



Commonwealth of the Independent States - Election Monitoring Organization

Ukraine Electoral System Situation Report by International Organization for Elections Observation CIS-EMO



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CIS-EMO is an International Organization for Elections Observation that was established in 2003 as an international non-governmental organization. Purpose of the organization is contributing to the preservation and development of elections institution and public control in countries having developing democratic systems. From its inception, CIS-EMO has monitored several tens of election campaigns in the CIS countries and the EU. In Ukraine, the organization has been working at the presidential elections of 2004 and 2010, at the local elections of 2010 and parliamentary elections of 2006 and 2012. CIS-EMO's mission has always been one of the largest in terms of observers' number.

CIS-EMO is the only organization that has maintained a standing mission after the parliamentary elections of 28 October 2012. Since then, experts of the Organization have been pointing out the shortcomings of the elections preparation process and have repeatedly stated the necessity to reform the Ukrainian electoral legislation. Our mission has reported that the Ukrainian authorities are trying to ignore the EU and OSCE recommendations regarding necessity of a profound reform of the Ukrainian electoral law. After that, the mission became a subject of unprecedented pressure on the part of the media controlled by the Party of Regions aimed to discredit the Organization, to force observers to leave the country and cease activities. During the last summer by-elec-

tion in District 224 (Sevastopol) the most massive campaign against the independent observation has been launched.

In a preliminary monitoring report on the elections to the Verkhovna Rada of 2012 we pointed out that the idea of “anti-democratic regime” and “democratic opposition” clash in Ukraine is quite controversial and, as a rule, does not reflect real state of the case. In the context of current Ukrainian model of “peripheral capitalism”, the terms “power” and “opposition” are rather conventional. In a situation of lack of consolidation and cooperation between the members of ruling elite and an overt internal struggle between the leading financial and industrial groups and corporations of Ukraine (the term “oligarchs” is being often used to define them) for access to the locus of real state power, all the existing political parties (both the conditionally ruling Party of Regions and conditionally opposition parties - “Batkivschina”, UDAR, etc.) only play the part of institutionalized political forms for implementation of the economic interests of oligarchic entities. Thus, the phenomenon of “political party” in Ukraine can be only tentatively considered as a full-fledged institution of civil society. At the same time, this inter-party struggle in Ukraine is, above all, a struggle of various financial and industrial groups of Ukrainian oligarchy for access to the levers of state power, which enables them to count on taxation preferences, on a favour in the state orders and state-run programs distribution system, as well as on monopolization of certain market segments and other benefits of proximity to power.

CIS-EMO mission of the international observers notes that what has happened in Ukraine should have never happen under any circumstances - a so-called “Oligarchic consensus” has been reached. On 5th of September, 2013 the voters of Ukraine ultimately lost an opportunity to have transparent and democratic elections in the foreseeable future.

This day the parliamentary majority and the parliamentary opposition quite unanimously (371 votes) voted for the law "*On re-election of people's deputies of Ukraine in single-member constituencies number 94, 132, 194, 197 and 223*» (No. 2971-Д).

On the one hand, the law has finally set the final date for re-election in five so-called "problem constituencies" – **the 15th of December, 2013**. But on the other hand - it seems to have finally buried the hopes of Ukraine citizens for fair and transparent elections in these longsuffering districts and will be in full compliance with international democratic election standards. The touching solidarity of government and opposition reappeared in apparent reluctance to modernize the Ukrainian electoral system even now, on the eve of the abovementioned re-elections.

"Oligarchic consensus" of government and opposition in the Ukrainian parliament is postponing major reform of the Ukrainian electoral law "for a rainy day" over and over again. In the meantime, not only world and Ukrainian experts opinion is roughly ignored, not only the opinion of many missions of the international election observation organizations, but also the direct recommendations of the European Union authorities. On the one hand, both government and parliamentary opposition are vying to swear loyalty to the European choice and sincere desire to sign the EU and Ukraine Association Agreement in November 2013 in Vilnius, and on the other hand - **they are doing everything possible to rudely ignore the European Union and OSCE recommendations regarding the necessity of a profound reform of Ukrainian electoral legislation.**

