlike the Parliamentary Election Law, fails to establish a maximum. This means that if 20 presidential candidates participate in an election, then the DECs and PECs could have up to 40 members each, which would make it all but impossible for them to carry out their functions effectively. Additionally, as has been suggested by the Organization for Security and Co-operation in Europe's Office for Democratic Institutions and Human Rights (OSCE/ODIHR),⁴ the Law should provide for an odd number of commissioners to reduce the chance commissions will become deadlocked.

Under Articles 23.8 and 24.11 of the Law, each presidential candidate whose nominees have been appointed to DECs and PECs has the right to a proportional number of management (chair, deputy chair and the secretary) positions on the respective commissions. Nevertheless, the Law fails to provide for an appointment process that takes into consideration geographical distribution of appointments. As a result, certain parties/candidates might be represented by the chairs, deputy chairs and secretaries of the commissions only in regions where they enjoy strong support of the electorate, and remain underrepresented in managerial positions on commissions in regions where their competitors enjoy more support. The Law should make it clear that managerial positions on DECs within respective shares of the presidential candidates are evenly distributed throughout the country.

¹ In August 2009, just on the eve of the 2010 presidential elections scheduled for January 2010, the Parliament made a number of controversial changes to the Law, which was strongly criticized by both the Venice Commission and the OSCE/ODIHR. Many of those changes were then declared unconstitutional by the Constitutional Court of Ukraine.

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

³ Articles 23.2, 23.3, 24.1 and 24.2 of the Presidential Election Law.

⁴ OSCE/ODIHR. *Ukraine. Presidential Election 17 January and 7 February 2010. OSCE/ODIHR Election Observation Mission Final Report*, 2010, page 28.

Article 28 of the Law provides that commission decisions may be adopted only if the majority of commissioners from the entire composition of commission vote in favor. However, on the day of the election and while counting and tabulating the voting results, commission decisions may be adopted by a majority of members present at the meeting. In practice, this formula allows the adoption of decisions on Election Day by as few as two commission members, an obviously problematic situation. The Law should establish a minimum number of commissioners required to be present at a meeting (e.g., a majority of members) to adopt commission decisions.

Article 30.4.2 of the Law allows presidential candidates who 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 is contrary to international standards and has the potential to undermine the independence and professionalism of election commissions. It should be reconsidered.

Unlike the Parliamentary Election Law,⁵ the Law fails to provide a mandatory training of the chairs, deputy chairs and secretaries of the DEC's before their appointment to the respective DEC. Commissions are formed shortly before Election Day,⁶ and commissioners do not necessarily have any prior experience with elections. Mandatory training of commissioners (or at least chairs, deputy chairs and secretaries of the DEC's) should be considered as a way to foster a higher level of professionalism and competence within the election administration.

2. Voter Lists

Article 32.4 of the Law provides that voters are entitled to file complaints against inaccuracies on the voter list (i.e., non-inclusion or multiple inclusion of voters on the list, or inclusion of incorrect data) with either their respective DEC, PEC or Register of Voters Maintenance Body (RMB). Inaccuracies on the lists may be also challenged in court. By way of comparison, under the Parliamentary Election Law, changes to voter lists may be made upon decision of the RMB or through court decision. Allowing DEC's and PEC's to change voter lists may be problematic, as election commissions do not have direct access to the database of the State Register of Voters to check whether the voter is already included on another voter list. Additionally, empowering four bodies to change the voter lists may result in adoption of conflicting decisions on the same matter and multiple inclusion of the voter in question on different voter lists.

Additionally, Article 32 of the Law gives a voter the right to apply to an election commission or court to correct inaccuracies on the voter list on Election Day up to one hour before the close of polls. Experience in Ukraine and elsewhere has shown that the power to make last minute changes to the election list, can create an opportunity for fraud. In the absence of strong systems of communication between election commissions, the courts and RMB's, it is difficult to exclude the possibility that last minute changes will result in some voters being included on the voter list in multiple places and, theoretically, being able to have the ability vote twice. Given that during the 2010 Presidential election, there were roughly 400,000 changes made to the voter lists on Election Day,⁷ this is potentially a very large problem. It was precisely this concern that led to changes in the Parliamentary Election Law in 2004 that restricted the possibility of changing the voter lists on Election Day.

⁵ See Article 26.7 of the Parliamentary Election Law.

⁶ Under Articles 23.2 and 24.1 of the Law, DEC's are formed by the CEC no later than 50 days before the day of voting, while PEC's are established by the respective DEC's no later than 26 days before Election Day.

⁷ OSCE/ODIHR, Ukraine. Presidential Election 17 January and 7 February 2010. OSCE/ODIHR Final Election Observation Report, page 11. Ibid., page 11-12.

