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## Legal Reform Priorities for Elections, Referendums and Political Finance

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On February 22, 2017, Ukraine's Parliamentary Committee on Legal Policy and Justice considered three draft versions of a parliamentary election law (draft laws Nos 1068, 1068-1 and 1068-2) and two draft election codes (draft laws Nos 3112 and 3112-1).

Two of the three draft parliamentary election laws would introduce various modifications to the closed-list proportional system for parliamentary elections in Ukraine, while only one of them (Draft No 1068-2, which was prepared based on the 2010 Draft Election Code registered in the Parliament by former MP Yuriy Kliuchkovskiy) proposes holding parliamentary elections based on a fully open-list proportional system. The same open-list system is also proposed in the Draft Election Code No 3112-1, which is also based on the 2010 Draft Election Code. Draft Election Code No 3112 proposes introducing a unique electoral system for parliamentary and select local elections, which combines both features of a proportional and a first-past-the-post systems. This system is very similar to the proportional system utilized in the 2015 local elections, which received strong criticism from civil society and the international community.

Since the Legal Policy and Judiciary Committee did not express its opinion with respect to the election and referendum-related drafts, the final decision on each of laws will be taken by Parliament. However, the Parliament's Rules of Procedure do not establish clear deadlines for consideration of such bills. It is up to faction leaders, through their coordination meetings, to decide and take action on legislative priorities. Reaching political consensus on any of these five drafts is problematic, given that some factions (such as Samopomich, Opposition Bloc, Batkivshchyna and Oleh Liashko's Radical Party) support the introduction of a fully proportional electoral system, while the two largest factions in Parliament (Petro Poroshenko Bloc and People's Front) may be increasingly inclined to support the existing parallel system or even a shift to a first-past-the-post system.

### Electoral system reform

Reforming Ukraine's electoral system and replacing the current parallel system with a fully proportional, open-list system for parliamentary elections, as recommended by the Venice Commission and Parliamentary Assembly of the Council of Europe in 2012 continues to be one of the key priorities for reform in Ukraine. Depending on its key elements (such as threshold, procedure for

transferring the votes into seats, possibility of running independent candidates in elections etc.) This reform could have a significant positive impact on stability of the coalition and government, accountability of elected representatives, internal party democracy, abuse of state resources, money in politics, and opportunities for “new faces” to appear in a future Parliament. The commitment to introducing a fully open-list proportional system for parliamentary and, where applicable, in local elections, is one of the priorities highlighted in the post-Revolution-of-Dignity Coalition Agreement signed by a majority of political parties in late 2014.

However, in light of continued inaction and the clear absence of political will on the side of Ukraine’s leadership in the area of electoral system reform, it is important to continue to raise and promote other key electoral reform priorities. This advocacy should be conducted in parallel to ongoing electoral system reform efforts, but should not be frozen by continued stagnation on electoral system change. Reform priorities include strengthening Ukraine’s Political Finance Reform Law, replacing the 2011 Law on National Referendums, and amending various areas affecting Ukrainian elections ranging from the abuse of state resources to the participation and representation of disenfranchised groups, as outlined below.

## **Harmonization of election laws**

Currently, the parliamentary, presidential and local elections are governed by three separate laws, which were adopted at different times and are not harmonized with each other. Harmonization of the election laws has remained one of the key priority (and repeated) recommendations of IFES, OSCE/ODIHR and Parliamentary Assembly of the Council of Europe for election law reform in Ukraine for many years. However, it has never been effectively addressed by the Ukrainian Parliament.

In the laws governing elections in Ukraine, there is no common approach toward the regulation of political campaigning, campaign finance, vote counting, electoral operations or the procedures for establishing election commissions. The absence of harmonization across different laws results in confusion among election commissions, election contestants and voters.

Such confusion increases in cases of last-minute changes to election laws, which is a common practice in Ukraine. If all three election laws were harmonized well in advance (at least 12 months) before an electoral contest, parties, candidates, voters, media, and election commissions would be better prepared for the electoral event and would require less continued capacity support ahead of each election.

Therefore, the Parliament should introduce changes to the Parliamentary Election Law, Presidential Election Law and Local Election Law to harmonize the procedural provisions in the laws to the highest extent possible.

## **Proportionate, effective and dissuasive penalties for violations of election laws and effective investigation of offences**

The system of penalizing violations of Ukraine’s electoral legal requirements remains a significant weakness and vulnerability.

While Ukraine’s electoral legislation clearly articulates what is permissible under the law and what is not, in many cases there are no penalties in place to ensure enforcement of the respective provisions. For example, the distribution of goods and services in relation to election campaigning is formally prohibited by law, but no penalties are in place for individuals who violate this provision. This leads to a sense of impunity and the abuse of state resources.