To confirm our thesis it is sufficient to refer to the official text of the **Conclusions of the Council of the European Union for Ukraine Affairs dated 10.12.2012 [EU Council 10.12.12]**. Paragraph 2 clearly states their position in respect of the electoral situation and the elec-

toral law in Ukraine: “The Council notes with concern that the parliamentary elections held on 28 October have formed a compound picture with a range of disadvantages. **The elections revealed a deterioration of the situation in some areas as compared with those standards that had already been achieved.** While waiting for final conclusions of the OSCE/ODIHR missions, the Council underlines the importance of the full implementation of the mission’s recommendations and correction of the disadvantages uncovered... **In particular, the Council expects that Ukraine will take quick steps (emphasis added by CIS-EMO) to establish a reliable electoral system based on the Electoral Code and clear regulations regarding the proportional access to the media for the electoral competitors.”**

But, as we can see, instead of the required by European Union “quick steps” to upgrade the existing Ukrainian electoral system, the symbiosis of government and opposition performs something quite different – **the highest possible inhibition of the reform and persistent attempts to “drag out” any progress.**

Already in February 2013 a list of **19 points** indicating necessary steps for successful signing of the EU and Ukraine Association Agreement was passed to the representatives of Ukrainian authorities by European Commissioner **Stefan Füle**. In spite of the fact that it was an informal document, it was bound to become a catalyst of a number of positive developments in the political and legal Ukraine. One of the points of «Füle’s document” clearly and unambiguously requires the Ukrainian authorities **“to remedy the deficiencies of the parliamentary elections, including those connected with the failure to calculate the election results in five single-mandate constituencies.”** And the other point makes it clear that the Ukrainian authorities should **“really start a profound reform of the electoral legislation on the basis of a broad consensus”**

with actual participation and entertaining of the parliamentary opposition’s opinion, relevant non-governmental organizations, the Venice Commission, the Council of Europe, the OSCE / ODIHR.”

At the same time, the project suggests some controversial and even dangerous innovations, which only formally comply with the recommendations of the final report of the OSCE / ODIHR observation mission. In particular:

- devolution from the CEC to the relevant TEC of the responsibility to register candidates in the single-member constituencies. This raises a risk of making subjective decisions on registration refusal or cancellation for individual candidates under TEC control;

- setting election funds limits (**USD 100 million for the parties on the national level and 4.5 million for the majority candidates**) and granting the relevant TEC a power to control over the majority candidates’ funds receipt and application. On the one hand, the proposed amounts are large enough to have all needed election expenses. On the other hand, a risk of selective law use by the TEC, which do not have sufficient human and technical resources for the implementation of effective control over the financing of election campaigns;

- revocation of voters living abroad or outside of their constituency of the right to vote by majority districts without changing the electoral address. On the one hand this would prevent such phenomenon as “electoral tourism”, and on the other hand, this may contradict the principles of equality of voting rights defined in the constitution;

- a number of progressive innovations in the process of covering the electoral process in the mass media, in particular, the requirement to provide equal opportunities of campaigning and political advertisement placement, the distinction between commercial and political advertising, the requirement of well-balanced programs with participation

of the candidates, non-admission of the facts of concealment or misrepresentation of information of public interest concerning elections – all of this may be made null and void through the control mechanism which is assigned to the National Council for Television and Radio that cannot be considered a politically independent body in the current situation in Ukraine. Thus, the OSCE / ODIHR recommendations on attraction of independent social organizations to the monitoring of the mass media use balance during the elections and supervision on the basis of this independent monitoring were not implemented.

The bill leaves a number of recommendations from the OSCE / ODIHR observation mission final report unaccounted: regarding the revising of the grounds for the invalidation of the vote results on a ballot station or cancellation of the election results, reviewing the reasons of eligibility restriction, reconsidering the electoral deposit amount and the bases for its return, introducing of proportionate and forceful sanctions for election laws violation and creating an appropriate institutional mechanism for monitoring potential abuse of administrative resources, etc.

Once again we see that touching solidarity of the government and parliamentary opposition amid the “oligarchic consensus” rudely ignores these requirements of the European Union, preferring backstage trading concerning the date of re-election without any desire to change anything in the electoral legislation in a consistent manner.