Finally, under Article 20 of the Law, the number of voters assigned to an election precinct generally should not exceed 3,000 voters. This number exceeds the number of voters assigned to election precincts in both parliamentary and local elections. In addition, the Law allows this limit to be exceeded in certain circumstances. The maximum amount of 3,000 voters is a large number of voters for any single polling place to handle in one day without crowding and long queues. Consideration should be given to establishing a lower limit.

3. Nomination and Registration of Candidates

Under Article 9.4 of the Law, a person who has been convicted of an “intentional” crime cannot be nominated as a presidential candidate, unless that conviction has been voided pursuant to the procedure established by the Law. However, Article 103 of the constitution provides that a person who meets certain criteria, which do not include the absence of criminal convictions,⁸ is eligible to run for President. Arguably, the provision in Article 9.4 of the Law is unconstitutional. Given that one of the prospective presidential candidates for the 2015 presidential elections, Yulia Tymoshenko, has a criminal record, further clarification of the constitutional validity of Article 9.4 is needed.

Under Article 44 of the Law, a presidential candidate may either be self-nominated or nominated by a party or bloc. However, a party may nominate a candidate only if it has been registered with the Ministry of Justice for at least one year prior to Election Day. There is no apparent reason that would justify limitation on the right of new parties to participate. As recommended by the OSCE/ODIHR and the Venice Commission, it should be removed.⁹

Finally, as electoral blocs have been abolished both in the national legislature and local government, the reference to blocs in the Law should also be removed.

In accordance with Article 49 of the Law, a presidential candidate may be registered only upon payment of an electoral deposit in the amount of UAH 2,500,000 (\$312,500 USD). In 2009, the Venice Commission concluded that the amount of this deposit “is significantly high and represents an unnecessary restriction on candidacy, particularly for candidates from small parties or those who choose to contest the elections as independent candidates.”¹⁰ Further, the Law specifies that a deposit is returned only to candidates who proceed to the second round of voting. Not only does this rule disregard the possibility that a candidate might win on the first round, in which case no candidates would proceed to the second round, but it also prevents serious candidates who perform well in the election (receiving as much as 15-20% of the vote) but who do not proceed to the second round from receiving a refund. Both the amount of deposit and grounds for its reimbursement should be reviewed to ensure they do not create unjustified barriers to participation in the elections.

The Law establishes potentially problematic timelines for the registration of presidential candidates. Specifically, it requires registration documents to be submitted to the CEC no later than 68 days before

⁸ Under Article 103 of the Constitution, a person can be nominated a presidential candidate on condition that he/she is a citizen of Ukraine, reached 35 years of age, has the right to vote in elections, has been residing in the territory of Ukraine for the last 10 years before the day of election and has knowledge of Ukrainian language.

⁹ Venice Commission. *Joint Opinion on the Law on Amending Some Legislative Acts on the Election of the President of Ukraine adopted by the Verkhovna Rada of Ukraine on 24 July 2009*, by the Venice Commission and OSCE/ODIHR, paragraph 15, page 6.

¹⁰ Venice Commission. *Joint Opinion on the Law on Amending Some Legislative Acts on the Election of the President of Ukraine adopted by the Verkhovna Rada of Ukraine on 24 July 2009*, by the Venice Commission and OSCE/ODIHR, paragraph 17, page 6.

Election Day, while registration of candidates is to be completed no later than 64 days prior to Election Day. The CEC must adopt a decision on registration or refusal of registration of presidential candidate no later than on the fifth day following the day on which it receives the registration documents.¹¹ If the CEC refuses to register a person as a candidate, then he or she has the option of resubmitting his or her registration documents, but no later than 66 days before the day of voting.¹² Hence, if a candidate were to file registration documents with the CEC 68 days before Election Day, and the CEC refused to register candidates on the 66th or 67th day prior to voting day, then the candidate would likely not have time to resubmit the corrected documents before the deadline. The timeframes for registration should be reconsidered to provide candidates and the CEC with sufficient time for filing, processing and, if needed, correction of registration documents.

4. Election Campaigning and Media Coverage of Election

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

Article 64.5 of the Law explicitly prohibits the dissemination of deliberately false or defamatory information about presidential candidates. The lack of a clear definition of the concepts “deliberately false” and “defamatory” in either the Law, or the general law of Ukraine, could result in arbitrary or unfair application of the respective provisions in the Law. The vagueness of this rule could also lead media organizations to self-censor their election coverage to ensure that they do not violate the rule.

