

COMPARATIVE ANALYSIS AND RECOMMENDATIONS FOR ELECTORAL LEGISLATION IN BELARUS, MOLDOVA AND UKRAINE

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INTRODUCTION

This comparative research project explores the existing electoral legislation in Belarus, Moldova and Ukraine with the focus on the elections that took place in these countries in 2015: local elections in Moldova (14, 28 June), Ukraine (25 October, 15 November), and presidential elections in Belarus (11 October). Our analysis covers several areas of electoral legislation: the provisions, which regulate the participation of civic and social organizations (SCO) in the electoral process, provisions that prevent and regulate violations of electoral laws, and regulations that provide the right to vote to internally displaced persons (IDP), labour migrants and other internally mobile groups of citizens. This research was primarily designed in order to elaborate legislative and policy recommendations in regards the above mentioned areas for the governments of Belarus, Moldova and Ukraine.

The research methodology includes such qualitative methods as the analysis of electoral legislation and expert interviews, which were conducted in the three countries. The data was collected and generalized by the analysts of the three NGOs: Human Rights Center "Vyasna" (Belarus), Promo-LEX (Moldova) and Donetsk regional organization of All-Ukrainian civic organization "The Committee of Voters of Ukraine" (Ukraine).

This report contains our preliminary research findings and conclusions. Firstly, we will provide an overall comparative overview of the electoral legislation in Belarus, Moldova and Ukraine. Then, we will offer a brief analysis and suggest a list of legislative and policy recommendations for each of the three countries.



ELECTORAL LEGISLATION OF MOLDOVA, BELARUS AND UKRAINE: COMPARATIVE PERSPECTIVE

In our assessment of the electoral legislation in Moldova, Belarus and Ukraine, we applied four criteria: stability, legislative guarantees of SCOs' participation in the electoral process, effectiveness of the legislative mechanisms of prevention and combating electoral law violations, legislative guarantees of the right to vote of IDPs, labour migrants and other mobile groups of citizens.

In our understanding of the stability criteria we refer to the definition of the Venice Commission.¹ None of the three states sets time restrictions in regards electoral law amendments and their entry into legal force, therefore electoral legislation can be changed before elections. While in Ukraine the law on local elections was adopted one month and a half before the beginning of the electoral process, certain amendments to the Electoral Codes of Belarus and Moldova were adopted less than a year before elections. The status of the Electoral Codes in Belarus and Moldova is higher than ordinary law, whereas in Ukraine the law on local elections is ordinary. Although the codified structure of the electoral legislature in Moldova and Belarus contributes to the legislative stability, both Codes contain certain "gaps", discrepancies with other laws, and provisions that are incomplete. These weak points apply to Ukraine's law on local elections. As a result, the Central Elections Commissions in Ukraine and Belarus partially take up a law-making role by issuing interpretations of existing provisions.

As for legislative guarantees of SCOs' participation in the electoral process, the most comprehensively defined form is elections observation. In general, the lists of elections observer's rights from civic organizations in the legislature of Moldova and Ukraine are assessed as sufficient as opposed to the list of observer's rights in Belarus. Most importantly, certain rights of elections observers in Belarus remain declarative. While in Moldova and Ukraine the accreditation procedure for elections observers is rather simple, in Belarus the registration of civic organizations is problematic.

The effectiveness of the legislative mechanisms of prevention and combating electoral violations varies in the three states, however, the common underlying issue is the weakness of law enforcement, particularly bringing violators of electoral law to responsibility.

While the legislation in Belarus and Moldova provides guarantees and mechanisms for mobile citizens to vote in elections in a place that is different from the place of their official registration, Ukrainian citizens cannot vote in local elections in a territorial community where they reside if they are not officially registered in this community. Moldova's legislation sets rather liberal regulations in regards IDPs' right to vote, whereas there are certain discrepancies in the Ukrainian legislation: on the one hand, the IDPs' right to vote in all elections is guaranteed; on the other hand, the law on local elections does not provide legal mechanisms for this right to be exercised.

