

Challenges and Perspectives Concerning Election Reform at the Local Level in Ukraine

Executive Summary

Local elections in Ukraine took place October 31, 2010. Being the first under the Presidency of Victor Yanukovich, they were widely regarded as a test for the new administration's commitment to democratic reform and the principle of democratic self-government. For several reasons, the elections failed to meet these expectations and can be regarded a step backwards in Ukraine's reform process. This paper examines the shortcomings of the electoral process and how they were re-enforced by the current structure of local self-governance in Ukraine. Recommendations focus on the need for a new, comprehensive electoral code and on necessary structural changes in local self-governance with the aim to ensure a functioning system of democratic checks and balances as well as just and equal representation on all levels of state administration.

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Introduction to the problems of Ukrainian self-government

Constitutionally, Ukraine is a unitarian, centralised state. The territory of Ukraine consists of 24 regions (oblast') and the autonomous region of Crimea, with the cities of Kyiv and Sevastopol enjoying special status. These constitute the highest level of the Ukrainian state structure. The central government in Kyiv has a different scope of influence on each of these administrative units. There are three major subdivisions – region (oblast), district (rayon) and municipality (cities, villages and settlements); thus, Ukraine resembles other unitarian states in Europe, like Poland or France. Ukraine joined the European Charter of Local Self-Government in 1997. However, Ukraine has failed to reform its administrative-territorial structure after the end of the Soviet Union, so old structures persist – with the effect that, at each administrative level, different types of administrative bodies with different competencies co-exist. In addition, the borders of today's territorial administrative units do not correspond to current economic and demographic parameters, resulting in units at the municipal level that are not viable (Morgner 2010, 164) and objectionable reasons for the unequal provision of public services to the local population. The majority of communities cannot provide the full range of public services, not due to legal restrictions, but for lack of resources – financial, human, etc. (Nyikos et al. 2008, 13).

The need for reform of local self-governance has been broadly recognised within the country, including the current government of President Yanukovich and Prime Minister Azarov. In his Presidential Programme 'Strong society, competitive economy, effective state', President Yanukovich announced a 'reform of inter-budgetary fiscal relations closely connected with the reform of local self-government and with the administrative-territorial reform aiming at the creation of a system of administrative-territorial units which are able to carry out their tasks and functions' (Komitet 2010, p.20).

Without adequate resources and clear competencies, local authorities are transformed into pure symbols of self-governance without any political substance, and the institutions of democratic elections lose their credibility (Krasnop'orov, O. 2010). However, the opposite is true as well – without democratic legitimacy, without democratic checks and balances, even well-structured bodies of self-government will not be able to function properly. The success of the envisaged reform will depend on the political will to decentralise, to shift power from the central to the regional level and to provide for real democratic representation. In this context, it is worth taking a closer look at the recent local elections in Ukraine.

The democratic legitimacy of local authorities: the Ukrainian local elections of 2010

The Ukrainian local elections took place on 31 October 2010. They were the first elections under newly-elected president Victor Yanukovich and the government of Prime Minister Mykola Azarov, primarily based on the President's *Party of Regions* (PR). Given the strong centralist and authoritarian tendencies observed, the elections were seen as a test for the new administration's commitment to democratic reform and the principle of democratic self-government. President Viktor Yanukovich repeatedly declared that the elections would be democratic and abuses of state resources and violations of the law would not be tolerated. He further promised that state authorities would be held accountable for organising a fair and transparent electoral process (National Democratic Institute for International Affairs/NDI 2010 [a]).

However, both the voting date and the election law became objects of political speculation under conditions of an unclear legal and constitutional situation. Originally, the local elections were scheduled to take place on 30 May 2010. Immediately after the presidential elections, Parliament, the *Verkhovna Rada*, cancelled the original election date of without set-

ting a new one. Ukrainian members of Parliament belonging to the leadership of the ruling *Party of Regions* (PR), as well as those belonging to the strongest opposition *Bloc Yulia Tymoshenko*, suggested scheduling local elections for spring 2011. However, in late May 2010 President Viktor Yanukovich declared that local elections should take place in the autumn of 2010. Moreover, the President announced the introduction of a ‘mixed’ majority proportional voting system, replacing the proportional system with closed party lists (foreseen by the previous law from city to oblast’ level, while village and settlement councils were elected by majority vote system).

The political speculation surrounding the election date as well as the change of the election system by orders ‘from above’ deepened the atmosphere of mistrust between different political camps and within civil society: First, the President scheduled the new election date only after the central authorities had replaced almost all key positions in the local and regional state administrations, presumably (as noted by local observers) in order to assure the ruling party’s control over the election process. Second, as a result of the President’s late decision, there was little time left for the adoption of a new election law as well as the preparation of the election campaign (OPORA 2010, 3). In addition, the election of local authorities and the debate about the legal framework were strongly overshadowed by motives of power politics dominating the political struggle at the national level.

Subsequently, this atmosphere of mistrust persisted during the whole election process, according to domestic and international observers. The Ukrainian Civic Network *OPORA* (‘Support’), which constitutes – together with the Committee of the Voters of Ukraine (*Komitet Vyborciv Ukraïny/CVU*) – the largest independent election observation organisation in Ukraine, reported that the local elections did not meet European standards concerning fair, transparent and professionally organised elections (OPORA 2010 [d], p. 1). According to *OPORA*, important criteria and principles defined in the documents of the *European Commission for Democracy through Law (Venice Commission)*, the *Copenhagen Conference*, as well as the *OSCE* were violated during the election campaign and on the day of elections, if they had been addressed in the new election law at all.