The Criminal Code of Ukraine includes penalties for falsifying sensitive election documents. However, the law does not define “election documents.” As a result, domestic observers have identified numerous cases whereby the nominations to the election commissions were falsified, – but, since nominations are not explicitly referred to as election documents, such violations are not subject to penalization.

Moreover, the Criminal Procedure Code does not ensure timely and effective investigation of the election-related crimes. When electoral crimes are detected during election campaigns, investigations generally continue long after the elections, making the investigation outcomes less interesting for the media and citizens. Therefore, the Criminal Procedure Code should be amended to ensure the effective and timely investigation of electoral crimes, in advance of the election, if practically possible.

Another area of concern is the fact that certain penalties that are in place are not effective, proportionate, or dissuasive. Administrative fines in most cases are too low to effectively dissuade voters, candidates, and journalists from committing electoral offences. Many violations, such as those relating to election campaigning, only elicit official warnings, which do prevent the offenders from committing subsequent offences. Some minor criminal offences can entail lengthy prison terms, and law enforcement agencies consider them too harsh to be imposed on those guilty and, as a result, courts release offenders on probation or close the criminal case.

The election laws, Code of Administrative Offences and Criminal Code should be amended to ensure that any violation results in punishment and that those sanctions are effective, proportionate and dissuasive, as recommended by the international standards.

As reported by Civil Network OPORA, Ukraine’s law enforcement agencies—who are responsible for investigating election-related administrative and criminal offences, at times lack knowledge and skills related to collecting evidence, documenting violations, and identifying violations as such. In this respect, further comprehensive elections-specific training for law enforcement officials is needed to effectively enforce the system of sanctions, to complement ongoing reform of law enforcement and the judiciary.

## **Professional electoral administration**

Before each major electoral event, IFES, jointly with the Central Election Commission (CEC) of Ukraine, organize comprehensive trainings for election commissioners to increase their level of knowledge and skills to administer the election using a cascade training model.

For this purpose and with IFES technical assistance, the CEC established a Training Center within its premises. The Training Center has taken the responsibility for organizing and delivering trainings for election commissioners and other electoral stakeholders. However, notwithstanding this support, the capacity of lower-level election management bodies to administer elections is weakened by the fact that they can be replaced at any time before or after an election (or even Election Day itself) by their appointing party or candidate. It is not something uncommon in the Ukrainian electoral practice to replace the trained commissioners by individuals with limited knowledge of electoral procedures and operations just before an electoral contest.

The Venice Commission and OSCE/ODIHR recommended restricting the possibility of replacing the election commissioners by their nominating subjects, i.e. parties and candidates. However, many domestic experts are convinced that such a restriction might result in election commissions controlled by one party/candidate and/or its affiliates, especially given the reasonable suspicions that the seats on the election commissions are “sold” by one contestant to another.

Certain measures which could contribute to increasing the level of professionalism of the commissioners are possible without restricting the possibility of replacements on the election commissions.

The laws governing the elections in Ukraine should be correspondingly amended to introduce mandatory certification of all candidates for election commissioners by the CEC, namely by the CEC Training Center. To ensure the CEC’s internal capacity to provide ongoing support to lower-level election management bodies, the status of this Training Center, its powers and responsibilities should be articulated in the Law on Central Election Commission. Ukraine’s election laws should make it clear that no person can be appointed to a lower level election commission without certification by the Training Center. The election laws should impose an obligation on political parties and candidates to recruit members of election commissions only from among those certified by the Training Center. In cases when a certified commissioner commits a grave violation of the election law while exercising his/her duties, the CEC should have the right to void their certification, which would be eligible for renewal following a legally established period.

## **Election management body (EMB) reform**

The terms in office of 12 out of 15 members of the Central Election Commission expired in June 2014. In February 2017, the term of one more commissioner, Oleksandr Osadchuk, also has come to an end. The President’s slate of 11 candidates for CEC members proposed to Parliament in June 2016, has yet to be considered. Moreover, it is likely to be re-submitted to the legislature based on the results of

consultations with faction leaders in Parliament. The replacement of the CEC commissioners is one of the top and most crucial steps that would bring certainty and independence to the CEC operations. To be independent and in line with the Venice Commission's Code of Good Practice in Electoral Matters, the future CEC must include at least one representative of each party group in Parliament.

In Ukraine, the CEC is a highly centralized body that operates in an old-fashioned manner. It is in charge of providing assistance to lower-level commissions, printing out ballot papers for the national elections, supervising the operations of lower-level commissions, and analyzing campaign finance reports submitted by political parties. Presently, the CEC delegates key powers related to specific regions to individual CEC commissioners who administer elections in designated regions. This approach undermines the collective decision-making nature of the Commission.