¹ Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report , Venice Commission, p. 26, [http://www.venice.coe.int/webforms/documents/CDL-AD\(2002\)023rev.aspx](http://www.venice.coe.int/webforms/documents/CDL-AD(2002)023rev.aspx)

Moldova



GENERAL ASSESSMENT OF THE ELECTORAL CODE

The Electoral Code of Moldova was adopted in 1997.¹ Throughout eighteen years of its appliance, the Code demonstrated its strengths and weaknesses. The main advantage of the Electoral Code is the fact that it regulates elections both at the national and local levels providing substantially identical electoral procedures for all types of elections. The Code guarantees a single and stable principle of membership composition in electoral bodies. Apart from this, the Electoral Code introduced a unified Voters' Registry system, which is managed by the Central Elections Committee (CEC) of Moldova. Additionally, the Code allows independent candidates to participate in the elections. Finally, the Electoral Code established a CEC-based Centre of Permanent Education in the Field of Elections that provides learning opportunities to those who work in the elections' field, but also to observers, representatives of media and local self-government bodies.

At the same time, the interviewed experts of Moldova identified certain weaknesses of the Electoral Code. As it was mentioned above, the number of amendments to the Code is rather high. It is worthy of note that certain amendments were adopted less than a year before elections. Apart from this, there are discrepancies between the Code and other electoral laws, such as the law on political parties and the law on personal data protection. Next, the Code does not set specific dates or time frame for holding elections, which results in conflictive political debates on the date of elections. Then, the Code sets certain limitations for independent candidates, which might undermine their competitiveness with those candidates who are nominated by political parties. The Code does not guarantee the representation of women and underrepresented social groups, for instance ethnic minorities and youth, in the party lists. Additionally, the Code allows making changes in the final list of candidates one week prior to Election Day, however, voters are not always informed about the changes that are made by the political parties in the list of candidates. Another weakness of the Electoral Code is the right of the candidates to recall their nominated members of elections commissions until the day before the Election Day, which, according to the experts, influences the quality of commissions' work.

¹ The Electoral Code of Moldova, https://www.cec.md/files/files/blocul_COD_Elect-2014_eng_07-11-12_corect_FINAL.pdf



Recommendations:

1. To adopt a legislative provision that would impose restrictions on amending the Electoral Code less than a year prior to elections.
2. To set specific time frame for holding elections in order to prevent political debate on the date of elections.
3. To adopt legislative provisions that would guarantee the representations of women and underrepresented social groups in the party lists.
4. To establish minimal professional and competence requirements for the members of elections commissions.
5. To impose legislative restrictions on the time frame when political parties can make changes in the party lists, so that voters have a sufficient amount of time to be informed about new candidates or any other changes in the party lists.


SCOS' PARTICIPATION IN THE ELECTORAL PROCESS

The interviewed experts of Moldova identified the strengths of legislative guarantees for SCO's participation in elections observation. Firstly, the accreditation procedure for civic observers is rather simple. The accreditation is valid before, during and after the electoral process. Importantly, the legislative guarantees of observers' rights are sufficient. These strong points create necessary prerequisites for the emergence of professional civic elections observation which is credible in the eyes of the public. Elections observers, voters and candidates have the right to appeal against actions and inaction of elections bodies and other actors of the electoral process.

At the same time, there is a problem of "fake" elections observation that is conducted by civic organizations in favour of certain political parties. In general, elections observation, which is held by representatives of political parties and candidates, lacks competence. The provision of the Electoral Code, which guarantees the right of civic and political organizations (including political parties, fronts, leagues, mass political movements) to nominate their candidates, remains rather ineffective. In practice, this right is exercised by political parties and blocs of political parties, as well as independent candidates.