The *Party of Regions* won clear majorities in most regions and big cities throughout Ukraine, with the exception of the west of the country. Especially in central Ukraine, traditionally a stronghold of Tymoshenko’s *Batkivshchyna (Fatherland Party)*, the *Party of Regions* attained majorities in the regional (oblast’) councils through those candidates who won the one-seat constituency.

1. *The legal framework of the elections*

The *Kharkiv Human Rights Protection Group (Kharkivs’ka Pravozakhisna Hrupa/KPH)* and the *Laboratory of Legislative Initiatives (Laboratorija Zakonodavchyykh Inicijativ/LZI)* found that the legal and political framework of the local elections was the main source of disregard for and violations of voters’ rights, and that the violations were rooted in the adoption of the new election legislation of summer 2010. First of all, there was the hasty introduction of fundamental changes to the election system and electoral procedure, as well as to the institutional framework of the election’s organisation wrought by the new law *On Elections of Deputies of the Verkhovna Rada of the Autonomous Republic of Crimea, Local Councils and Village, Settlement and City Mayors* (short: local election law) by the ruling *Party of Regions*. The draft of the law was registered in Parliament by the pro-government *Party of Regions* on 29 June and was already approved on 10 July without due discussion with representatives of Ukrainian self-governments and ignoring the numerous amendments which reached the *plenum* before the final vote. President Yanukovich signed the Law on 27 July 2010 (Zakon 2010). Al-

though the law was sharply criticised by domestic and international experts, Parliament organised neither parliamentary hearings nor public debates.

Such a non-transparent and hurried implementation of an election law establishing new ‘rules of the game’ is inconsistent with the *Code of good practice in electoral matters* of the *European Commission for Democracy through Law* (Venice Commission), which declares that fundamental elements of electoral law (e.g., the electoral system) ‘should not be open to amendment less than one year before an election’ (Venice Commission 2002, p. 10, No. II.2 b). Additionally, the official electoral period, which encompasses candidate nomination, registration and campaigning, was shortened from 90 to 50 days. Thus, the period in which campaigning could take place was reduced to three weeks. Moreover, the law shortens the timeframe for submission and consideration of election-related complaints by election commissions and courts from five to two days after the day of election. That has the effect of impeding complaints about the results of voting because it is very difficult to collect the necessary documents within two days (NDI 2010, p. 3-4). According to a US National Democratic Institute (NDI) analysis, non-transparent implementation of new rules for electoral processes and a three week campaign ‘favors incumbents and the national ruling party, which would have unlimited access to local and national media’ and – as is the case in Ukraine – other administrative resources. Other parties and their candidates had to popularise their messages and programmes during a very short period.

But the shortening of timelines was not the only obstacle for opposition to organise a full-fledged campaign: The new law does not permit political blocs to take part in elections. In principle, this norm can be seen as a positive change, because it provides for transparency and the consolidation of the political landscape in the future. In the past, various parties had united in numerous blocs in Ukraine, which made it difficult for the voter to know for whom exactly one votes. Decisions to form a bloc were often made at the central level, neglecting the interests of local party organisations (Korniychuk, A. et al. 2010, p.7). However, in the given situation the norm introduced shortly before the campaign significantly weakened the *Bloc Yulia Tymoshenko* (Byut), the strongest opposition movement in Ukraine. As a result, only the biggest party within the bloc, the All-Ukrainian Union, ‘Fatherland’, could participate in the elections and had, in addition, to spend much time reorganising its branding and campaign.

The law on local elections also changed the traditional system for establishing the positions of the parties on the ballot sheets. Earlier, the positions were determined through a draw. The new election law prescribed a chronological order: The party coming first to the Territorial Election Commission gets the first place on the ballot. In fact, nearly everywhere, the *Party of Regions* occupied the first place.

Finally, the law did not clearly define important elements of electoral procedure (e.g., oversight of ballot security and printing, vote counting, transmission of the results). This made the process open to forgery.

Under pressure from the Ukrainian opposition and international organisations, the coalition introduced some amendments to the law; for example, the restriction preventing the participation of parties not registered more than a year before the elections was removed. However, serious problems remained. The non-transparent implementation of the law deepened the scepticism of the opposition forces as to whether both the government and the President would guarantee fair and free elections.

2. *Institutional framework: the legal basis of the Election commissions*

2.1 Central Election Commission (CEC)

According to the Ukrainian law ‘On the Central Election Commission’, the Central Election Commission (Central’na Vyborcha Komisija/CEC) has been installed to supervise and conduct presidential, parliamentary, and local elections in Ukraine, as well as national and local referendums. It issues mandatory decrees which can be appealed to the Supreme Court of Ukraine or the High Administrative Court of Ukraine. The commission consists of 15 members who, after the Ukrainian President has submitted his candidates taking into account the proposals of each parliamentary faction, are appointed by the *Verkhovna Rada* for seven years. As a result, the candidates who are nominated by the parties forming the ruling coalition have the majority in the CEC.

