

Out-of-country voting in Ukraine: practical challenges, prospective solutions, and state institutions' support needs

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PRACTICAL CHALLENGES / PROBLEMS: a BROAD VIEW

- A significant number of the Internally and Externally Displaced Citizens, including Voters that entails needs: (i.) to substantially update the State Registry of Voters and (ii.) to explore ways to expand possibilities to vote for voters who are staying abroad.
- Damaged facilities/premises (including damaged infrastructure of water and electricity supply) that are traditionally used for accommodation of the District Election Commissions and Polling Stations on a large territory of the state.
- Security issues, including an urgency to demine some territories and facilities/premises.

- Assuming that the next regular elections to the Parliament are not held on October 29, 2023, as envisaged by the Constitution of Ukraine, the following issues would require discussion on constitutional level, namely:
 - Which state body is authorized to call/designate the post-war Parliamentary elections?
 - When the post-war elections are to be called/designated and when these elections are to be held?

OCV: PROSPECTIVE SOLUTIONS

A number of measures aimed to ensure the voting rights of voters staying outside Ukraine are discussed now, including the following ones:

- Simplification of certain electoral procedures;
 - Employment of so-called methods of “expanded personal voting”, including in particular “mobile polling stations”;
 - On-line/electronic voting;
 - Postal voting.
- ❖ It is **expedient** to **scrutinize** the above mentioned measures through the lens of **internationally** recognized **standards** and existing **practice**.

OCV: PROSPECTIVE SOLUTIONS THROUGH the LENS of INTERNATIONAL STANDARDS

- Resolution 1459 (2005) of the *Parliamentary Assembly* of the *Council of Europe* states that member States should take appropriate measures to facilitate the exercise of voting rights to the **fullest extent possible**, in particular by **means of postal voting**.
- Recommendation 1714 (2005), the *Parliamentary Assembly* invited the *Council of Europe* to develop its activities aimed at improving the conditions for the **effective exercise** of election rights by groups facing special difficulties, including **expatriates**.
- The *Committee of Ministers* of the *Council of Europe* has highlighted in its Recommendation (2004)¹¹ on legal, operational and technical standards for e-voting that “**e-voting** shall be as **reliable** and **secure** as **democratic** elections and referenda which **do not involve** the use of electronic means”.

OCV: PROSPECTIVE SOLUTIONS THROUGH the LENS of INTERNATIONAL STANDARDS

Venice Commission, Report on out-of-country voting:

- 18. “countries considering arrangements for **external** voting will have **to balance** **universal suffrage** against **transparency** and **security** during elections. It is also a matter of **costs** to what extent large groups can be accommodated”...
- 19. “no precise international standards exist for implementing such measures, but **elections abroad** should generally meet the **same standards** for **democratic elections** as **in-country** procedures. The design of a system for voting abroad depends on the **particular** circumstances of a country, including its administrative, infrastructure, budget constraints, in-country election arrangements and level of public confidence” .

Venice Commission, Report on voters residing de facto abroad

- 12. If **out-of-country** voting is **allowed**, it should **not remain** wishful thinking but the **state** has to take measures to **ensure its effectiveness**.

OCV: PROSPECTIVE SOLUTIONS THROUGH the LENS of INTERNATIONAL STANDARDS

Venice Commission, Code of Good Practice in Electoral Matters: Guidelines on Elections

3. Free suffrage

3.2. Freedom of voters to express their wishes and action to combat electoral fraud

.....

- ii. voters should **always** have the possibility of **voting** in a **polling station**. **Other means** of voting are **acceptable** under the following **conditions**:
- iii. **postal** voting should be allowed only where the postal service is **safe** and **reliable**; the right to vote using postal votes may be confined to people who are or to electors residing **abroad**; fraud and intimidation **must not** be **possible**;
- iv. **electronic** voting should be used **only** if it is **safe** and **reliable**; in particular, voters should be able to obtain a confirmation of their votes and to correct them, if necessary, respecting secret suffrage; the system must be **transparent**;
- vi. **mobile** ballot boxes should **only** be allowed under **strict conditions**, **avoiding all risks of fraud**;