RELEVANT FORMS OF SCOS' PARTICIPATION IN THE ELECTORAL PROCESS

The principal form of SCOs' participation in the electoral process in Republic of Moldova, which requires legislative regulation, is elections observation. Other forms, such as voters' education and training for election commissions' members, are crucial, however, this area is not explored enough by SCOs. The interviewed experts of Moldova identified the strengths of legislative guarantees for SCOs' participation in elections observation. At the same time, the experts pointed out that a SCO should not have the right to simultaneously conduct civic elections observation and nominate its members for elections commissions due to the conflict of



interests. It is worthy of note that during a pre-election campaign SCO members can train election commissions' members within the CEC-based Centre of Permanent Education in the Field of Elections if these SCO members do not simultaneously conduct elections observation. In such a way, simultaneous elections observation and training of elections commissions' members is considered as a potential conflict of SCO's interests.

Recommendations:

1. To consolidate efforts in improving the competence and quality of elections observation that is conducted by representatives of political parties and candidates.
2. To raise public awareness about voters' rights by the means of information and educational campaigns.

PREVENTION AND REGULATION OF ELECTORAL LAW VIOLATIONS

It is worthy of note that since April 2015 the regulations on responsibility and sanctions for electoral law violations have been improved. The education of electoral process actors and judges, which is conducted by the CEC-based Centre of Permanent Education in the Field of Elections and National Institute of Justice, contributes to preventing electoral law violations.

At the same time, there is a problem with the enforcement of sanctions for electoral law violations that are established by the laws of Moldova. Elections bodies have the right to impose two types of sanctions on candidates: a public warning and motion to annul candidate's registration.

Recommendations:

1. To set a range of ascending sanctions for electoral law violations which can be applied by elections bodies in regards candidates (ranging from the public warning to annulment of candidate's registration).
2. To set internal party sanctions for electoral law violations which can be applied by political parties in regards candidates, such as public admonition or exclusion from party lists.

THE RIGHT TO VOTE OF IDPS, LABOUR MIGRANTS AND OTHER INTERNALLY MOBILE GROUPS OF CITIZENS

On the one hand, the Electoral Code of Moldova sets rather liberal regulations of the right to vote of mobile citizens. A voter (a Moldovan citizen who reached the age of 18 years old), whose location is different from the place of official registration, has a right to file an application on the change of location to local authorities no later than 30 days prior to Election Day.

At the same time, according to the interviewed Moldovan experts, the negative consequence of such regulations is a phenomenon of “electoral migration” during local elections, which implies the flow of citizens changing their place of official registration before elections, in order to change the voting outcome in certain electoral constituencies. As for the conflictive Trans-Dniester region, local elections initiated by the Moldovan state are not held there. There are certain limitations for the residents of the region to participate in Moldovan national parliamentary elections and referenda. Firstly, the number of special voting stations in Trans-Dniester region is not sufficient. Secondly, there are administrative barriers for the residents of Trans-Dniester region to reach the territory of Moldova before and during elections.

Recommendations:

1. To set clear regulations of the right to vote in local elections in order to prevent “electoral migration” before elections.
2. To lift the restriction on the number of special voting stations in the Trans-Dniester region.

Belarus



GENERAL ASSESSMENT OF THE ELECTORAL CODE

The Election Code of Belarus was adopted in 2000.¹ The main advantage of the Code is the fact that it regulates the elections both at the national and local levels. At the same time, the interviewed experts of Belarus point out several weaknesses of the Code. Firstly, the Code’s structure is rather complex, which makes it more difficult for ordinary citizens to use the Code. Secondly, due to the fact that certain provisions of the Code are rather vague and incomplete, the Central Elections Commission (CEC) has to adopt decrees that clarify the norms of the Code; however, such interpretations might be inconsistent with the laws of Belarus.