According to the new local election law, the CEC was provided with additional powers compared to the previous local election law. Article 24 No. 1, (2) states that decisions of the CEC are now ‘binding for 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 (TEC) and precinct election commissions (PEC)’. In contrast to the previous law, according to article 24, No. 1, (5) and (6), the CEC may void TEC’s ruling and issue its own, as well as certify local election results should any TEC either fail to act or make an illegal decision (Article 24; NDI 2010, p. 3). The new law (article 24, No. 1, [5]) even enables the CEC to make decisions ‘on its own initiative’ if the decision of the election commission is illegal. However, this norm *does not oblige* the CEC to revise the TEC’s decision. According to domestic experts and observers, the CEC mostly *reacted* if the TEC remained inactive or refused to carry out court decisions which have satisfied the complaints of local candidates and voters about a TEC decision (Aivazovs’ka, O. 2011; Kohut, I. 2011). But even in cases when TECs did not carry out or ignored the appeals decision of the courts, the CEC reacted only in single cases (Aivazovs’ka, O. 2011).¹ Despite its additional powers, the CEC remained passive during the whole electoral process.² Against the background of numerous questionable and controversial decisions by the TECs during the local elections as well as the passivity of courts in today’s Ukraine, Ukrainian observers stated that the CEC could have carried out its arbitral functions more actively (OPORA 2010, p. 4-5; OPORA 2010a, p. 3-4; Aivazovs’ka, O. 2011).

In the case of elections at the national level, the CEC has to publish important information about the electoral process and present the information on its homepage. In the case of local elections, the peculiarity and complexity of the electoral campaign was predetermined by the fact that 23,500 elections of city mayors, heads of villages and settlements as well as local and regional councils took place simultaneously all over the country. The complexity of the elections would have required a systematic collection and presentation of all data relevant for the election process, starting from information about the candidates and parties as well as their programmes and finishing with the permanent publication of the results of all elections.

¹ According to Olha Aivazovska, head of the civil network OPORA, the passive behavior of the CEC was already observed during the presidential elections of 2010.

² According to Ukrainian experts, in the future the CEC should more actively carry out its arbitral functions: in an improved version of the election law the CEC should be obliged to make decisions ‘on its own initiative’ if the TEC made illegal decisions or ignored court decisions.

Unhindered access to information for voters, candidates and journalists would have been necessary to guarantee a transparent electoral process.

As with local elections in the past, the CEC was not obliged to present that information. The law does not require that the TECs send protocols with the election results (or copies of them) to the CEC (Vedernykova, I. 2010).³ The results were presented on the CEC's homepage only after a long delay, at the beginning of February 2011. Due to the lack of centralised information, it was difficult for national journalists and mass media to obtain official information about provisional and final results and to inform the public about the elections. The public depended on the Internet newspaper *Ukrains'ka Pravda*, which published the non-official results on its homepage (Ukrains'ka Pravda 2010). Some Oblast' administrations delivered results to journalists if requested, but some did not. In general, there was no broadcasting body in the regions which systematically provided voters, candidates, observers and journalists with information about the electoral process (Vedernykova, I. 2011).⁴ This weakened public control of the elections and made it difficult for civil society to critically examine the electoral process as well as the political debates it provoked (Vedernykova 2010 [a]).⁵

2.2. Territorial Election Commissions (TECs)

Because the CEC did not extensively use its additional powers given by the new law, the Territorial Election Commissions (TECs) had the main responsibility of organising the local elections, supported by the Precinct Election Commissions (PECs) at the local level. This paper focuses especially on the formation and composition of the TECs, which became one of the most controversial issues of the electoral process.

The procedure of the formation of the TECs is described in article 22 of the new election law. In general, the article does not precisely define the formation of the TECs and their executive positions and leaves room for speculation.⁶ The final decision about the composition of the TECs is made by the CEC.

Each TEC has to consist of at least nine and up to 18 members at most. According to article 22 No. 1 of the local election law, each local branch of a party or bloc which forms a faction in national Parliament can receive a maximum of three seats in each TEC. Together, they can attain 15 seats in each TEC. A close reading of the amended law allows for the conclusion that the three parties of the ruling coalition gain nine seats and thus half of all seats, leaving at best six seats for the two opposition blocs, a conclusion strengthened when taking into account that the CEC, which is dominated by the ruling coalition, makes the final decision about the composition of the TECs. However, the law did not fully clarify whether each party of a bloc can apply for seats in the TEC. In principle, with nine parties forming the op-

³ The members the CEC told journalists that they are also unsatisfied with the fact that the role of the CEC as provider of the most important information (publication of election results) is not mentioned and defined.

⁴ According to Ukrainian journalist Inna Verdenykova (Vedernykova, I. 2011), a specialist in issues of self-governance in Ukraine, at least the Oblast' Parliaments sent some information on the electoral process to the CEC during the local elections of 2006. In 2010 the CEC either did not require or did not receive such information from the Oblast' Parliaments at all.

⁵ See the recommendation of OSCE/ODIHR to establish 'an independent public broadcaster with sustainable funding' which 'could help improving the media environment and ensure voters have access to objective and unbiased information about candidates' (OSCE/ODIHR 2010).

⁶ The law merely states that candidates for the TEC are selected based upon their experience working on election and referendum commissions. The applications of the parties contained relatively brief information about their experience and the vague criteria sometimes led to partial decisions: According to observers of the Committee of Voters in Ukraine for Cherkassy Oblast' about 80% of candidates from the opposition parties to the district election committees were denied TEC membership on grounds of their lack of experience (Belyi 2010, p. 16). Additionally, during meetings of the CEC to approve the final TEC composition, the majority of the CEC could refuse the candidates nominated by parties and replace them with their 'own' candidates.

position bloc *Our Ukraine*, such an interpretation could result in a TEC composition where the coalition parties would not necessarily dominate (Vedernykova, I. 2010 [b]).⁷

Finally, the CEC, which generally remained passive during the whole electoral process, clarified the rules defining the proportional composition of the TEC: According to the CEC decision of 10 September 2010 (CEC 2010), three seats were given to each of the two parties who formed a single faction in the parliament (PR and CPU/coalition) as well as to the Bloc Lytvyna (coalition) and the two opposition blocs (*Blok Yulia Tymoshenko*, *Our Ukraine*). The three seats left could be allocated to non-parliamentary parties. So the CEC did not resolve the contradictions of the selection process and only served to further entrench the ruling coalition.

