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UKRAINE LOCAL ELECTION LAW ANALYSIS

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The Ukrainian parliament recently approved a new law pertaining to local elections scheduled for October 31, 2010. The law "On Elections of Deputies of the Verkhovna Rada of the Autonomous Republic of Crimea, Local Councils and Village, Settlement and City Mayors" ("the local election law") has raised concerns among domestic and international experts as well as some members of the Central Election Commission and opposition parties. At least one party has filed a petition with the Constitutional Court seeking an order from the Court declaring certain provisions of the Law to be unconstitutional. The Law includes numerous technical errors and confusing procedures. It limits the electoral potential for a number of newly established parties, including some that are now represented in the parliament, while creating apparent advantages for incumbent parties. Restrictions on new parties and independent candidates appear to be unreasonable in light of principles established by the Ukrainian constitution, as well as international obligations and commitments that Ukraine has undertaken.

The Law makes key changes to Ukraine's election law within 100 days of the election, contrary to principles set forth by the European Commission's Venice Commissionⁱ that discourage changing election-related legislation within a year prior to an election. It is important to note that the Law was drafted and adopted in a non-transparent manner and involved virtually no public debate. The draft was registered in the Rada (parliament) by the Party of Region's leadership on June 29 and was approved on July 10. Very few of the 1355 amendments reached the full Rada for consideration prior to the final vote. President Yanukovich signed the Law on July 27, 2010.

The following analysis highlights the most significant changes that will likely have the most direct impact on the quality and fairness of local elections in Ukraine. The following document does not purport to be an extensive analysis of the new Law.

Change in Party Registration Requirements

Under the new Law, only regional and local party branches that were registered more than one year before the election date are qualified to participate in the local election. In addition, the Law prohibits political parties from running as blocs. Only individual parties are eligible to run.

Practical implications

Rather than merely eliminating frivolous attempts to contest elections, the one year registration requirement will have a substantive and disproportionate effect on parties that are newer but have established popular bases. This includes Strong Ukraine (led by Serhiy Tyhypko who came in third in the first round of the January 2010 presidential election) and Front of Change (led by Arseniy Yatsenyuk, who came in fourth, earning seven percent of the vote), as well as Udar ("Kick"), (led by professional boxer Vitaliy Klytchko). Many of these parties' regional and local branches were registered in late 2009 and in 2010, which, under the new Law, disqualifies them from participating in the

October elections. This allows the governing Party of Regions (PoR) and other so-called “mature” parties (including the major opposition party, Batkivshchyna) to avoid competition with new and popular political organizations. These changes deprive citizens of political choices that have recently emerged, which subvert genuine election processes. They are in apparent conflict with Article 36 of the Ukrainian Constitution, which provides for equal rights for all organizations of citizens.

In the long term, banning blocs could be seen as a positive change that may encourage consolidation of the political landscape. In the short term, the effect will be to weaken the strongest opposition party, and to do so for the first election since the new government took office. The largest and most successful party bloc in Ukraine’s recent history, the Bloc of Yulia Tymoshenko (BYT), is also the largest oppositional grouping. It has a wide popular following and, if blocs were allowed to compete, would be well positioned in many of Ukraine’s localities.

These developments could be characterized as changing the legal framework to create restrictions on political competition and, thus, as a form of discrimination based on political opinion and as unreasonable denial of citizens’ rights to legitimate choices in the local elections.

The table below illustrates the disparate impact of the new changes on various political competitors.

Party Name	Number of local offices for which the party would be eligible to compete under the old law	Number of local offices for which the party would be eligible to compete under the new law	Percentage change in number of local offices for which the party would be eligible to compete
TRADITIONAL PARTIES			
Party of Regions	1,045	1,045	100%
Batkivshchyna	Around 800	Around 800	Almost 100%
People’s movement of Ukraine (RUKH)	770	681	88%
Reforms and Order	Around 1000	Around 1 000	Almost 100%
Svoboda (Tiahnybok)	471	407	86.41% (13.59)
NEWER PARTIES			
Strong Ukraina (Tyhypko)	1212	427	35.23% (64.77)
Front of Change (Yatsenyuk)	650	19	23.6%(76.4)
For Ukraine! (V.Kyrylenko)	408	199	48.77% (51.23)
Civil Position (Hrytsenko)	172	106	61.62% (38.38)

Change in Election Commissions - Territorial Commissions

Members of the Territorial Election Commissions (TECs) will be nominated by local branches of parties who are represented in parliament. In the past, TEC members could be nominated by any local party regardless of its national parliamentary presence. Precinct Election Commission members must be nominated by candidates and parties that are contesting the elections.

Practical implications

With the change in TEC composition, parties that are not necessarily represented at the local level will have the power to manage local elections. This could mean national political conflicts are projected inappropriately into disputes at the TECs. It could at a minimum lead to loss of confidence in the TECs by local participants in the electoral process.

Change in Central Election Commission's (CEC's) Authority

The CEC was given additional powers under the new Law, although the ability to exercise such powers may be limited due to the organizational ability and finances of the CEC.

Compared to the previous local election law, the CEC will have a greater role in ensuring adherence to and equal execution of the local election law. Decisions of the CEC are now binding on all subjects of the electoral process, including local governments, local councils and their officials, and associations of citizens, enterprises and institutions as well as territorial and precinct election commissions.