Thirdly, the Code does not regulate to the full extent such aspects of the electoral process as the rights of elections observers, formation of elections commissions, pre-elections campaigning, counting of votes. The amendments to the Code were not elaborated as a result of a wide public discussion. It is worthy of note that since the time of its adoption, the opposition parties of Belarus, independent national experts, OSCE ODIHR, the European Union and the

¹ The Electoral Code of Belarus, [file:///C:/Users/%D0%9B%D0%B8%D0%B7%D0%B0/Downloads/Belarus%20Electoral%20Code%20consolidated_a_m_2011_eng%20\(1\).pdf](file:///C:/Users/%D0%9B%D0%B8%D0%B7%D0%B0/Downloads/Belarus%20Electoral%20Code%20consolidated_a_m_2011_eng%20(1).pdf)



Recommendations:

1. To launch a public discussion between the government, civil society, national experts and international organizations in regards the electoral legislation and ways of its improvement.
2. To provide real guarantees for the representation of competing political parties and candidates in elections commissions at all levels.

SCOS' PARTICIPATION IN THE ELECTORAL PROCESS

On the one hand, the Electoral Code of Belarus sets a rather simple accreditation procedure for elections observers from SCOs. Civic organizations have a right to nominate members of the elections commissions at all levels except for the CEC.

In practice, the registration procedure for SCOs is rather complicated. Despite the fact that the Code contains the list of the rights of elections observers, certain provisions are rather declarative and ineffective. For instance, the observer's right to be present during the counting of votes can be interpreted by the elections commissions as the right to be present in the building where votes are counted and to observe the counting from a distance. In general, the interviewed experts from Belarus pointed out the unwillingness of the states authorities, particularly the CEC to discuss the changes of the electoral laws with the civil society.

Relevant forms of SCOs' participation in the electoral process

The crucial form of SCOs' participation in the electoral process is civic elections observation. However, in Belarus, this form cannot fulfill its core purpose of civic control for two reasons: impeded registration of SCOs and declarative nature of civic observers' rights. In such a way, the extent of SCOs' participation in the electoral process is determined by the structurally low opportunities for SCOs within the existing political regime in Belarus.

Recommendations:

1. To simplify the registration procedure for SCOs.
2. To provide real guarantees for the declared rights of elections observers, particularly their access to the documentation of elections commissions and observation of voting count.
3. To launch a dialogue between the state authorities and civic organizations, which conduct elections observation, in regards the improvement of electoral laws and their enforcement.



PREVENTION AND REGULATION OF ELECTORAL LAW VIOLATIONS

According to the interviewed experts of Belarus, the legislative mechanisms of prevention and regulation of electoral law violations are rather ineffective. Although certain violations are criminalized, there are no precedents of bringing the violators to criminal responsibility. In practice, actions and inaction of elections commissions, as well as the outcome of elections cannot be challenged in a judicial proceeding. Actions and inactions of elections commissions cannot be challenged in CEC after elections, as elections commissions lose their legal capacity. Apart from this, there is no real civic control over the funding of pre-election campaigns.

Recommendations:

1. To set a mechanism of challenging actions and inaction of elections commissions in a judicial proceeding.
2. To set a mechanism of challenging elections outcome in a judicial proceeding.
3. To oblige the law-enforcement authorities to react and take appropriate measures in regards electoral law violations.
4. To prolong the term of legal capacity of elections commissions after elections.
- 5.

THE RIGHT TO VOTE OF LABOUR MIGRANTS AND OTHER INTERNALLY MOBILE GROUPS OF CITIZENS

The Electoral Code defines that voters are included in voters' lists in accordance with a place of their official registration or a place of their temporary residence.

Recommendations:

1. To establish a transparent procedure of the voters' lists formation.
2. To provide elections observers with the right to have access to voters' lists.
3. To review the criteria of inclusion to voters' lists and required documents for obtaining a ballot on Election Day.

Ukraine



GENERAL ASSESSMENT OF THE LAW “ON LOCAL ELECTIONS”

The Law of Ukraine “On Local Elections” came into effect in July 2015.¹ As for the strong points of this law, it envisages a second round of voting for cities with the population that equals to or is higher than 90 000 people. Despite the criticism of the electoral system, which the law sets for elections in multi-mandate constituencies, this proportional system allows to replace a deputy if he or she resigns without holding repeat elections. This electoral system can potentially reduce the scale of political corruption (selling and buying places in party lists), as mandates are distributed among those candidates, who receive the biggest number of votes in a constituency. The law contains a provision on the 30-percent gender quota, which applies to party lists, but does not envisage any responsibility or sanctions for its violation.