It was the early November 2012 when the International Organization for election observation CIS-EMO, immediately after the Central Election Commission of Ukraine had published the final results of the parliamentary elections of 2012, clearly stated that they believe this election is not finished and do not terminate the long-term observation mission. We hoped that the good will of the Ukrainian parliamentarians,

aimed at the modernization and democratization of the country's electoral law, will give a major boost to complete and final settlement of the problem. However, conscious dragging out and consolidated blocking of these problems in the walls and lobby of the Verkhovna Rada and other government institutions is only exacerbating current situation, intensifying absentee trends in the Ukrainian society and contributing to extreme radicalization of prevailing attitudes in it. Also this position does not facilitate social tension the relieving, and only redoubles the range of problems that is deep as it is and arose as a result of the huge number of grave technical and legal boss-shots as well as deep methodological and organizational drawbacks that showed up as a result of the October 2012 parliamentary elections.

Another crucial issue that is a component of the general crisis of confidence in the modern Ukrainian electoral system is the undecided question of local elections (city council members and the mayor) in Kiev.

The powers of present Kiev city council composition expired on the 2nd June 2013. On the 31st of May 2013 the Constitutional Court decided that the next elections of the Kiev Mayor and Kiev City Council will be held in October 2015. At the same time, the possibility of the early elections of these local government bodies is preserved.

Resolution of the elections situation in Kiev together with the nature of these and other local elections in Ukraine this year will also serve as an important indicator of how Ukraine is improving electoral practice. However, the existing legislation on local elections is the most problematic in Ukraine. It allows the widespread use of administrative resources and does not guarantee equality of the electoral process subjects during the campaign. In particular, these shortcomings were revealed once again during the local elections in a number of localities held on the 2nd of June 2013.

The matter is not that the attitude of the European officials is loyal to certain consolidated actions of the Ukrainian authorities and the opposition or it's not. The key to solving basic problems of the Ukrainian electoral legislation is not the point. After all, only political or geopolitical considerations of various officials of the European Union alone will not necessarily lead to a triumph of democratic provisions and principles in the electoral legislation of Ukraine. It will possibly occur that the same rules and principles may be sacrificed to the triumph of current "reasonability" and "forced compromises". The above-mentioned Stefan Füle is already ladling out messages on Ukraine's demonstration of its "positive trend" in relations with the EU and **those messages are mouthed by him in a situation where practically no demand of the European Union and none of the OSCE / ODIHR recommendations regarding the restructuring of Ukrainian election legislation are not fulfilled at the moment.**

We emphasize once again that the Organization for International Observation CIS-EMO considers the problem of incompleteness of these overlong parliamentary elections in Ukraine in **2012 in a much broader context than just context of lack of elected deputies of the Verkhovna Rada of Ukraine.** It was seen not only by the expert community, but the entire Ukrainian and international community, that the elections of 2012 have clearly indicated a mountain of problems connected with the electoral legislation of Ukraine, which is to be updated and subsequently resolved. **And this should happen not "sometime", as it is believed solidly by the government and agreed by the parliamentary opposition, but in the immediate future, as it is required very strongly by evidence of current explosive situation.**

In the course of its own long-term monitoring process over the parliamentary elections in Ukraine 2012, the International Organization for monitoring CIS-EMO has marked and continues to systematically

point out a number of serious problems and criticize a number of significant anti-democratic provisions of the current electoral legislation as of **the 17th of November 2011**, which was the day when the combined efforts of government and parliamentary opposition led to creation of the first edition of the “oligarchic consensus”. Once again, we stress **some of the most crucial ones**:

1. Raise of the vote threshold for party lists. This means, that the right to participate in distribution of seats now receive only those parties that gain more than 5 % of the vote in an election. Earlier this barrier amounted only to 3%.

2. Removal of the “against all” option from the ballot count.

3. Prohibition of participation in election of inter-party polling units (political alliances), which, in turn, was criticized by the Venice Commission, and the International Foundation for Electoral Systems (IFES).

4. Particular concern of the International Observation mission of CIS-EMO was raised by new law introducing the prohibitive for the social and political realities of the post-Soviet countries amount of monetary deposit, racking for the vast majority of the Ukrainian political parties (by law - non-profit organizations), including those representing (according to their political declarations) the interests of the low-income Ukrainian social groups. To fight in election political parties have to leave **2 million 200 thousand hryvnia (220 million euros)** as a deposit and **13.6 thousand hryvnia (1.36 million euros)** for each candidate in a majority constituency. Thus, the total amount of monetary deposit as a condition of a full-fledged inter-party struggle amounts **5 million 260 thousand hryvnia** ($2.200.000 + 13,6 \times 225 = 5.260.000$ hryvnia) or **526 thousand euros** (this sum is needed just to register for the elec-

tions). **Obviously, in such a situation only those parties that are sufficiently tightly related to the major oligarchic groups manage to find the necessities required for the registration by legislation. Could this be the underlying economic reason of the current “oligarchic consensus” of the government and parliamentary opposition?**