Article 64.3 of the Law prohibits the dissemination of certain kinds of speech (e.g., speech that advocates violence or incites inter-ethnic hatred) during an election campaign. Nevertheless, the Law does not consider the possibility that a media outlet will accidentally broadcast such speech, for example, during a live interview. The Law should include protection for media organizations that inadvertently broadcast prohibited speech.

Article 64.5 of the Law gives presidential candidates a right of reply to information published about them that they consider “obviously 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.

Article 64.4 of the Law establishes severe sanctions for violations of certain campaigning restrictions by public media organizations that could have a chilling effect on media coverage of the election. In particular, if a court finds that a public media organization has, without prior agreement of a candidate, campaigned for or against that candidate, or has treated candidates in any unequal manner, then the court may impose a temporary ban on further publication (in the case of print media) or suspend the media license (in the case of broadcast media). This sanction is so extreme that it perhaps ought to be abandoned. Even if retained, it ought to be supplemented by a wider scope of sanctions for violations, including administrative fines, so the courts are in a position to impose sanctions that are proportional to the violation. Additionally, it is unclear why these provisions should be applied only to public media, but not state-run media.

¹¹ Articles 51.5, 51.9 and 51.10 of the Presidential Election Law.

¹² Article 52.3 and 52.4 of the Presidential Election Law.

To ensure that elections are covered in the media comprehensively and without bias, and to ensure that candidates have equal opportunity to communicate their messages to voters through the media, a wider reform of the regulatory framework for media should be implemented along the lines proposed by the OSCE/ODIHR: the state-owned National Broadcasting Company should be transformed into public service broadcaster;¹³ an independent media council should be established with a clear mandate to oversee and control free, equal and fair access to the public broadcasters;¹⁴ and the independence and powers of the National Broadcasting Council and should be strengthened to increase transparency of media ownership.¹⁵

5. Campaign Finance

While the regulation of political finance in Ukraine is generally weak, the provisions in the Law relating to campaign finances are the weakest of any of the three election laws. Particularly:

- Under Article 42.5 of the Law, election fund managers are obliged to submit financial reports on the receipt and use of election funds to the CEC no later than 15 days following the election. Like the other election laws, the Law is vague as to the information that must be included in the reports.
- The Law does not require the CEC to analyze the reports, nor publish them.
- The Law and the Code of Administrative Offences provides for no liability for election fund managers for either late submission of reports and for presentation of incomplete or untruthful information in them. The absence of any sanctions means that campaign managers have no incentive to be accurate in their disclosure or, indeed, to file the disclosure at all.

The most recent draft amendments to the Parliamentary Election Law, prepared by the Ministry of Justice in June 2013, include a provision that would require filing financial reports before, as well as after, each election. Such reports would be published on the CEC website in advance of Election Day. This would be a welcome change, and one that should also be considered for presidential elections.

We also note that the Law does not establish any mechanisms to limit the amount candidates may spend in election campaigns, although the Venice Commission and the OSCE/ODIHR have argued for campaign spending limits in the past.

As has been already stated by IFES and others, the way the role of money in politics is regulated is in need of comprehensive reform, which should target not only the election laws, but also the Law on Political Parties in Ukraine.

¹³ OSCE/ODIHR. *Ukraine. Presidential Election 17 January and 7 February 2010. OSCE/ODIHR Election Observation Mission Final Report*, 2010, page. 30.

¹⁴ OSCE/ODIHR. *Ukraine. Presidential Election, 31 October, 21 November and 26 December 2004. OSCE/ODIHR Election Observation Mission Final Report*, 2005, page 41.

¹⁵ OSCE/ODIHR. *Ukraine. Pre-Term Parliamentary Elections, 30 September 2007. OSCE/ODIHR Election Observation Mission Final Report*, 2007, page 28.

6. Election Observation

Unlike the Parliamentary Election Law and Local Election Law, the Law does not allow for domestic non-partisan observation of the elections. The exclusion of nongovernmental observers is contrary to international standards. In particular, the 1990 OSCE Copenhagen Document explicitly states that OSCE participating states should “invite observers from any appropriate private institutions and organizations who may wish to do so to observe the course of their national election proceedings, to the extent permitted by law.”¹⁶ NGO observers can help increase the transparency and credibility of election, and may also deter fraud and other violations of the rules. The Law should be amended to allow NGOs to field official observers in presidential elections, as they are in parliamentary and local elections.

7. Voting, Vote Counting and Establishment of Election Results

Article 76.10 of the Law states that only those voters present at a polling place at the time the polls close shall be allowed to vote. However, 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 allowed the opportunity to vote, as is the case under the Parliamentary Election Law.

The Law 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 to accommodate those with limited mobility, it should not be provided to those who would prefer to vote from home for personal convenience. Home voting may also be more difficult to monitor, and is thus a potential vehicle for fraud. For these reasons, consideration should be given to restricting home voting to only those who can provide documentation that would demonstrate a need to do so.