The Law on Central Election Commission provides for the establishment of territorial branches of the CEC Secretariat, which are able to assume certain secretariat powers. However, such branches have never been established. The Law on Central Election Commission and respective election laws should be amended to specify the mandate of the branches and to make sure that CEC is allocated funds needed to create them. These branches can take on a number of functions currently performed by the CEC or its secretariat, such as providing assistance to the lower-level commissions, analyzing campaign finance statements, and supervising the operations of the territorial/district election commissions.

In addition to the above, a number of other CEC internal structural and operational reforms are needed. The Law on Central Election Commission, which dates back to 2004, should be amended to ensure that all information posted on the CEC website (including information on the election results in all the elections, be it national or local elections) is published in an open data format and is accessible to people with disabilities. The future amendments to this Law should also make it impossible for the Commissioners with expired terms to participate in Commission's decision-making once their terms in office have expired, provide for staggered terms of the future commissioners, as well as for mandatory, open and inclusive public consultations on key draft regulations to be prepared/issued by the Commission. The CEC should also have greater clarity of its mandate and increased funding to introduce voter outreach initiatives. Last but not least, the CEC should do more efforts to ensure effective protection of the IT data and administrative operations carried out through its electronic system (such as selection of election commissioners, delivery of various data to the CEC through the electronic system etc.).

### **Political participation of women, IDPs, internal labor migrants and people with disabilities**

In Ukraine, the overall representation of women in parliament is one of the lowest in the region. While the Political Party Law requires parties to include one-third of women on their party lists, there are no penalties for noncompliance.

The political rights of people with disabilities are not effectively ensured in Ukraine. The premises of precinct election commissions in most cases are not accessible to voters with disabilities. Moreover, people with disabilities have a restricted access to election-related information (as accessible formats are not used by the CEC and subordinated election commissions) and blind, or low-vision voters face challenges in selecting their candidates on Election Day. Tactile ballot guide templates are foreseen only for parliamentary elections, but in fact, the CEC does not produce them for technical reasons. Therefore, more advocacy is needed to ensure political rights of the voters with disabilities. The Ministry of Social Policy has prepared a draft law aimed to ensure voting rights of people with disabilities, which is currently pending in Parliament. The Parliament should be encouraged to consider recommendations of civil society and others, including IFES, in review and adoption of the law. The Government should also be encouraged to ensure effective enforcement of the adopted law. Moreover, as recommended by IFES and others, the current Constitution of Ukraine needs to be reviewed to ensure full voting rights to persons with intellectual and psychosocial disabilities, as required by the UN Convention on the Rights of Persons with Disabilities ratified by Ukrainian Parliament.

While the number of internally displaced persons (IDPs) in Ukraine exceeds 1.6 million (according to UN estimates), IDPs residing in Ukraine-controlled territory cannot effectively exercise their voting rights. Similar voting challenges are faced by internal labor migrants and other categories of voters residing in areas of Ukraine that differ from their domicile registration. The overall concept of voter (and domicile) registration should be reviewed to ensure that all voters have the right to vote in all the elections held within the territory of their factual residence. IFES works closely with the Group of Influence and Civil Network OPORA on legal changes aimed to ensure voting rights of IDPs and other “mobile” citizens. This cooperation resulted in the registration of the Draft Law No [6240](#) on Amendments to Certain Laws of Ukraine Related to Electoral Rights of Internally Displaced Persons and Other “Mobile” Groups of Ukrainian Citizens. The Draft Law was sponsored by 24 Verkhovna Rada members representing the Petro Poroshenko Bloc, People’s Front, Samopomich, Batkivshchyna, Oleh Liashko’s Radical Party, and the Opposition Bloc. If adopted, it would amend the Law on State Register of Voters, along with other relevant legislation, to guarantee full voting rights for millions of Ukrainians who are displaced by conflict or are voluntarily residing in places that differ from their registered places of residence by enabling them to vote in their actual places of residence.

### **Adoption of a new national referendum law**

On November 6, 2012, Ukraine adopted a new National Referendum Law. This was done without the involvement of civil society or the expert community through a process that violated procedures prescribed by the Constitution of Ukraine. The 2012 Law, which is still in force, raises a number of concerns that may adversely affect Ukrainian democracy. After the Revolution of Dignity, the newly elected Verkhovna Rada of Ukraine has failed to repeal the undemocratic and unconstitutional National Referendum Law. While a constitutional petition seeking to recognize the Law as unconstitutional was filed almost two years ago, the decision on this case is still pending.

Starting from early 2013, IFES has been providing support to an NGO coalition named, “For Fair Referendum” which is comprised of key election and referendum experts, as well as civil society activists; the coalition was established under the auspices of the Reanimation Package of Reforms Initiative. This coalition, together with select MPs, drafted a new National Referendum Law (draft reg. No 2145a of June 23, 2015) aimed to replace the current flawed law and to bring the legislation governing the national referendums in Ukraine in compliance with democratic standards and good practice.

