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A LOST VOTE. IS THIS A LIFETIME SILENCE?



KYIV, 2018

Analytical Report A lost vote. Is this a lifetime silence?/ Serhii Movchan, Oleksii Bida, Olha Aivazovska, Oleksandr Kliuzhev / Ukrainian Helsinki Human Rights Union, Civic Network OPORA.

The analysis provides an overview of the issue of the respect for electoral rights on liberated territories of Donetsk and Luhansk oblasts. Violations that occurred during Extraordinary Presidential Elections, in 2014, and local elections, in 2015, are described. The publication spotlights problematic issues related to the possibility of internally displaced persons to exercise their electoral right inside the communities where they reside, and also provides proposals for improving the situation.

THE CURRENT REPORT CONSISTS OF THE FOLLOWING CHAPTERS:

Introduction

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2. One day in the life of district election commissions in Donetsk oblast
3. Extraordinary Parliamentary Elections in 2014 in Donetsk and Luhansk oblasts
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1. Electoral rights of internally displaced persons: Key problems and ways to solve them
2. Main preconditions for holding elections on the liberated territories
3. E-voting during potential local elections in specific areas of Donetsk and Luhansk oblasts

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INTRODUCTION

Since late 2013, Ukraine has been undergoing the course of permanent changes and transformations, which have multiple impacts on its development. On the one hand, the Revolution of Dignity resulted in positive changes in the Ukrainian society as renovation and partial rotation of political elites have taken places; a clear foreign policy course towards EU integration and close cooperation with NATO was declared; the commitment was expressed to transform the social and political order in the country towards democratization, protection of fundamental human rights and freedoms, civil society development; as well as the need to establish a transparent market system was declared, etc. On the other hand, the process of practical implementation of the pronounced intentions is not simple and clear-cut; it is being impeded by a number of external and internal factors, and can be qualitatively assessed some time later. Furthermore, the Revolution of Dignity and a desire of the Ukrainian society to live in a democratic European state demand a very high price to be paid, such as military actions in the East of Ukraine; numerous casualties both as a result of events on Maidan and during the armed conflict in Donbas; lost control of the Ukraine's government over the part of the territory, and an immediate threat to the sovereignty and territorial integrity of the country.

In the conditions of developing crisis trends, one of the principal tasks for the Ukrainian authorities is to regulate the issue of security that is related to all spheres of social life, social and political processes in Ukraine. The sphere of electoral relations is also not an exception.

A mandatory precondition and a defining feature of a democratic rule-of-law state, which Ukraine has proclaimed itself in the Constitution, is conducting regular and free elections aimed at renewal of representative public bodies, and change of elected officials on the basis of democratic procedures.

Unfortunately, early presidential elections in 2014 and local elections in 2015 took place in a difficult political, economic and security situation, during the ongoing constitutional reform in Ukraine aimed at decentralization of power. The conditions, in which these elections were held, were marked by illegal annexation of the Crimean peninsula by the Russian Federation, and temporary control of illegal armed groups together with Russia over the parts of Donetsk and Luhansk oblasts. Due to this, more than five million voters residing in these territories were not able to vote.

Depriving internally displaced persons (IDPs) of the right to vote discriminates them both in terms of ensuring equal rights and freedoms, and in terms of equal opportunities. Moreover, this is a sign of indirect discrimination on the grounds of the place of residence and of being an IDP, which is contrary to the standards of international law, Constitution, laws of Ukraine as well as Ukraine's commitments concerning sustainable integration of IDPs in the area to which they were displaced.

The objective of this report is to improve the situation with elections in the territory of Donetsk and Luhansk oblasts, and to enable internally displaced persons to exercise their right to vote in the communities of their permanent residence.

RESULTS OF RESEARCH

UNDER CHAPTER I.

STANDARDS FOR CONDUCTING ELECTIONS

Drafting the normative and legal framework, organizing election procedures or general evaluation of campaign should be based on international standards that are primarily set forth in the UN universal documents or the documents of institutions that are territorially closer to Ukraine such as the PACE, OSCE or Venice Commission (the European Commission for Democracy through Law). Articles of the declarations, conventions, and recommendations formed the basis of national legislation in the European states, were tested in dozens of election cycles, and became a norm.