Under Article 78.21 of the Law, all the ballot papers in the mobile box for home voting must be invalidated if the number of ballots in the box exceeds the number ballot papers given to the election commissioners to organize home voting. As has been stated by the Venice Commission and the OSCE/ODIHR, “this provision treats voters unequally and discriminates against mobile voters because this invalidation requirement does not appear in the Law in reference to regular ballot boxes.”¹⁷ Hence, these provisions should be changed to ensure the same rules for addressing discrepancies in the number of ballots are applied to all types of ballots.

Article 80.1 of the Law allows a PEC to recognize voting in a precinct as valid provided that certain discrepancies and irregularities with respect to voting, 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. A better approach would be to allow an election commission to invalidate voting if there is evidence that fraud may have affected the results in a precinct.

Further, the Law does not provide for the possibility of invalidation of election results in the country as a whole. The CEC is obliged to certify election results regardless of the number of violations that have occurred or the number of election precincts in which the results have been invalidated. This is contrary

¹⁶ See Paragraph 8 of the OSCE Copenhagen Document.

¹⁷ Venice Commission. *Joint Opinion on the Law on Amending Some Legislative Acts on the Election of the President of Ukraine adopted by the Verkhovna Rada of Ukraine on 24 July 2009*, by the Venice Commission and OSCE/ODIHR, Paragraph 66, page 17.

to international standards, which call for the invalidation of elections in cases where the voters' collective intent is impossible to determine.¹⁸

The Law does not require results protocols to specify the number of voters included in the excerpt from the voter list to vote at home, the number of ballot papers used for voting at home and other important information. 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 irregularities in voting.

8. Election Dispute Resolution and Liability for Violations

In contrast to the Parliamentary Election Law, the Law does not allow official observers to file complaints against violations with the election commissions. Further, official 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 the appropriate authorities. They should be reconsidered to ensure that official observers are entitled to challenge election-related violations.

Under Article 96.4 of the Law, election disputes must be resolved by election commissions within two days of receipt of a complaint. While the quick adjudication of complaints is important for the timeliness of election processes in general, two days may not provide enough time for adjudication, especially in complex cases requiring supporting documentation. The Venice Commission recommends three to five days for both filing and deciding electoral appeals at the first instance.¹⁹ This short timeline could undermine the ability of voters and others to assert their rights in the electoral process.

Like the other two election laws, the Law fails to provide for effective, proportionate and dissuasive sanctions for violations. In most cases, violations committed by the presidential candidates can be "punished" only by announcement of warning by the CEC, which can hardly be considered an effective measure to prevent further violations. Also, in 2009 the Venice Commission and OSCE/ODIHR criticized amendments made by Parliament to Article 158-1 of the Criminal Code of Ukraine, under which criminal liability can be imposed for repeat voting only at one polling station. The OSCE/ODIHR and the Venice Commission recommended this article be amended to "clearly state that multiple voting, whether in the same polling station or several different polling stations, results in criminal liability for the offender."²⁰

Summary

Although the Presidential Election Law cannot be considered the most flawed of Ukraine's three election laws, it still suffers from a number of defects that threaten the transparency, credibility and fairness of the upcoming presidential election.

The list of the most important areas of concern includes: procedures for establishment and operations of election commissions; the possibility to revisions to the voter lists on the Election Day; especially by

¹⁸ Venice Commission. *Code of Good Practice in Electoral Matters. Guidelines and Explanatory Report*, Paragraph II.3.3.e.

¹⁹ Venice Commission. *Code of Good Practice in Electoral Matters. Guidelines and Explanatory Report*, Paragraph 95 of the Explanatory Report, page 30.

²⁰ Venice Commission. *Joint Opinion on the Law on Amending Some Legislative Acts on the Election of the President of Ukraine adopted by the Verkhovna Rada of Ukraine on 24 July 2009*, by the Venice Commission and OSCE/ODIHR, Paragraph 85, page 22.

the election commissions; weak regulation of campaign finance; and the failure to provide for non-partisan domestic observation of the election.

In addition to these major points, given a need to harmonization of the election laws in Ukraine, the procedures laid down in the Law should be aligned with the respective procedures for parliamentary elections as much as possible.

In closing, most of the issues raised in this paper are not new. In fact, international and domestic experts identified many of the same problems and put forward clear recommendations for action prior to the 2010 presidential elections. Regrettably, no progress has been made to update the Law so far. Given that the next presidential election will be held in March 2015, and international standards call for changes to election laws to be made at least one year before the elections, the government should take urgent measures to change the Law before March 2014.



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