At the same time, the law on local elections has certain limitations and deficiencies. In general, it is rather complex and contains certain discrepancies within the law, as well as with other laws of Ukraine. Certain provisions of the law are incomplete and contain legislative “gaps”, which resulted in the fact that during the local elections of 25 October the Central Elections Commission (CEC) had to take up a law-making role issuing decrees explaining the norms of the law.

The proportional electoral system applied to elections in multi-mandate constituencies was publicly presented as “open-list”, however, in practice, voters cannot choose candidates from a party list. Political parties nominate one candidate per each constituency; therefore, voting ballots contain a list of political parties with one corresponding candidate. Additionally, the electoral system has two effects on popular representation of a territorial community in local councils: overrepresentation and underrepresentation of certain constituencies.

The law on local elections does not contain specific rules of the constituency formation: it does not specify the allowed deviation from the average number of voters in electoral constituencies. Apart from this, there are certain inconsistencies in the regulations of candidates’ registration by elections commissions and defining elections outcome.

¹ The Law of Ukraine “On Local Elections” (Ukrainian version), <http://zakon0.rada.gov.ua/laws/show/595-19>



Recommendations:

1. To adopt an open-list proportional representation system for electing councils at oblast, regional and city levels (with population over 90 000 people).
2. To set specific regulations for constituency formation that would set the allowed deviation in the average number of voters in electoral constituencies.
3. To set judicial consequences and sanctions for violating the gender representation in party lists.
4. To adopt a compulsory requirement of educational training for potential elections commissions' members with a further accreditation procedure.
5. To initiate a public and expert discussion of the drafts of the electoral code that would set unified electoral procedures for all types of elections.

SCO'S PARTICIPATION IN THE ELECTORAL PROCESS

The law on local elections provides a sufficient list of rights for elections observers. The law provides a rather simple accreditation procedure for the elections observers representing civic organizations. In practice, there are certain problems with guaranteeing the rights of elections observers. For instance, their access to the building, where elections commissions are located, at the time when commissions do not hold meetings, is not regulated. The law states that the basis for depriving an observer of his or her right to be present at elections commissions' meetings and in elections commissions' buildings on Elections Day is "interference in the work of an elections commission" or observer's actions which infringe the electoral process, however, such wording is rather vague and needs to be specified.

RELEVANT FORMS OF SCOS' PARTICIPATION IN THE ELECTORAL PROCESS

The principal form of SCOs' participation in the electoral process in Ukraine, which requires legislative regulation, is elections observation. According to the interviewed experts, other forms, such as voters' education and training of elections commissions' members, are crucial, but do not necessarily require legislative regulation. It is worthy of note that all interviewed experts agreed that the extension of SCOs' participation in the electoral process through the right to nominate members of elections commissions is premature for Ukraine. By providing such right to SCOs there is a risk that "fake" SCOs will be used to influence the electoral process at the level of elections commissions. The manipulation and potential pressure on SCOs could be seen as an additional destabilizing factor of the electoral process in Ukraine.



Recommendations:

1. To regulate the access of elections observers to elections commissions during working hours (along with the presence at commissions' meetings) not requiring a permission or invitation.
2. To regulate the access of elections observers to the documentation of elections commissions (along with commissions' decisions and minutes) allowing observers to make an inquiry.
3. To clarify the basis for depriving elections observers of their status, such as "interference in the work of an elections commission" and observers' actions which infringe the electoral process.
4. To allow a centralized accreditation of elections observers from civic organizations in CEC with an option of accreditation in a specific territorial elections commission.