Therefore, this report refers to the UN universal documents (more specifically, provisions of the Universal Declaration of Human Rights, the Convention on the Political Rights of Women, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of Racial Discrimination, the Guiding Principles on Internal Displacement), as well as international standards at the regional level (the Document of the Copenhagen meeting of the Conference on the Human Dimension of the CSCE, the OSCE Charter of Paris for a New Europe, the Code of Good Practice in Electoral Matters of the Venice Commission). It also quotes general European principles in electoral matters, such as: universal suffrage – every person has the right to elect and be elected; equal suffrage; free, secret and direct voting, regular elections; respect for fundamental rights; stability of legislation; organization of voting by an impartial body; election observation; effective system of appeal; election system.

UNDER CHAPTER II.

VIOLATIONS OCCURRED DURING THE ELECTION PROCESS

MONITORING OF VIOLATIONS OCCURRED DURING THE EXTRAORDINARY PRESIDENTIAL ELECTIONS IN 2014

During elections of the President of Ukraine, members of election commissions at a district and polling station level organized voting in the conditions of the failure of law enforcement bodies to fulfill their duties in terms of ensuring public order. It was members of territorial and polling station commissions who had to deal with criminal actions of illegal groups, whereas state and local authorities were disoriented or resorted to unacceptable inaction. Early parliamentary elections were held the same year in the conditions when a clear contact line was defined between the Armed Forces of Ukraine and illegal armed groups created and supported by the Russian Federation. The latter fact made it totally impossible to organize voting in those territories of Donetsk and Luhansk oblasts that were controlled by the illegal groups.

Civic Network “OPORA” carried out independent monitoring during the early presidential elections in Donetsk and Luhansk oblasts with due regard to the standards of security for observers. In view of destabilization of the situation in Donetsk and Luhansk oblasts, the main problems were related primarily to security challenges and illegal actions against the process of organization and conducting of voting, and not to violations by candidates for the President or their representatives. More specifically, the following cases of impeding the election process were reported: creating obstacles for candidates for the President of Ukraine; preventing activities of campaign headquarters of candidates for the President of Ukraine, campaign activists; using violence against members of election commissions; seizing/destroying premises, property of election commissions, etc.

Official vote-tallying for territorial election districts in Donetsk and Luhansk oblasts demonstrate that 15.5% and 25% voters took part in voting in these regions, respectively. These figures reflect activities only in those polling stations where it was possible to organize voting. If we compare the number of voters who participated in the elections and the total number of voters in these regions, the situation can be called catastrophic. Only 4% of the total number of voters

participated in voting in Donetsk oblast, and 3% – in Luhansk oblast. Therefore, it can be stated that in May 2014 the actions of Russia and of the illegal groups supported by it resulted in a restriction of electoral rights of the majority of voters in Donbas.

EXTRAORDINARY PARLIAMENTARY ELECTIONS IN 2014 IN DONETSK AND LUHANSK OBLASTS

Extraordinary parliamentary elections were held in 12 out of 21 election districts in Donetsk oblast, and in 5 out of 11 election districts in Luhansk oblast. As a result of liberation of several towns and districts in Donetsk oblast from illegal armed groups, the number of voters who were able to vote during the early parliamentary elections increased significantly. During the early presidential elections, 23% voters in this region were included in the voter lists at polling stations that were opened despite militants' resistance. Same year the respective lists for the parliamentary elections included 42% voters in this region. A slight increase of the number of voters involved in the voting was reported in Luhansk oblast – from 23% to 26%.

The prevailing type of violations was the failure of candidates and political parties to adhere to the rules of election campaigning, prevention of activities of official observers and journalists, vote buying.

MONITORING OF VIOLATIONS OCCURRED DURING THE LOCAL ELECTIONS IN 2015

One of the key problems related to the election process in Donetsk and Luhansk oblasts was the absence of clear criteria for making decisions on holding local elections in government-controlled areas of these regions. The list of localities in Donetsk and Luhansk oblasts for holding regular local elections in 2015 was prepared by the Central Election Commission (CEC) based on the submissions of military-civilian administrations. Furthermore, the applicable laws and a special explanation of the CEC did not provide for practical mechanisms of verifying justification of submissions for holding or not holding elections in individual communities. Such legal ambiguity created preconditions for politically justified decisions to postpone elections in specific communities while security reasons turned out to be rather manipulative. It is important to avoid such problems in the future by developing criteria and procedures of taking security risks into consideration for the purposes of decision making on the election process in Donetsk and Luhansk oblasts.