It is important to point out that, OSCE/ODIHR in its final report on the parliamentary elections in Ukraine-2012 also drew attention to a very high level of the deposit and grounds for its refund which are not quite reasonable for the situation in the country. *“The deposit is returned to the parties that have passed the 5 per cent barrier for the proportional component of the election and to the candidates elected in single-member constituencies. This runs contrary to the proper practice, according to which, in case a deposit is required, it should be returned, if a party or a candidate wins a certain percentage of votes **that should not be too high** (emphasis added - CIS-EMO)”*.

It bears reminding that in the current legislation of Ukraine addressed to the political parties also requires that in case of non-nomination of any candidates from a political party for the Ukraine presidential elections and the Election of People’s Deputies for over 10 years, the Ministry of Justice is bound to appeal to the Supreme Court of Ukraine with a declaration for cancellation of the registration certificate of the party.

In other words, as we can see, a range of aspects of the legal regulation of political life in Ukraine has in fact obviously contributed to strengthening of the oligarchic and governmental influence on a variety of party structures. Deprivation of the right to form political blocs, in fact, led to loss of any electoral outlook by more than a hundred of political parties registered in the Justice Ministry of Ukraine. **As for the establishment of draconian property qualifications for political parties**

coupled with mandatory participation in the electoral process under the threat of registration cancellation, in fact, has thrown them into the arms of governmental authorities and oligarchic groups, which would rather use political parties solely in their own self-interest.

It is important to note that during the parliamentary elections-2012 the CIS-EMO international observation mission has detected the fact of active appliance of a **technology called “Party franchise” in its two original variations:**

(a) parties rent their political brand to the regional oligarchic groups and their representatives nominated as candidates in majority constituencies;

(b) political parties demise their legal status to the party of power to use it in order to get the guaranteed majority of commission members in the electoral commissions at all levels.

The second one of these “party franchise” options had an unprecedented scale in the parliamentary elections of 2012 in Ukraine. Nearly always this situation led to many absurd and comical situations. For example, for the better part of electoral commissions members representing the Anarchists Union of Ukraine replied in the affirmative to a question “Nestor Makhno from Zaporozhe is the leader of their party, isn’t he?” put by the international observers. As for the members of electoral commissions of the party “Bratstvo”, they have never even heard the name of the party leader Dmitry Korchinsky.

It is of importance that criticism of such an outrageous situation from the lips of the parliamentary opposition was extremely specific and focused mainly not around the problem of “technical parties” appearance but on their prior use by the Party of Regions to solve their electoral problems. Probably, joint political liability of the opposition and the Party of Regions for the legislative formation in November 2011 did

not allow the opposition to appropriately realize their full critical potential regarding the problem at issue. **Their criticism was focused on the technical nature of a number of parties and not on the phenomenon of “technical” use of various party structures.**

CIS-EMO executives and experts have repeatedly referred in their public speeches and materials to the exceeding impropriety of the “technical game” term regularly used by Ukrainian journalists. **After all, frequent use of the term “technical party” which is not legally recognized carries the key anti-democratic risk of possible announcement by the Ukrainian media that any not very popular political party is only a “technical” party which was rented as a “political franchise”.** In this situation newly formed young political party projects do not and will not have any chance to overcome the risk of marginalization nor sustainable clichés about “technical” nature of a party used by the leading and defining the main social messages mass media.

Thus, in our view, the problem of “technical” use of political parties in Ukraine is a complex problem which can and should be solved only in an integrated manner. **The main direction of its solution is extreme democratization of the legal regulation of party political life in Ukraine in order to release the party structures from the influence of governmental authorities and oligarchic groups. And the necessity of radical reform of the electoral law serves the key aspect here.**

It is worth noting that during the 2012 election campaign the Organization for International Observation CIS-EMO has regularly pointed to a number of other key issues that need a considerable legislation improvement in the nearest future. Here are some of them:

- trend of family voting that is clearly expressed in a number of Ukraine regions and is related to the actual lack of data in the local commissions from the State Border Service on Ukraine citizens who had tak-

en abroad and are not in the constituency on the election day;

- unequal access for potential members of parliament to the mass media and, in the first place, to the private media;
- cancellation of the funding limits for the majority candidates and political parties, etc.