PREVENTION AND REGULATION OF ELECTORAL LAW VIOLATIONS

The laws of Ukraine do not regulate the whole range of electoral law violations. At the same time, the appliance of the existing regulations is rather problematic, as electoral law violators are rarely brought to administrative or criminal responsibility. Ukrainian laws do not regulate indirect vote buying. Apart from this, the law on local elections establishes a rather weak mechanism of control over the funding of political campaigns, which results in a fact that a substantial part of expenses for political campaigning remains "in the shadow". In October 2015, the Ukrainian parliament adopted a law on amending certain laws of Ukraine concerning the prevention and counteraction to political corruption, particularly in regards the funding of political campaigns.

The legal provisions, which guarantee equal opportunities for political parties and candidates, is rather declarative, specifically in regards media campaigning. The existing regulations of political advertisement remain rather weak, while the problem of "djinsa" (paid media materials in favour or against certain actors of the electoral process) is unregulated.

Recommendations:

1. To adopt detailed legal definitions of the following notions: "vote buying", "indirect vote buying", "djinsa".
2. To establish criminal responsibility for indirect vote buying.
3. To regulate and establish responsibility for early political campaigning and the use of "djinsa".
4. To consider establishing a legal ban on outdoor and media political advertisement.

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5. To adopt appropriate legal changes in accordance with the Law of Ukraine “On amending certain laws of Ukraine concerning the prevention and counteraction to political corruption” in order to reduce the scale of political corruption in the funding of political campaigns.
 6. To elaborate practical commentaries and guidelines for judges and investigators on the electoral laws, Criminal and Administrative Violations Codes of Ukraine.

THE RIGHT TO VOTE OF IDPS, LABOUR MIGRANTS AND OTHER INTERNALLY MOBILE GROUPS OF CITIZENS

The law on local elections provides the right to vote to the members of territorial communities, whose membership can be proven by the official registration that is indicated in a passport. In practice, internally displaced persons, labour migrants and other groups of mobile citizens do not have a right to vote in a territorial community, where they live at the time of local elections, if the place of their official registration is in a different territorial community. The risk factor of such regulation is the phenomenon of “electoral tourism”, which implies an organized change of official registration place by a number of citizens for the period of local elections.

It is worthy of note that according to Article 8 of the Law of Ukraine “On Guaranteeing the Right and Freedom of Internally Displaced Persons”, IDPs exercise their right to vote in presidential, parliamentary, local elections and referenda through changing the place of their voting without changing the place of their official registration.¹ The right to change the place of voting without changing the place of official registration is provided to all voters with a right to vote in respective elections and referenda in the Law of Ukraine “On the State Voters Registry”.²

Recommendations:

1. To review and liberalize the criteria of membership in territorial communities. To consider establishing such criteria as taxpaying, living period within a community, certificate from the place of work.
2. To simplify the procedure of changing the place of voting for the period of elections upon the official motion from a voter.
3. To recognize the IDP’s certificate as the legal basis for changing the place of voting.

¹ The Law of Ukraine “On Guaranteeing the Right and Freedom of Internally Displaced Persons” (Ukrainian version) <http://zakon2.rada.gov.ua/laws/show/1706-18>

² The Law of Ukraine “On the State Voters Registry” (Ukrainian version), <http://zakon4.rada.gov.ua/laws/show/698-16>



Information about organization:

Donetsk regional organization of all-Ukrainian public organization "Committee of Voters of Ukraine" was founded on February 20, 1998 as an independent non-partisan organization. The key idea of the initiators of the foundation was to promote democratic reforms in the country through independent public monitoring of referendum, electoral process and public advocacy of legislative changes.

For 15 years of activity Donetsk regional organization of all-Ukrainian public organization "Committee of Voters of Ukraine" significantly expanded scope of expertise. Today organization is a key analytical, research and resource center of Donetsk region. It has significant experience in public advocacy, intersectoral cooperation, human rights protection and so on.

**Mission of organization is formation of Ukrainian state as a community
of self-sufficient citizens - owners of the country.**

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