According to article 22 No 2 (3) of the amended law, non-parliamentary parties received the right to nominate candidates for the TEC. A public lottery was held to determine the three seats in the TECs to be given to these parties (NDI/IFES 2010, p.11). Due to time and financial constraints, only one lottery was held by the CEC. As a result of the draw, parties were ranked 1-109. The single lottery favoured the parties who fared well in this one draw and handicapped those who came at the bottom of the list. Indeed, smaller parties not registered in the national Parliament could nominate a candidate (NDI/IFES 2010, p. 11). However, the disproportional composition of the TECs favouring the ruling coalition was not balanced by the lottery because only in very rare cases did the opposition obtain additional seats in the TEC.

The CEC's relatively free selection of TEC members without solid criteria created additional disadvantages for political blocs and for the opposition in particular. Concerning the nomination of candidates, the *Tymoshenko Bloc* and the bloc *Our Ukraine – People Self Defence* were faced with fierce competition for TEC seats among the parties of their blocs. Finally, the CEC decided to which parties of these blocs the seats were allocated. Because of the lack of specific instruction in deciding which members of the blocs should be chosen (e.g., equal representation of different parties), the CEC sometimes made strange decisions (NDI/IFES 2010, p. 10). For example, in the case of the TEC formation in Kherson, the CEC made the unexpected decision of delivering the seats to the *Ukrainian Social Democratic Party* (USDP) on the *Batkyvshchyna* quota, although the party had not been active in that region at all. Moreover, according to USDP leaders, the party did not nominate any candidate. Thus, representation of parties rooted in the region (and of the opposition party *Batkyvshchyna* in particular) was weakened during the electoral process (OPORA 2010 [b]).

The appointment process of executive members to the local commissions is of high importance for the electoral process. TEC executive positions (heads, deputies, secretaries) take responsibility for organising the elections and the voting process and officially announce the results of local elections for the coming five years (OPORA 2010 [b], p. 2). The leadership of TECs is appointed by the CEC. But clear and solid criteria for selection is not provided with by the law.

For example, criteria safeguarding proportionality among the various political parties are not addressed (Korniyshuk, A. et al. 2010, p. 8), and 'this has left the door open for a highly subjective process of selection, one that ignores any concept of proportionality between the parties comprising the Territorial Election Commission and contesting the election (NDI/IFES 2010, p. 11).' According to the CEC decision, 669 TECs were formed for the Ukrainian local elections at all levels. The clear majority of the members of TECs and PECs belonged to the ruling parliamentary coalition. The coalition also attained majority membership of TECs as well as 1,042 of the TECs' executive positions (head, deputy head and secretary) and took the majority of leadership positions in the TEC. The PR obtained the majority of

⁷ Here the contradiction within in the new election law is obvious: According to the law, blocs are seen as a basis for distributing seats to the TEC, yet they are prohibited from nominating their candidates in local elections (NDI/IFES 2010, p. 10).

TEC head positions with 210 seats, with their partners in the governing coalition obtaining 99 (People's Party) and 55 (CPU) seats, respectively. The leading opposition party *Batkivshchyna* attained 108 and *Our Ukraine*, the second party in the national democratic camp, attained 45 seats. The *Ukrainian Social Democratic Party* (USDP) captured 31 seats. The competition for seats in the TEC was fierce; however, almost half of all TECs have less than 18 members. Thus, the unclear legislation led to an unequal distribution of TEC leadership positions among the competing political forces. The opposition parties and parties which are not registered in the current Parliament were underrepresented in the TEC (OPORA 2010 [b], 2).

Except for the non-transparent selection of TEC members, there are other aspects of the law which put the equality of chances for all competitors in question. According to article 27 No. 4 (first sentence), a session of a TEC is generally authorised to make decisions if more than half of the members take part in the session, in contrast with the previous law on election days, where only three members were needed for a quorum (Korniychuk, A. et al. 2010, p. 9). Against the background of the non-balanced composition of the TECs (and the leadership positions in particular), the risk of potential abuse seems clear: For example, if the members nominated by the ruling party simply do not inform the other members about the time of the session, it is easy to make arbitrary decisions. This mostly favoured the ruling party (Vedernykova, I. 2011).⁸

Another important task carried out by the TEC is the transparent formation of electoral districts (single seat/single-mandate constituencies), because the guarantee of equal starting conditions also depends on the balanced mapping of constituencies. Single-mandate constituencies appeared only ten days after the local electoral process had started. So the Ukrainian TECs had very little time to propose the mapping of the districts. In general, TECs are not able to carry out this amount of work in a few days. Given the partiality of the election commissions, there is a risk that districts are hurriedly and non-transparently established and that one party controls the district mapping. This leads to non-proportional mapping of districts in favour of one political faction. Moreover, due to the short timelines, territorial changes in the single-mandate constituency render the candidate's past legacy in the area useless and discriminate against the candidate's election campaign (Korniychuk, A. et al. 2010, p. 9).⁹ Additionally, the short time allotted for mapping districts limits an important advantage of the majority vote system: the balanced representation of all areas and their voters in an administrative-territorial unit (e.g. *Rayon* and *Oblast*).