For instance, in Donetsk oblast observers of Civic Network OPORA documented 38 violations of election legislation, 20 of which were related to inappropriate election campaigning. The documented violations included 9 cases of election commissions not following the law, manipulations with voting ballots and illegal voting – 5, vote buying – 4, abuse of administrative resources – 2, prevention of activities of journalists and observers – 2.

In Luhansk oblast, observers duly reported 31 cases of violation of election legislation, 11 of which were related to violation of the campaign rules. Unlike in Donetsk oblast, there were several cases of criminal interference with the election process in Luhansk region in the form of threatening the members of election commissions or candidates/property damage or violence.



UNDER CHAPTER III.

VIOLATIONS OCCURRED DURING THE ELECTION PROCESS

ELECTORAL RIGHTS OF IDPS: KEY PROBLEMS AND WAYS TO SOLVE THEM

In 2014-2017, full integration of IDPs into their new territorial communities remains the main task for the state. National and local authorities implement inconsistent and ambiguous policy regarding internally displaced persons. One should admit honestly that discriminatory practices, inaction or lack of system in decisions of the state authorities became possible because IDPs are not an influential factor in the political process or an important electoral group. The latter fact makes it possible for politicians to ignore critical problems or even use them in order to provoke political conflicts.

Lack of the influence of IDPs' interest on politics, including the local level, can be addressed in different ways. Mobilization of activism of IDPs themselves, public pressure on the state authorities for revision of inefficient policy and elimination of discriminatory practices, reform of legislation – all of these are preconditions for appropriate integration of internally displaced persons. However, a decision on proper guarantees of electoral rights of this group of individuals is a solution that is achievable and can be implemented without delay.

Pursuant to the current law, the grounds for including a voter in a respective polling station is the voter's election address¹. The imperative connection of the election address to the registered place of residence does not take into consideration the actual circumstances of voters' residence (for instance, labor migrants and IDPs) in a territorial community, which limits electoral rights in those communities where they actually reside, and creates indirect discrimination.

This situation is characterized by complications entailed by the IDPs' moving from their registered places of residence, and the objective need to preserve the formal connection with the temporarily occupied territories caused by security, family, property, social, economic, and other factors. The state, in its turn, is

¹ Article 8 of the Law of Ukraine on the State Register of Voters

not interested in a significant decrease of the number of citizens registered in the temporarily occupied territories while being IDPs. Therefore, internally displaced persons need, on the one hand, efficient mechanisms of integration in the new communities. On the other hand, these citizens should preserve a potential possibility to influence political regulation of the inter-state conflict in the territory of specific areas in Donetsk and Luhansk oblasts, Autonomous Republic of Crimea, and Sevastopol, and to protect their rights in the respective territory after the end of conflict. Such approach is completely in line with international standards on internal displacement.

At present, electoral rights of IDPs in Ukraine are guaranteed only through the procedure for changing the place of voting without changing the election address during elections of the President of Ukraine and parliamentary elections in the proportional component of a parallel election system. If a voter registered in the temporarily occupied territories of Ukraine has an intention to vote, such a voter has to submit an application to the agency maintaining the Register of Voters not later than five days before the election day asking it to change his/her voting address without changing the election address. It should be mentioned here, that this is a one-time procedure, and for the next elections (also for repeat elections) the voter has to submit the same application again. The law on local elections sets forth that the voter's belonging to the territorial community and the fact of his/her permanent residence in the respective territory is determined exclusively by the registered place of residence. The Law of Ukraine on Parliamentary Elections reads that a citizen of Ukraine who temporarily changes his/her voting address (without changing the election address) for another polling station outside the boundaries of the single-mandate constituency, to which such a voter belongs on the basis of the information entered in the State Register of Voters about his/her election address has a right to vote during the parliamentary elections only for the nationwide constituency (Part 10 Article 2). Therefore, in the authors' opinion, the absence of a possibility for IDPs to exercise their active right to vote at local elections and in single-mandate constituencies is not in line with the Constitution of Ukraine and international standards.