Civil society has called on the Verkhovna Rada of Ukraine to repeal the National Referendum Law of November 6, 2012, and to adopt a new National Referendum Law. This new Law should be based on the Draft Law No 2145a and comply with the Constitution of Ukraine, international standards and good practice in the field of referendums. Civil society has also called on the Constitutional Court of Ukraine to accelerate consideration and adoption of a decision on the unconstitutionality of the 2012 National Referendum Law.

### **Political finance reform**

While the adoption of the 2015 Political Finance Reform Law marked Ukraine’s significant step forward to regulate the role of money in Ukrainian politics, certain provisions of that Law could benefit from further improvements.

The 2015 Political Finance Reform Law requires political parties to submit their quarterly reports in paper and electronic formats. Reporting in a paper format makes it difficult for the National Agency for Prevention of Corruption (NAPC) to analyze the reports and to identify donations from prohibited sources, illegal expenses or concealed party assets. IFES is working closely with the NAPC to establish an electronic party and candidate declaration system which will integrate party and candidate financial reporting, enable parties and candidates in the national and local elections to fill the reports online, contribute to more effective political finance oversight, and provide comprehensive information on political finance to public authorities, watchdogs, journalists and citizens. Establishing such a system should be preceded by the respective changes to the Political Finance Reform Law, which will provide for the key principles of its functioning.

In 2015, OSCE/ODIHR and Venice Commission recommended that penalization for failure to comply with the political finance rules should be effective, proportionate and dissuasive. Nonetheless, Ukraine’s current system of penalizing political finance violations remains by-and-large ineffective. Parties’ or candidates’ failure to submit timely financial reports to the NAPC or respective election commissions is punishable by a small fine of up to UAH 6,800, while the repeated failure to file the reports entail the same fines. This is a key reason why only two-thirds of more than 350 registered political parties file their quarterly reports to the NAPC. Therefore, the system of penalizing political finance violations should be strengthened to make sure that it dissuades parties and candidates from committing repeated violations.

The rules governing donations, expenses and reporting by political parties, MPs, and presidential candidates have been harmonized by the 2015 Political Finance Reform Law. However, this Law has not brought the campaign finance rules applicable to local elections in compliance with the rules governing campaign finance in parliamentary and presidential elections. As has been highlighted by the Venice Commission, OSCE/ODIHR, IFES and GRECO, the 2015 Local Election Law should be correspondingly amended to regulate campaign finance in local elections as it does for national elections.

The 2015 Political Finance Reform Law requires all political parties that receive annual public funding or participated in national or local elections undergo an independent external audit on an annual basis. Such audits are expensive for many new or small political parties with low incomes. The auditing requirement should be reviewed to make sure that only those parties whose income exceeds certain legally established levels, who participated in the regular or pre-term presidential and parliamentary elections or received public funding, are subject to mandatory independent auditing. Auditing requirement should not apply to parties that nominated candidates in rolling local elections.

GRECO and others have also recommended to clearly delineate the powers of the NAPC and other agencies (such as Accounting Chamber, CEC, Fiscal Service and other) involved in political finance regulation to avoid duplication of efforts and to increase the overall effectiveness of political finance monitoring. This recommendation has yet to be addressed in the current legal framework.

One of the reasons for strong dependence of political parties on wealthy donors is the absence of instruments aimed to limit campaign spending by parties and candidates in elections. As such, OSCE/ODIHR and the Venice Commission have recommended the introduction of campaign spending limits for all elections. Many civil society organizations, including IFES-supported RPR Election Group, also advocate for restrictions on television/radio and outdoor political advertising, as advertising-related expenses constitute a lion's share of the budgets of electoral contestants. The need to restrict campaign expenses, which could include the introduction of spending limits and/or restrictions on political advertising, should therefore be carefully considered.

## Conclusion

While the reform and harmonization of Ukraine's current electoral systems for parliamentary and local elections remain a key reform priority, political inaction on this front must not hold other reform priorities hostage. In addition to electoral system reform and harmonization of the election laws, the advocacy campaign aimed to implement the election law reform should include a variety of changes which would strengthen the country's electoral processes, including:

- harmonization of election laws;
- mandatory certification of election commissioners;
- introduction of timely, proportionate, effective and dissuasive penalties for electoral violations;

- replacement of CEC commissioners with expired terms;
- implementation of structural and operational reforms of the CEC;
- ensuring the electoral rights of underrepresented and disenfranchised groups (IDPs, internal economic migrants, women, people with disabilities);
- replacing the 2012 National Referendum Law;
- establishment of an electronic declaration system for party and campaign financial reports;
- considering restrictions on campaign spending and advertising;
- harmonization of political finance provisions for local elections.

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