

## The Role of the Courts in the Electoral Process of Ukraine

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In the dusk of this millennium, the Ukrainian government has set out on a difficult journey toward the establishment of its own electoral system. But an even more thorny path stands between Ukraine and the achievement of democratic election laws. One of the most important elements for the realization of a democratic character in the electoral process is the legal review of election law disputes which surface during the campaign for the election of deputies.

In order to define specific paths for the enactment of election laws and, in particular, the role of the courts in the electoral process, it is essential to have a sense of the historical stages of the development of voting rights in Ukraine. After the Declaration of 1918, an independent Ukrainian government existed for a short time. During the course of the Civil War (1918-1920) several governments held power for brief intervals. Under such conditions, it proved impossible to initiate the serious development of legislation regarding elections.

### Historical Background

The Civil War ended with the establishment of the Communist regime which created an undemocratic electoral system that denied the majority of the population who owned property the right to participate in elections and upheld inequality among the various classes through a multilevel system for the selection of members for legislative chambers.<sup>1</sup> Truly, the dictatorship of the proletariat denied the judiciary any role in the electoral process.

In the Ukrainian SSR Constitution of 1937 (the Stalinist period in Ukraine's history) a system of elections was formally established. However, under the conditions of the totalitarian regime, electoral rights received neither legal or any other form of protection.

A new stage in the democratic reform of Soviet society and its corresponding system of legal rights began with the accession to power of Nikita Khrushchev and his group in both government and Communist Party circles. In 1963 the new Code of Civil Procedure of the Ukrainian SSR was ratified. Chapter 30 regulated the procedure of judicial review of petitions by citizens regarding discrepancies found in voter lists. This provided the first instance of the protection of the voting rights of citizens, even in the less impressive

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sections regarding the legal relationship between the individual and the government. A total of six articles (238-243) regulated this process. These articles provided the primary means for resolving grievances insofar as the Soviet government placed the entire process under the control of the courts. This included procedures for contesting decisions of the Executive Committee of the Local Council of People's Deputies, which oversaw the rejection of complaints filed by citizens regarding discrepancies in voter registration lists. The courts were required to review such complaints on the grounds that, during the creation of voter lists, the organs of Soviet power incorrectly included certain individuals, completely overlooked the inclusion of other individuals, or committed errors in listing surnames, first names, and patronymic names, or any other data required to be included in voting documents. In response to such complaints, a representative of the Local Council of People's Deputies would be summoned by the court for the purpose of placing the election officials before the court on the same level as the common citizen.

In 1978, a new Constitution of the Ukrainian SSR was ratified, which stated that "control of voter turnout is not permitted" (Article 88). In this sense, not only was the principle of the secret ballot constitutionally strengthened, but the prohibition of government influence over the conduct of voters during the election of representative bodies of power was guaranteed as well. This was one of the first steps toward the "democratic" restructuring of the Communist system of voting which, nonetheless, existed in the structure of a totalitarian regime.

The criminal judicial process, as it was related to election law, also deserves careful consideration. Regulations set forth in the Criminal Code of the Ukrainian SSR in 1923 and 1927 were intended not to protect the voting rights of the citizenry, but to protect the entrenched Bolshevik electoral system from those deemed undesirable by the regime, people who were consequently excluded from participation in elections for political-ideological motives (those who participated in the Civil War on the side of the White Army, individuals who owned property, the clergy, former members of non-Bolshevik parties, the opposition to the Communists, and those who professed a critical temperament toward the Soviet regime).

The process of Khrushchev's "democratization of society" touched even upon the criminal aspects of the electoral law. In the new Criminal Code of the Ukrainian SSR of 1960, the odious regulations of the Stalinist period had already disappeared and a special chapter, "Crimes Against the Political and Labor Rights of the Citizen," which consisted of three articles (127-129), was intended to protect voters' rights. These articles imposed a criminal sentence for obstructing the proper implementation of the election law, tampering with or forging electoral documents, the fraudulent tabulation of votes, and the disclosure of how ballots were cast (in accordance with the guarantee of a secret ballot), in particular, those votes cast by members of the election commission and other officials.

Aside from these articles, the stipulated accountability of officials accused of tampering with or forging any election-related documents (Article 172 of

the Criminal Code) meant that government officials could be brought before the court on criminal charges. At present, the semantic content of these articles enjoys greater appreciation in comparison with their adoption in the 1960 Criminal Code since new legislation on election law brings with it a new understanding of the voting rights of citizens.