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- vii. at least **two criteria** should be used to assess the **accuracy** of the **outcome** of the ballot: the **number** of votes **cast** and the **number** of voting **slips** placed in the ballot box;
- x. **polling stations** must include **representatives** of a **number** of **parties**, and the presence of **observers** appointed by the candidates must be permitted during voting and counting;
- xii. **counting** should **preferably** take place in **polling stations**;
- xiii. **counting** must be **transparent**. Observers, candidates' representatives and the media must be **allowed** to be **present**. These persons must also have access to the records;

OCV: PROSPECTIVE SOLUTIONS THROUGH the LENS of INTERNATIONAL STANDARDS

Venice Commission, Compilation of VC opinions and reports concerning digital technologies in the electoral process:

- ❑ should **any new technologies** be introduced in the electoral process, a **number of issues** should be thoroughly **considered**, including:
 - ✓ a **risk assessment** of the costs, benefits and challenges of introducing such technologies,
 - ✓ **harmonisation** of **new provisions** with **existing** data protection laws and standards, but also **ensuring trust** in the process,
 - ✓ necessary **check-ups** and **pilot** procedures, proper procedures for procurement,
 - ✓ **public testing** and **certification** of the equipment,
 - ✓ **contingency planning** if the technology fails,
 - ✓ sufficient efforts for **training** electoral staff,
 - ✓ and effective **awareness-raising** among **voters** and **political parties**.

If new technologies are to be introduced, it is recommended that a gradual approach to the introduction of such technologies be adopted through **pilots** over the course of **several elections**, starting from the upcoming local elections.

OCV: PROSPECTIVE SOLUTIONS and RISKS – POSTAL and MOBILE VOTING

Venice Commission, Code of Good Practice in Electoral Matters: Explanatory Report

3.2.2.1. Postal voting or proxy voting in certain circumstances

- 38. **Postal** voting and proxy voting are permitted in countries throughout the **western** world, but the pattern varies considerably... It should be **allowed only** if the postal service is **secure** – in other words, safe from intentional interference – and **reliable**, in the sense that it functions properly...
- 39. **Neither** of these practices should be widely encouraged if problems with the **postal** service are added to other difficulties inherent in this kind of voting, including the heightened risk of “family voting”... **Postal** voting would take place under a **special** procedure a **few days before** the election.
- 40. The use of **mobile** ballot boxes is **undesirable** because of the attendant **serious risk of fraud**. Should they nonetheless be used, **strict conditions** should be imposed to prevent fraud, including the **attendance of several members** of the **polling station** election commission representing **different political** groupings.

POSTAL VOTING: PROBLEMS in PRACTICE

Constitutional Court of Austria ruled on July 01, 2016, that the runoff election of the Federal President must be repeated in its entirety in all of Austria.

The fundamental rulings of the Constitutional Court are as follows:

- The possibility of **postal** voting is **not unconstitutional** can therefore **remain in effect**.
- However, **infringements** of the law occurred in numerous districts in the **implementation** of the system of **postal** voting.
- It is absolutely clear that **laws** governing an election **must be strictly** applied. This is to **exclude** any **abuse** and **manipulation**.
- If **infringements** of the law are of an **extent** that they **may have had** an **influence** on the election result, it is of **no relevance** if manipulations have **actually occurred** or **not**.
- The **infringements** of the law in the implementation of the **postal** voting system necessitate a **complete repetition** of the **runoff** election of the Federal President.

POSTAL VOTING: SOLUTIONS

OSCE/ODIHR Election Expert Team Final Report, Presidential Election in Austria, Repeat Second Round, December 04, 2016:

Key recommendations:

- 2. As previously recommended, consideration could be given to **restricting elected officials** from directly serving on election boards, in order to **safeguard** the **impartiality** of the election administration.
- 3. With the aim of **reducing** the number of **invalid** voting cards, the authorities should consider **redesigning** the **voting card** in a manner that draws attention to the need to sign the affidavit and instituting enhanced voter information on the process.
- 4. To ensure the equality of voting conditions within Austria, the **arrangements** for depositing, collecting, and delivering voting cards could be **standardized**.
- 6. Consideration could be given to establishing **procedures** aimed at **ensuring** the **uniform handling** and **storage** of voting cards received by polling station boards.