Regulating electoral rights of IDPs provided for by the Constitution should be based on the principles of equal participation of citizens in the political process and full integration of displaced persons in new territorial communities. New processes, on the one hand, should ensure long-term and sustainable solution of the problems in the sphere of electoral rights. On the other hand, these procedures should be flexible enough for efficient taking into consideration the actual circumstances of internally displaced persons.

One of the possible guarantees of IDPs' electoral rights is provided for in the draft law № 6240, On Ensuring Access to Electoral Rights for IDPs and Oth-

er Citizens Mobile Within the Country, that was registered in March 2017 and provides for a possibility of a voter to submit a justified application to the bodies maintaining the Register of Voters asking to change his/her election address. Liberalization of the procedure for changing an election address will make it possible to efficiently protect electoral rights of IDPs and other citizens mobile inside the country: after changing the election address, a voter will be able to permanently vote at the place of actual residence during elections of all levels. Taking into consideration the concerns about using illegal election technologies (bribing voters for their "mobility" from one constituency or territorial community to another), several rather severe restrictions are envisaged. Furthermore, an advantage of the model provided for in the draft law is preservation of the potential possibility of participation of IDP voters in local elections that is part of the process of peaceful regulation in specific districts of Donetsk and Luhansk oblasts. The draft law also stipulates that next change of the election address can be granted 180 days after the last change in the Register of Voters. Such procedure for changing the election address will make it possible to practically implement the right of IDPs to freely select the strategy of their own future provided for in the UN Guiding Principles on Internal Displacement: integration in the new community, return to the territories of previous residence or further displacement within the safe part of the country.

MAIN PRECONDITIONS FOR HOLDING ELECTIONS ON THE LIBERATED TERRITORIES

Elections are the key element of post-conflict regulation, and a measure aimed at restoring democracy and starting the process of reintegration of the post-conflict territories. The main preconditions for holding elections on the liberated territories are as follows:

- disarmament and demilitarization;
- neutralization of political environment;
- involvement of independent international organizations;
- significant period of time between ceasefire and elections;
- for organizing elections, independent election commissions should be established;
- security of the election process participants should be ensured;
- elections should take place strictly in accordance with the Ukrainian legislation.

E-VOTING DURING POTENTIAL LOCAL ELECTIONS IN THE SEPARATE AREAS OF DONETSK AND LUHANSK OBLASTS

Using modern technologies during elections is being discussed in the expert and civil society community involved in the dialog on peaceful resolution of the inter-state conflict in the territories of Donetsk and Luhansk oblasts occupied by the Russian Federation. The interest in various types of e-voting systems, in the context of holding local elections in Donbas, can be explained by two crucial factors:

- First, a significant part of citizens eligible to vote during potential local elections provided for in the Minsk Protocols and the Package of Measures reside outside the boundaries of specific districts of Donetsk and Luhansk oblasts. In the opinion of some experts, the Internet voting systems can involve more IDPs and refugees in voting at local elections, and lead to certain political regulation of the conflict.
- Second, there are hopes that with the help of e-voting systems a range of problems related to administration of potential elections that will emerge after a long break in holding a legitimate election process in certain areas of Donetsk and Luhansk oblasts can be solved.

However, before analyzing advantages and disadvantages of one or another system, it is critically important to verify expediency of the use of e-voting technologies in specific territorial, temporal, social, and political conditions. If we imagine the prospects for organizing local elections in individual districts of Donetsk and Luhansk oblasts, there is an important question of preventing disruption of voting and the vote-tallying process, which is relevant even in ordinary conditions. Post-conflict elections will require prompt vote counting, reliable procedures for generalizing voting results at the level of territorial communities, protection of communities, protection of voting ballots from irreversible destruction.

It should be mentioned that all e-voting systems without exception are prone to insufficient transparency for election process actors who are not competent in technologies. These are the facts that can create favorable conditions for discrediting elections by unscrupulous candidates who will claim that there was organized interference with the work of electronic systems. Therefore, taking into consideration the high cost, security and logistic challenges related to using e-voting systems at polling stations (providing polling stations with scanners, computers, ensuring protected and interrupted Internet connection), one can predict higher popularity of the idea of voting through the Internet. However, the totality of challenges and risks related to voting through the Internet (voting is done in uncontrolled environment, which makes it more difficult to en-

sure secrecy of voting, prevent vote buying, family voting, intimidation of voters and controlled voting – especially in the territories close to the conflict zone), makes using this modern technology virtually impossible. Furthermore, protection of e-voting system from external interference is an important problem even in Western democracies while in post-conflict communities the challenges in terms of security and results of voting are much higher.