The last two points have given rise to serious criticism not only on the part of our mission. Particularly, the OSCE / ODIHR mission in their final report on the parliamentary elections in Ukraine-2012 specified that *“the electoral legislation provisions governing the right of voters for “access to a variety of objective and impartial information necessary for making a conscious, knowledgeable and free choice” and fair and well-balanced coverage of the electoral race participants could contain a precise definition of “well-balanced coverage” and a determination of the procedures and body that will be responsible for controlling compliance with these rules”*. As for the problems of opaque campaign funding, the OSCE / ODIHR mission has sharply expressed their attitude: *“legislation and regulation system of political parties and campaigns funding could be reviewed in order to increase accountability, as well as create a more equitable conditions for the pre-election canvassing. It might be well to consider opportunities of making deposit sources and amounts available to the public before and after the elections, as well as campaign expenses character. It would be possible to introduce more effective monitoring and control over the election campaigns funding by establishing proportionate and forceful sanctions for violations of campaign financing provisions”*. **Thereupon, it is hard to escape the necessity of implementation of European, particularly French experience of establishing a campaign expenditures limit, as well as strict state and public control over its spending.**

It is obvious that the Ukrainian parliament members, without

regard to their political party affiliation, have had for already almost a year since the October 2012 election and on the threshold of the EU summit in Vilnius and continue to have all the opportunities to consolidate efforts in the electoral law reformation before the re-election in the “problem constituencies” on the 15th of December 2015. The key lines of this radical electoral law reformation and modernization were clearly defined by the relevant institutions of the European Union as well as by conclusions and proposals of the international observation missions and expert communities. **However, Ukrainian deputies representing both the authorities and the opposition conjointly preferred acting as a brake for this essential reform, roughly ignoring and sometimes quashing even relatively innocent attempts to break the deadlock.**

The Organization for International Observation CIS-EMO keeps updating their specific set of proposals for the Ukrainian civil society on the reformation and modernization of the current electoral legislation of Ukraine towards its further democratization and accountability. In particular, we suggest to:

1. return the possibility of inter-party political blocking during the parliamentary and local elections to the electoral legislation of Ukraine;
2. cancel draconian property qualifications for participation of the political parties and their majority candidates in the parliamentary elections;
3. change the electoral threshold for party lists in the Verkhovna Rada back to the rate of 3%, followed by preparation to reduce this figure;
4. set aside the necessity for political parties of Ukraine to participate in the election of the President and Parliament of Ukraine every 10 years under the threat of de-registration in the Justice Ministry

of Ukraine;

5. return a democratic opportunity for the Ukrainian voters to vote “against all parties and candidates”;

6. restrict the total expenses for election campaigns of the parties and candidates (campaign funds) with specific and reasonable amount;

7. forbid categorically both direct and indirect financing of election campaigns bypassing the official campaign funds of the parties and candidates;

8. establish the institutions of social control with a deciding vote over the parties and candidates spending of their election funds;

9. entrench the right of full and free access of the parties and candidates to the private mass media during the election campaign;

10. strengthen the government and public media liability for unequal coverage of election campaigns of all parties and candidates without exception; and

11. reconsider the restriction of the right to stand for election as a result of conviction record, which has not been expunged or removed at the beginning of the candidates’ nomination, to ensure compliance to the ratio principle between the offense gravity and voting rights protection.

Implementation of this complex set of measures, according to leading experts of CIS-EMO mission will enable radical transformation of the Ukrainian electoral legislation towards its qualitative modernization and democratization. Of special attention is the fact that the range of essential debating points and recommendations on Ukrainian electoral law modernization have been defined jointly by a number of international observation missions involved in monitoring the parliamentary elections in Ukraine on the 28th of October 2012.

The OSCE / ODIHR and the CIS-EMO have similar opinions on many issues but our mission suggests essentially different solutions to a number of problems. However, we are united in the certainty that the Ukrainian authorities must finally face the international expert community and the recommendations of the international observation missions. **The European vector of Ukraine development, especially on the threshold of the European Union summit in Vilnius in November, can not be imagined without major modernization and democratization of its current electoral legislation.**



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