OCV: PROSPECTIVE SOLUTIONS and RISKS – ELECTRONIC VOTING

Venice Commission, Code of Good Practice in Electoral Matters: Explanatory Report

3.2.2.3. Mechanical and electronic voting methods

- 42. Several countries are already using, or are preparing to introduce mechanical and **electronic** voting methods. The advantage of these methods becomes apparent when a number of elections are taking place at the same time, even though certain precautions are **needed** to **minimize** the **risk** of **fraud**, for example by enabling the voter to **check** his or her vote immediately after casting it. Clearly, with this kind of voting, it is important to ensure that ballot **papers** are designed in such a way as to **avoid confusion**. In order to facilitate verification and a recount of votes in the event of an appeal, it may also be provided that a machine could print votes onto ballot papers; these would be placed in a sealed container where they cannot be viewed. Whatever means used should ensure the confidentiality of voting.

OCV: PROSPECTIVE SOLUTIONS and RISKS – ELECTRONIC VOTING

Venice Commission, Code of Good Practice in Electoral Matters: Explanatory Report

3.2.2.3. Mechanical and electronic voting methods

- 43. **Electronic** voting methods must be **secure** and **reliable**. They are **secure** if the system can withstand **deliberate attack**; they are **reliable** if they can **function on their own**, irrespective of **any shortcomings** in the hardware or software. Furthermore, the **elector must be able** to obtain **confirmation** of his or her vote and, if necessary, **correct** it without the secrecy of the ballot being in any way violated.
- 44. Furthermore, the system's **transparency** must be **guaranteed** in the sense that it must be possible to check that it is functioning properly.

OCV: PROSPECTIVE SOLUTIONS and RISKS – ELECTRONIC VOTING

Venice Commission, Compilation of VC opinions and reports concerning digital technologies in the electoral process:

- 62. ... Electoral Code provides for **electronic** voting by electors who are – on voting day – on diplomatic service in diplomatic and consular representations of Armenia, as well as members of their families residing abroad with them and having the right to vote. The introduction of electronic voting – especially when conducted in an **uncontrolled environment**, as indicated by the CEC – should **only** be an **alternative** means to voting in a **controlled** environment. **Remote** electronic voting is particularly **controversial** because it **cannot** guarantee **secrecy** and it **cannot** be **observed** through the methods **commonly** applied to observation of voting in the controlled environment of a polling station. The adequacy of electronic voting in situations where **confidence** in the **impartiality** of the election administration is **limited** should be carefully evaluated. Should there be a decision to implement electronic voting, its **legal basis** should be drafted in an **equally detailed** and **accountable manner** as for **traditional** voting in a controlled environment. The Armenian authorities should **carefully examine** the **need** for Internet based voting against the **alternative** of organising polling stations at the consular offices on election day for this small group of voters.

OCV: PROSPECTIVE SOLUTIONS and RISKS – ELECTRONIC VOTING

Venice Commission, Compilation of VC opinions and reports concerning digital technologies in the electoral process:

- 66. The **limited** text of these articles is **insufficient** for establishing **legal** and **technical** guarantees required before **electronic** voting is introduced and before personal data is processed by the system. Further, the introduction of electronic voting should be done **gradually** and through **piloting** it in a limited number of polling stations, with contingency plans for **backup** voting arrangements should the electronic voting system fail. The Venice Commission and the OSCE/ODIHR recommend electronic voting **not be** introduced **without** addressing these issues and drafting **legal text** that is **specific** and **detailed**.

ELECTRONIC VOTING: PROBLEMS in PRACTICE

Federal Constitutional Court of Germany

Judgment of the Second Senate of March 03, 2009:

- 2. The deployment of computer-controlled voting machines is in particular to be reviewed against the standard of the **public nature of elections**...

The public nature of elections is a **fundamental precondition** for **democratic** political will-formation. It ensures the **correctness** and **verifiability** of the election events, and hence creates a major **precondition** for the well-founded **trust** of the **citizen** in the **correct** operation of the elections. The state form of parliamentary democracy, in which the rule of the people is mediated by elections, in other words is not directly exercised, demands that the act of transferring state responsibility to parliamentarians is subject to special public monitoring. The fundamentally required public nature of the election procedure covers the electoral **proposal** procedure, the election **act** (broken regarding the ballot by the secret nature of elections) and the **ascertainment** of the election **result**...