The PECs formed by the TECs often encountered similar problems. The PECs were formed according to close deadlines and without clear criteria for the selection of candidates. The imbalance of the representation of political parties in the PECs was even greater than in the TECs. The shortcomings in the process of the PECs' formation negatively affected the adequate representation of locals in the PEC:

In large settlements, where parties submitted a significant number of candidates for PEC membership, TECs selected candidates from little known and sometimes inactive parties, and at the time declined candidates of parties that participate in elections on a consistent basis. In smaller settlements and villages, TEC chairpersons often proposed candidates for PEC membership, because the number of candidates nominated parties was not sufficient (OPORA 2010 [e], p. 3).¹⁰

⁸ I am grateful for the remarks and recommendations concerning the electoral process and election law I was sent by Inna Verdenykova, ZN, 19.2.2011.

⁹ Due to the non-proportional mapping of districts in Doneck region, candidates elected by the majority system represented very different numbers of voters, which provoked protests among parties and observers (Korniychuk 2010).

¹⁰ Ten per cent of all PEC members were selected by a TEC chairman because the parties did not nominate a sufficient number of candidates to fill the PEC quorum.

In some cases PEC members were not even registered voters in the precinct in which they were nominated.¹¹

OSCE standards call for the independence of election commissions, which is ensured by their formation on the basis of clear criteria and political balance within the commissions. During the Ukrainian local elections, there was a great lack of balance in the TECs and PECs; unclear criteria for appointing the leadership positions led to groundless advantages for the governing parties in the executive bodies of the TECs and PECs (OPORA 2010 [d], p. 1).

3. *Local Elections and Self-Governance*

3.1 **The electoral system in the local elections of 2010**

One of the most important issues of the debate on election law is the choice of the electoral system. In Ukraine, the question of the electoral system is difficult, because the country still has not made a final decision about its type of political system (Parliamentary-Presidential versus Presidential-Parliamentary). Since the political reforms of 2004, deputies to the councils of settlements and villages as well as the city mayor had been elected by the proportional system with closed party lists. The paper ballot named only the first five candidates nominated by the conference of the local branch of the party. Voters had no possibility of influencing the position of the candidates on the party list. Critics contended that the political parties often presented candidates who did not care about the interests of a special region. Ukrainian politicians primarily from the coalition argued that the proportional system ruined the relationship between voter and candidate. Politicians from the ruling coalition often justified the return to the majority vote system (with one-seat districts) according to the preferences of the majority of Ukrainians for the majority vote system. An opinion poll conducted by the *Kyiv International Institute of Sociology (Kyivs'kyi Mizhnarodnii Instytut Sociologii/KMIS)* found that 39.3% of those polled 'fully support' and 31.6% 'rather support' the election of the majority of the deputies to local councils by the majority vote system 'when they vote for concrete candidates', while maintaining that some of the deputies should be elected by the proportional system. Obviously, the Ukrainian voters have candidates in mind who are familiar with the region and not sent by the central party organisation 'from above' to a province in which they are in fact not interested. But the opinion polls were flawed because the Ukrainians were not asked precisely which types among the different systems (e.g., the proportional system with open lists) they preferred.

The system of local government institutions in Ukraine is extremely complex, with different levels of councils being elected at the level of oblast' (region), Autonomous Region of Crimea, rayon (district), city, city district, town and village. The voter has to elect deputies to the councils of all the levels mentioned above as well as mayors at many levels of local government. The electoral systems differ depending on the local level: According to article 2 of the local election law, the deputies to the councils of villages and settlements as well as heads of village and settlement councils and the city mayors are elected solely by the majority vote system in single member constituencies. The candidate who gets the relative majority of the votes is elected. The deputies to the councils of the region (Oblast'), district (rayon) and cities as well as city districts and the candidates to the deputies of the Parliament (*Verkhovna Rada*) of the Autonomous Republic of Crimea are elected through a parallel ('mixed') electoral system, with half of the members elected from single member constituencies and the other half from a closed-list proportional system. The return to the 'mixed system' which was

¹¹ For example, in Volyn region residents of neighbouring districts were appointed PEC members (PORA 2010e., 3).

already in practice during the presidency of Leonid Kuchma was one of the fundamental changes in the new election law (NDI/IFES 2010, p. 8).

Mainly the representatives of the ruling coalition supported the introduction of the 'mixed system'. They argue that this system strengthens the relationship between the voter and the candidate as well as the identification of the candidate with the region or community. However, the importance of the change of the electoral system goes far beyond the local elections, because from the ruling coalition's point of view the mixed system as described in the new local election law also should be applied to parliamentary elections in 2012.

3.2 The combination of the proportional system and majority vote

The 'mixed system' is the combination of two almost incompatible electoral systems which fulfil different functions. For example, the majority vote system fulfils representative functions and is able to serve the personalisation of politics. The proportional system mainly serves the consolidation of the party landscape and can better represent the ideological and political orientations of the society. The effectiveness of each of these systems depends on the local level to which they are applied. Here I will argue that the special form of combination of these systems which was adopted by the Ukrainian Parliament does not fulfil the functions mentioned by supporters but rather leads to further concentration of political parties and non-transparent candidacies.