The CEC may also void the TECs' rulings and issue its own decisions, as well as certify local election results, should any TEC fail to act or make an illegal decision. In the previous Law the CEC had no role in certifying local election results.

Practical implications

These increased powers make it all the more important that the CEC's composition ensures its impartiality, as well as effectiveness, and that its work be transparent. In considering whether to void TEC decisions, some CEC members may be pressured or tempted to take political sides and make decisions in favor of one party over another. It is also possible that a politicized TEC would deliberately fail to act, turning certification of results or other decisions over to the CEC. There is no quorum requirement for TECs to function, making it easier for them to be 'hijacked' by one political party. CEC decertification of rulings by "hijacked" TECs could cause post-election integrity problems, while politically motivated CEC actions that overturn otherwise valid TEC rulings could raise questions about the legitimacy of some councils and mayors and even undermine trust in the overall election process.

Furthermore, with greater involvement in more than 24,000 elections, the CEC may postpone decisions or be more likely to make inadvertent errors given the high volume of activity it is now empowered to oversee.

Increasing Political Partisanship in Mayoral Offices

The Law would require mayoral candidates to be nominated by city branches of political parties. Self-nomination, previously allowed, is now impossible. Despite the strong recommendations of domestic political and civic leaders and international organizations, the Law calls for a majority voting system for mayors, meaning the candidate with a plurality wins, even if his percentage of the overall vote is small. A run-off system requiring 50 percent plus one vote support for one candidate was not introduced.

Practical implications

Self-nomination (independent candidatures) is called for in the Organization for Security and Cooperation in Europe (OSCE) Copenhagen Document (paragraph 7.5). The abolition of self-nomination by mayoral candidates represents a major departure from past practice in Ukraine. It undermines the local political bases of numerous successful, independently elected mayors, forcing them instead to ally with parties. In general this change will likely increase dependence of local elites on traditional political parties, including the national ruling party. The effect will be to restrict the choices of voters and the right of individual citizens to seek to be elected to public office.

Shortened Electoral Timelines

The Law decreases from 90 to 50 days the official electoral period, which encompasses candidate nomination, registration and campaigning. The period in which actual campaigning may occur is

reduced to three weeks. In addition, the Law shortens the timeframe for submission and consideration of election related complaints by election commissions and courts.

Practical implications

A three week campaign period favors incumbents and the national ruling party, which would have unlimited access to local and national media and other resources. Other parties and their candidates will have difficulties delivering their messages to voters in this short period and in light of constraints in the media environment. The nature of the campaign will likely be more heated, given the compressed campaign season and is likely to be based less on issues and ideas and more on sound bytes and candidates' personalities. Furthermore, the shorter period for submission of complaints and consideration of them by commissions and courts may leave many legitimate concerns unconsidered. This could impact election results and leave fraud unpunished.

Reducing Information to Voters

The Law abolishes the requirement that candidates submit their programs or platforms and pictures to the election commission as a part of registration process.

Practical implications

This change reduces opportunities for voters to receive information needed to make informed electoral choices. This presents a particular difficulty because voters will be asked to evaluate candidates in a large number of races. (Every voter will receive 6-7 ballots). The lack of information on candidates combined with the effects of a shortened campaign period will exacerbate the absence of political debate in Ukraine and risks yielding a campaign devoid of substance.

Domestic Observation

The new Law allows domestic non-partisan observers, which is a positive change from the previous local election law. Currently, domestic observers are present only in the Law on Election of People's Deputies of Ukraine (parliamentary election law). The Law, however, is vague, thus creating possibilities for arbitrary actions by officials and for imposition of unreasonable restrictions.

Practical implications

Compared to the parliamentary election law, the new local election law limits the rights of observers. Observers' rights have been described vaguely, which invites election commissioners' to interpret the Law freely and could lead to abuse. In addition, some important observer rights are not spelled out, making it easier for election commission members to exercise discretion to deny them. These include the right to receive the official protocols concerning the vote count and ballot transfer, as well as the right to observe mobile voting.

Furthermore, only nation-wide domestic organizations are permitted to observe. This excludes many groups that are regionally or locally based and that may be more knowledgeable about local conditions, which is particularly important for local elections. In practice, there are few nationwide non-partisan election monitoring groups in Ukraine. Moreover, the Ministry of Justice must certify each national group's charter before it can seek accreditation at the CEC. This could create more delays and make timely observation difficult, particularly observation of the campaign period.

The Law also fails to prescribe in any detail procedures for the CEC to accredit domestic observers, which raises possibilities for delay, confusion and abuse. In addition, the CEC is required to register each individual domestic and international election monitor; logistically this will be very difficult to do. Furthermore, the requirement undermines

freedom of association, because it creates a direct relationship between each individual monitor and the CEC, rather than between the monitoring organization and the CEC. Citizen organizations should be accredited by the CEC, and the organizations should take responsibility for the proper conduct of their monitors. Requiring each individual to apply for accreditation can have a chilling effect on citizen participation.

ⁱ The Commission, otherwise known as the European Commission for Democracy through Law, is the Council of Europe's advisory body on constitutional matters. Since its creation, the Venice Commission has been active in the electoral field, in particular, through the adoption of opinions on draft electoral legislation