ELECTRONIC VOTING: PROBLEMS in PRACTICE

Federal Constitutional Court of Germany

Judgment of the Second Senate of March 03, 2009:

- aa) In a representative democracy, the elections of the people's representation constitute the fundamental act of **legitimization**. The **ballot** in the elections to the German *Bundestag* forms the **major element** of the process of will-forming from the **people** to the **state bodies**, and hence at the same time constitutes the basis for political integration. Compliance with the election principles applicable to this, and confidence in compliance with them, hence constitute preconditions for a viable democracy. **Only** by the possibility of **monitoring** whether the elections comply with the constitutional election principles is it possible to ensure that the **delegation** of state power to the people's representation, which forms the first and most important part of the uninterrupted legitimization chain of the people to the bodies and office-holders entrusted with state tasks, **does not suffer** from a shortcoming... Only if the electorate can **reliably convince** itself of the lawfulness of the transfer act, if the elections are therefore implemented "before the eyes of the public" is it possible to guarantee the trust of the sovereign in Parliament being composed in a manner corresponding to the will of the voters that is necessary for the functioning of democracy and the democratic legitimacy of state decisions....

ELECTRONIC VOTING: PROBLEMS in PRACTICE

Federal Constitutional Court of Germany

Judgment of the Second Senate of March 03, 2009:

- bb) In a republic, **elections** are a **matter** for the **entire people** and a **joint concern** of **all citizens**. Consequently, the **monitoring** of the election procedure must also be a **matter** for and a **task** of the citizen. **Each citizen must be able to comprehend** and **verify** the central steps in the elections reliably and **without** any **special** prior technical knowledge.
- cc) The **public nature** of the elections is also anchored in the principle of the **rule of law**. The public nature of the state's exercise of power, which is based on the rule of law, serves its **transparency** and **controllability**.
- b) The principle of the public nature of elections requires that **all essential** steps in the elections are subject to public **examinability** unless other constitutional interests justify an exception. Particular **significance** attaches here to the monitoring of the election act and to the ascertainment of the election result.
- A procedure in which the voter **cannot** reliably comprehend whether his/her vote is unfalsifiably recorded and included in the ascertainment of the result, and how the total votes cast are assigned and counted, **excludes** central elements of the election procedure from public monitoring, and hence **does not comply** with the constitutional requirements.

ELECTRONIC VOTING: PROBLEMS in PRACTICE

Federal Constitutional Court of Germany

Judgment of the Second Senate of March 03, 2009:

- aa) The voter himself/herself **must be able to verify** – also **without** a more detailed **knowledge** of computers – whether his/her vote as cast is recorded truthfully as a basis for counting or – if the votes are initially counted with technical support – at least as a basis for a subsequent re-count. It is **not sufficient** if he or she **must rely** on the functionality of the system without the possibility of personal inspection. It is hence **inadequate** if he/she is **exclusively informed** by an electronic **display** that his/her ballot has been registered...
- neither **participation** by the interested public in procedures of the **examination** or **approval** of voting machines, nor a **publication** of examination reports or construction characteristics (including the source **code** of the software with computer-controlled voting machines) makes a major contribution towards ensuring the constitutionally required level of controllability and verifiability of the election events. **Technical** examinations and official approval procedures, which in any case can only be **expertly** evaluated by interested specialists, relate to a stage in the proceedings which is far in advance of the ballot.

OCV: COMBINATION of PROSPECTIVE MEASURES

European Court of Human Rights, Decision, February 17, 2015

Case of Zsófia VÁMOS and Others against Hungary

- The applicants complain under A14 of the Convention read in conjunction with P1-3 that they were **discriminated** against in exercising their voting rights, since they **couldn't vote** by **post** on account of their **permanent address** in Hungary, whereas **other** voters living abroad and **without** a permanent address in Hungary **could do so**.
- The applicants, **permanently** residing in Hungary, are **currently** working or studying in **other** countries. In order to vote they were expected to appear in person at the embassy or consulate in their country of temporary residence, or else in their constituencies in Hungary. Thus, they couldn't exercise their voting rights or only with substantial material difficulties. Other citizens living abroad who **do not have** a permanent registered address in Hungary were allowed to vote **by post**.
- **Court:** the voting arrangements reflecting the **distinction** between the different situations of voters outside Hungary **cannot be** regarded as overstepping the State's margin of appreciation in this field. It is not for the Court to pass judgment on the efficiency of the organisation of a voting system.

CONCLUSIONS

- All prospective measures pertaining to the out-of-country voting for the past-war Ukrainian elections should be **carefully scrutinized** and **widely discussed**.
- The measure/measures identified for further practical employment shall be based on the well-established and recognized **international standards** and **best practices**.