Elections in the conflict territories should be organized and held on the basis of procedures and in the way that would reduce the level of conflict in the involved groups and communities. We believe that e-voting, on the contrary, will create additional risks and grounds for development of oppositions among the election process actors.

CONCLUSIONS AND RECOMMENDATIONS

CONCLUSIONS:

1. Actions aimed at disrupting elections in Donetsk and Luhansk oblasts acquired a system nature in 2014 as a result of a combination of the following factors:

- Consistent intentions of representatives of illegal armed groups not to let voting happen during the Presidential elections in Ukraine were aimed at preventing legitimization of voting results in the oblasts.
- Numerous cases of law-enforcement officers' support of illegal actions aimed at disrupting elections or their criminal inaction, also during abduction of members of election commissions.
- Inadequate evaluation of the situation by heads of regional and national authorities which resulted in negative outcomes for organizers of elections as they were not sufficiently informed about security risks.
- Disorientation and absence of action strategy at the regional and national levels that frequently ignored the signals about preparation for disrupting the voting process.

2. Holding parliamentary elections in 2014 and local elections in 2015 in Donetsk and Luhansk oblasts were characterized by a different range of problems compared to the presidential elections held in 2014. It is explained by the fact that they were held exclusively in the Ukrainian government-controlled territory, and the contact line was sufficiently far away from them, yet this fact did not exclude violations during the elections, although of a different

3. Elections in the post-conflict territories should be organized and held using the procedures and in the way which will decrease the level of conflict in the involved groups and communities as well as ensure adherence to the international standards. The election process could begin only if there were grounds to claim that the prospects for campaigning and voting in accordance with international standards were very high.

4. Regulating electoral rights of internally displaced persons provided for by the Constitution for all citizens should be based on the principles of equal participation of citizens in the political process and full integration of displaced persons in the new territorial communities. New procedures, on the one hand, should ensure long-term and sustainable solution of the problems in the sphere

of electoral rights. On the other hand, these procedures should be flexible enough for efficient consideration of the actual circumstances of internally displaced persons.

5. It is impossible and inexpedient to introduce e-voting in Ukraine, especially in the post-conflict territories since it may create additional risks and grounds for confrontation between the election process actors.

RECOMMENDATIONS:

- The Verkhovna Rada of Ukraine should adopt the draft law of Ukraine № 6240 On Ensuring Access to Election Rights for Internally Displaced Persons and Other Citizens Mobile Within the Country, which regulates the issues of participation of IDPs in local elections in localities/communities at their new de-facto place of residence.
- The Cabinet of Ministers of Ukraine, the Central Election Commission should facilitate drafting amendments to the Ukrainian legislation in the part related to strengthening the possibilities for the state in terms of responding to security challenges to the election process, including improved coordination between the CEC and law-enforcement agencies.
- The President of Ukraine, the Ministry of Foreign Affairs should clearly declare to Ukraine's foreign partners that elections in the occupied part of Donbas will not lead to conflict resolution if being held before the disarmament, demilitarization, restoration of control of the border, appropriate legislative and institutional support for the elections.
- The Ministry of Interior of Ukraine, the Prosecutor General's Office should improve efficiency of investigation of criminal violations committed during the election process.
- The Criminal Code of Ukraine and the Code of Administrative Offenses should be improved in the part related to strengthening liability for illegal influence on expression of citizens' will, bribery, administrative resource, threats, intimidation, and pressure.
- The Cabinet of Ministers of Ukraine, the Central Election Commission should develop a clear mechanism for organizing elections on the Ukrainian territories that will be released in the future.



This publication is made possible by the generous support from the American people through the United States Agency for International Development (USAID) within the framework of the Human Rights in Action Project being implemented by the Ukrainian Helsinki Human Rights Union.

The contents are the responsibility of the authors and do not necessarily reflect the views of the USAID or the United States Government.

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The expert assessment of the report is performed by the International Foundation for Electoral Systems (IFES)