First, concerning the proportional system, the closed lists remain. Second, candidates elected by the majority vote system can only be nominated by the local party organisations, while self-nomination of candidates is no longer possible. In contrast with the previous law, independent candidacy at the lowest levels (candidacy to the deputies of councils of villages and settlements) has been excluded. Candidates for city mayors, one of the most important positions in the system of self-governance, must be nominated by the party, too. That does not mean that candidates for councils and mayors need to become a member of a party; however, they will present themselves as loyal to the nominating party, depending heavily on the party's material and political support. The liquidation of independent candidacy (except for settlements and villages) stands in contrast to a tradition of successful independent mayoral candidacies in post-Soviet Ukraine and weakens the legitimacy of self-governance in the regions (NDI/IFES 2010, p. 9).

In general, the liquidation of self-nomination limits the rights of the voters guaranteed in international documents. That is especially true for Ukraine, where membership in parties is not very popular. The restriction of the right to stand for office as well as the restriction on independent candidacy contradicts international standards of the United Nations Human Rights Committee. The OSCE's Copenhagen document and its 'Existing Commitments for Democratic Elections in OSCE Participating States' require the state to ensure the right of persons to seek public office 'individually or as representatives of political parties ... without discrimination, (NDI/IFES 2010, p. 9).

In the special political context of today's Ukraine, the type of combination of proportional system and majority vote adopted in the local election law seems to mainly correspond with the interests of the ruling party, for two reasons. On the one hand, the *Party of Regions* received high ratings (30-40%) in recent years and has become the strongest party in Ukraine. At the same time, the most important opposition blocs – Bloc Yulia Tymoshenko' and Tymoshenko's party 'Batkyvshchina (Byut)' ('Fatherland'), as well as the bloc 'Our Ukraine-National self-defense' – were hit hard by their defeat in the last presidential elections and were undergoing a phase of disintegration. The imbalance between the main political forces was fostered by the exclusion of party blocs from the election process.

On the other hand, the strong centralism of Ukraine's political system, further strengthened by the current state leadership, with its unclear relationships between the region-

al powers (local state administration) and the bodies of local self governance, favours the ruling party. In contrast to the three last election campaigns in Ukraine after 2004, the local elections of 2010 took place at a time when the regional power (Rayon and Oblast' State administration) were concentrated in the hands of the *Party of Regions*. Ukrainian municipalities (e.g., cities) depend on the financial transfers delivered by the oblast' state administration, the head of which (governor) is appointed by the President. Additionally, competencies of the bodies of self-governance on the one hand and the local state administrations on the other hand often overlap, so that local state administrations are able to interfere in the affairs of cities. Against this background it was easy for the local state administration to pressure mayors in office. Many city mayors who already have been in office as independents or belonged to opposition parties went over to the *Party of Regions*. Only well-known mayors of big cities in regions not representing a stronghold of the *Party of Regions* could resist. For example, in L'viv the incumbent Andrij Sadovyj was re-elected; however, Sadovyj also had to be nominated by a party and ran for the Republican Christian Party, which is absolutely unknown in the region and throughout the country. Thus, the 'mixed system' seemed to be most convenient for the PR, 'as local political leaders, who previously could create their own movements of support or run as independents, now have to ensure the support of an important political party, ideally the ruling party' (Olszański, T.A. 2010). Finally, the 'mixed system' neither served the consolidation of Ukraine's party system nor effectively realised the voters' wish to choose among 'concrete' regional candidates independent from the party.

3.3 Electoral systems and their effects on political competition at the local level

Supporters of the majority system argue that this election system better fulfils the representative function, particularly at the regional level (Rayon and Oblast' Councils). For example, the introduction of the proportional system in the Oblast' led to the situation that, in certain regions, the voters of one or more districts (rayons) are not represented in the oblast' Parliament. Thus the proportional system with closed lists deepens the de-personalisation of self-governance and widens the gap between voter and local authorities.

Supporters of the majority system also argue that oblasts and rayon cannot be seen as parts of self-governance and, according to the constitution, the Parliaments of oblasts and rayons have to represent the 'common interests of municipalities' forming part of that oblast' (Kliuchkovskiy, Ju. B. 2011; Solontai, O. 2008).

According to Ukrainian experts and observers under the 'mixed system' as well as under the pure majority-vote system with one-mandate constituencies, the use of administrative resources is growing. That is actually true in Ukraine: With its weakly developed rule of law and lack of respect for norms, rules and institutions, it makes no difference if independent candidacy is permitted or not.

For example, heads or deputy heads of the local state administration who took part in the elections as candidates nominated for a one-seat constituency by the ruling party used administrative resources: They campaigned at the expense of budgetary funds, presented 'gifts' to the voters (e.g., new playgrounds) with support of the local administration's budget or used their competencies and powers to pressure their competitors, such as the opening of criminal cases against rivals and the closure of the tenancy of competitor's enterprises in order to pressure workers in public services (OPORA, 2010 [a], p. 11). Another example derived from powerful businessmen or representatives of immense financial-industrial groups, (which have continuously grown over the last few years). They are interested in either public contracts, participation in tender committees or land property in order to strengthen the position of their own business. For them it is relatively easy to 'co-opt' a reasonably small constituency by buying votes or with the help of mutual agreements with the ruling party, which at the same

time dominates the local and regional state administrations. On the one hand, they promise financial support and political loyalty to the ruling party; on the other hand, due to 'administrative resources' they have great advantages in the election campaign (e.g., privileged position in the regional mass media, partly financed by the budget of local state administrations) and their economic interests are protected.

The proportional system in general was not criticised by PACE, but rather in the form it was adapted by the Ukrainian Parliament. In essence, PACE concluded that if self-governance is to be promoted, then closed lists should be excluded from the election system (Kril', I. 2010). Without doubt, the role of businessmen (who were often unfamiliar with the region) in the municipal councils had significantly grown since 2006 due to the proportional system with closed lists: These 'neutral' persons offered financial support to the party and loyalty to the party's leadership and in exchange received protection for their business (Solontaj, O. 2010).

Even in the councils of settlements and villages the dictate of the parties had been established, displacing self-governance within the local community. Another factor diminishing the legitimacy of self-governance is the majority vote system with *relative majority*. As the turnout for the elections was about 50 per cent and many voters voted 'against all', candidates had good chances of winning a constituency or even the office of a mayor with only ten or even just seven per cent of the vote (Lange, N. 2010, p. 3).

These factors were recently accounted for in the Draft Election Code of Ukraine submitted to the Ukrainian Parliament (Verkhovna Rada) by the deputies Yu. B. Kluchkovskiy, S.R. Hrynevetskiy, S.P. Podhorniy and V. Synchenko.¹² The group of authors consists of members of factions belonging to the opposition as well as to a bloc of the ruling coalition. The draft is the first serious attempt to codify all electoral rules in a single election code (Kliuchkovs'kyi 2010 [a]). For example, concerning the electoral system, the authors suggest applying a majority vote system for the elections to deputies of regional (Oblast') councils. The authors support the majority vote system at that level because the oblast' presents an administrative unit which does not belong to the bodies of self-governance but has to fulfil representative functions: according to the Ukrainian constitution, the oblast' must represent the common interests of the municipalities belonging to it. From the point of view of the draft's authors, representation of all parts of a certain region can be better fulfilled by the majority vote system if it allows independent candidacy. The authors are aware of the fact that in the Ukrainian political context the majority vote system is more vulnerable to manipulations (see above) than the proportional system with open lists. From their point of view the proportional system with open party lists can be applied to big cities where the administrative-territorial unit is identical with the body of self-governance and thus the question of representativeness has no priority.

3.4 Participation of local citizens (voters, candidates, and observers in the electoral process)

Local self-governance is one of the most democratic institutions because it is close to the citizens of a given community. Local elections can stimulate the engagement of the citizens for local self-governance if the broad participation of the locals in all phases and functions of the electoral process is guaranteed. The trust of the citizens in local authorities and thus the legit-

¹² The Chairman of the Verkhovna Rada of Ukraine, Mr Lytyvyn, asked the Venice Commission to comment on the draft of 7 June 2010. The Venice Commission recognised that the authors of the draft have taken into consideration a number of recommendations of the OSCE/ODIHR and the Venice Commission (Venice Commission 2010 [a]).

imacy of local self-governance grow if the local people have the possibility to elect concrete persons who are closely connected with their region or community, enjoy a good reputation among the citizens and are aware of the interests and problems of the community. This trust is strengthened even more if the local civil society can observe and control the whole electoral process by participating in the work of the election commissions or with the help of the local and national mass media. Thus, the trust of the citizens in the institutions of self-governance can be strengthened by free and fair elections based on inclusiveness and transparency.

Concerning the link between the candidate and the local community or region, the new Ukrainian election law brings a positive change. Candidates can run for the post at only one level. According to the previous law, a candidate could be registered in the party list to the city, district and regional council at the same time. Now the candidate has to make a decision for one level (Korniychuk, A. 2010, p. 4). The new election law does not require a close link with the administrative-territorial unit where he is nominated as a candidate (Berezyuk, O. 2010, p. 2). However, it should be taken into consideration whether the law should define a set duration that the candidate has to have lived in that region (Korniychuk, A. 2010, p. 6).

Notwithstanding the small changes mentioned above, the big national parties registered in Parliament were the most active competitors in the local elections and dominated all aspects of the electoral process. As shown above, this was to a great extent a result of the new legislation: Independent non-partisan candidates could not be nominated for the elections to local councils or as mayoral candidates. The same is true for their representation in the election commissions where the local non-parliamentary parties also had only limited access. The independence of local party members who were nominated as members in the TEC was reduced: according to the new election law (article 29, No. 4 [6]) a political party may recall and replace at any time its nominee on the relevant election commission if he made a decision against the party's interests. The norm presents an obstacle to the impartial organisation of elections. Once appointed, members of Election Commissions should be free of any influence from outside (NDI/IFES 2010, p. 12). The shortened timelines for the official electoral period also favoured the strong parties (in particular, the ruling party), with key political players like heads of local state administrations, mayors and influential businessmen often running for election on the tickets of the ruling party. They often started their campaign before the official beginning of the electoral period and had almost unlimited access to local and national media and other resources. Non-parliamentary small parties or new local party projects had much more difficulty delivering their messages to voters in the short period and had limited access to mass media (NDI 2010, p. 4).

The new election law provided additional advantages for 'key players': In contrast with the previous law, it cancelled the requirement that candidates submit their programmes or platforms and pictures to the election commission as a part of the registration process (NDI 2010, 4). Thus many voters disoriented by the huge number of ballot papers (5-8 ballot papers)¹³ had insufficient information about the candidates at the local level to make an informed electoral choice (NDI 2010, 4). In some regions, like Odessa, most of the election commissions did not place the information about the candidates on the information desks (LZI 2010, p. 166). As a result many citizens had insufficient information to select those candidates who are most familiar with the interests of the local community. Representatives of the opposition stated that many voters were therefore inclined to vote for well-known representatives of the strong parliamentary parties or influential incumbents of the state administrations (Krul'ko 2010).

Moreover, TECs did not inform the mass media about the place and time of their sessions. Despite their general obligations, they refused to give journalists information about the

¹³ According to the Kharkiv Human Rights Protection Group this is also connected with the 'mixed election system' proposed at the local level by law (Belyi, D. 2011, p. 15).

current situation of the electoral process (OPORA 2010, 8). One reason for that behaviour was the poor preparation of many of the TEC members, who were often unfamiliar with the election rights of the subjects of the electoral process. Together with the weak information policy of the CEC, the shortcomings mentioned above created an information vacuum around many election commissions.

Concerning the inclusion of civil society in the electoral process, one positive change should be noted: The new law does allow non-partisan observers to monitor the electoral process.¹⁴ However, only nationwide domestic organisations are permitted to observe, while local and regional organisations are left out; a rather illogical caveat, since local organisations often have a deeper knowledge of the political situation in their communities than national organisations (Korniychuk, A. 2010, p. 11).

Conclusions and recommendations

The October 2010 local elections in Ukraine strengthened tendencies toward centralisation, showed a lack of transparency and represented a step backward in the Ukrainian democratic reform process. The elections were announced on short notice and the new election law was hurriedly passed. The election law did not promote and strengthen the participation of local actors, thus weakening local self-governance. Several provisions of the law weakened the position of the opposition and made it possible for the political forces in power to exercise control over the election process and, presumably, influence its results. Moreover, the structure of Ukrainian self-governance is conducive to the use of administrative resources, as the scope of competencies of the bodies of local self-governance is not clearly defined, and local bodies heavily depend on the state budget while means are transferred by the oblast' and rayon administrations.

Following the local elections in November 2010, President Yanukovich convened a working group to improve Ukraine's election legislation. However, it is not decided yet if the mandate of this group includes working on a comprehensive election code, or if it aims only at creating a law for the 2012 Parliamentary elections. In addition, although some opposition and civil society representatives as well as representatives of the international community, including ODIHR, have now been invited to take part, the working group remains a heavily pro-government body. In order to meet European standards for elections and create a consistent legal basis for further elections in Ukraine, three preconditions have to be fulfilled:

1. Inclusive participation in the working group, which should consist of all political forces as well as renowned civil society representatives (Committee of Voters of Ukraine, OPORA) and heed the advice and experience of the international community (CoE, ODIHR);
2. Decisions about the new law/code must be made at least one year prior to the respective elections in order to ensure comprehensive and proper preparation and guarantee equal chances;
3. The allowance of a broad mandate for the working group which should aim at creating a comprehensive election code regulating elections on all levels (Presidential, Parliamentary and local).

This includes deciding which electoral system should be applied to the different local and regional elections as well as to the elections of the national Parliament. The guiding principle

¹⁴ The inclusion of the monitoring organisation in the electoral process must be improved: The rules are vague and the registration process is both bureaucratic and time consuming: Every organisation must be certified by the Ministry of Justice and registered by the CEC (Korniychuk, A. 2010, p. 11)

should be the goal of strengthening elections as the main institution to guarantee pluralism and just representation as well as provide for effective democratic representation and control. For most of the local and regional levels, the majority vote system seems to be the best option to give the voter the opportunity to choose a local (administrative-territorial unit) candidate and to ensure equal representation of all parts of an administrative-territorial unit in the *radas* of different levels.

However, one must take into consideration that – as the October 2010 elections have shown – the Ukrainian system of checks and balances does not work properly, democratic institutions are weak and both the system and society are prone to the use of administrative resources. Therefore, a proportional system with open lists, where the voter can influence the position of the candidates on the list, could be an option, as it is less susceptible to non-transparent agreements between candidates and the ruling political forces. This should be taken into consideration at least concerning elections in big cities and the oblast' level (and perhaps the rayon level), where political and ideological issues play a role in the voter's decision. In any case, the voters should be given the right to found committees which can open their own lists (Solontai, O. 2008).

Additionally, the proportional system would also contribute to making the political system more stable and mature by lending further structure to the political party landscape. Several EU member states (e.g., Germany) have broad experience in conducting elections under the proportional system with open lists, including the practice of cumulation and cross-voting; their experience could provide useful input to the Ukrainian discussion. For the heads and councils of small cities, settlements and villages, a majority voting system with nomination of candidates by political parties and blocs and through self-nomination of independent candidates could be among the best options. Again, the rayon level, especially, has to be discussed.

In order to further strengthen democracy at the local level, steps have to be taken to reform local self-governance. The relationship between the central level and local and regional bodies is still strongly influenced by the Soviet legacy and characterised by mainly paternalistic behaviour. As mentioned, the local level is permanently under-financed and dependent as far as the allocation of budgetary means is concerned. Reforming local self-governance in Ukraine would mean clearly defining the competencies, tasks and responsibilities of the bodies of self-governance and providing a budget that enables them to independently fulfil these tasks. In the mid-term, self-governance should be strengthened on the oblast' level by creating executive committees with a budget and the right to decide on spending in order to make and execute decisions independently. Following the example of Poland, the reform of local self-governance should start on the lowest level and follow the principle of subsidiarity. Likewise, the French experience of the past 20 years in decentralisation and transfer of responsibilities to the local and regional level could be an interesting basis for discussion.

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¹⁵ The report will be published soon on the website of the Kharkiv Human Rights Protection Group: <<http://www.khpg.org/en/index.php>>. The author thanks Yevhen Zakharov, Founder of the Kharkiv Human Rights Protection Group and head of the board of the Ukrainian Helsinki Human Rights Union.

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