#### **Changes Preceding Independence**

The second half of the 1980s began with a social evolution which culminated in the collapse of the Communist regime in both the Soviet Union and Ukraine. This was promoted in part by the gradual democratization of election laws. The new laws "On the Election of People's Deputies of the Ukrainian SSR" and "On the Election of Deputies to the Local Council of People's Deputies of the Ukrainian SSR" enacted on 27 October 1989, did not broaden, but rather, reiterated the legal protection of the citizens' voting rights set forth in the aforementioned chapter 30 of the Code of Civil Procedure. In addition, article 14 of both laws considerably expanded the list of possible violations of election law, which in turn called for accountability. The obstruction of any citizen's free exercise of the right to vote and to be elected by means of force, threats, or deceit was to be investigated for the purpose of determining criminal accountability. Such acts were defined as the prevention or obstruction of pre-election campaigning, the fraudulent tabulation of votes, the publication or dissemination by any means of unfounded slanderous information about a candidate for deputy, the prevention or hindrance of the assembly of voters for the purpose of meeting with candidates, and the obstruction or hindrance of voters' familiarization with the voter lists.

After the 24 August 1991 vote for independence by Ukraine's Parliament and the liquidation of the monopolization of day-to-day existence by the Communist Party (whose influence within government circles was consequently limited considerably), the process of true democratic reform of election laws began. Within a few months of the historic creation of the new government of Ukraine, the law "On the Election of the President of Ukraine" was drafted, enacted as of 5 June 1991, and then amended prior to the second election for president as of 24 February 1994.<sup>2</sup> On 18 November 1993, the law "On the Election of People's Deputies of Ukraine" was passed. Finally, on 24 February 1994, the law "On the Election of Deputies and Representatives of Villages, Rural Communities, Districts, Cities, Districts within Cities, and Oblast Councils" completed the rush to enact new electoral legislation. However, due to the haste in debate and quick passage of legislation, and the unfamiliarity of those involved with the potential demands placed on a democratic electoral system, these laws remain inadequate to protect voters' rights in Ukraine.

Although the laws' standards still require considerable improvement, they have significantly expanded the role of the courts in the electoral process. It is encouraging that the law allows appeals concerning refusals by election officials to correct mistakes in the voter lists, and also creates the right to appeal any decision made by the election commissions, including the Central

Election Commission (TsVK). In particular, the law "On the Election of the President of Ukraine" requires that decisions made by the TsVK regarding the refusal to register either political parties or electoral blocs for participation in the presidential election (the right to nominate a candidate for president) are subject to appeal through the Supreme Court of Ukraine. Such appeals are required to be filed with the Supreme Court within 10 days from the date of the decision of the TsVK (Article 21.4). Similar legislation concerning the appeal of rejection of an application of a candidate for a parliamentary seat has yet to be enacted.

In order to be registered as a candidate for president or deputy, the applicant must collect a required number of voters' signatures. Consequently, the laws on the election of the president and deputies of Ukraine have established the contingency for judicial verification of the legitimacy of voters' signatures (Articles 27.7 and 24.6 respectively). Both laws (Articles 30.3 and 26.5) also uphold the right of the TsVK, through the representation of a constituency election commission or upon its own initiative, to address the Supreme Court with a petition to repeal its own original decision to allow the registration of a candidate for president or deputy. Grounds for this may be the establishment of discrepancies in the number of voter signatures whose omission from the list reduces the number below the legal minimum required for registration; the alteration of a candidate's pre-election platform in such a way as to lead to the violation of existing laws on human rights and/or national security; and registration of a candidate in several constituencies for a parliamentary seat inasmuch as, in accordance with Article 25.7, the same individual cannot be registered as a candidate in more than one constituency.

Pursuant to the election laws, the declaration of an election as invalid is also the subject of litigation. As it stands, the decision on invalidation lies with the TsVK. Yet this decision may be appealed to the Supreme Court in accordance with both the presidential and parliamentary election laws (Articles 43.2 and 47.3 respectively). Clearly, the declaration of an election as invalid has a negative effect on election campaigns and their outcomes. Grounds for invalidation can be considered those violations of the law which substantially affect the outcome of the election. These violations include the improper promotion of future candidates and their registration; restricting the rights of candidates; depriving them of guaranteed rights and protection from violations of the law on pre-election campaigning; the use of funds in violation of prescribed laws;<sup>3</sup> disregard of the conditions of voting and procedures involved in the activities of the members of the election commission; the violation of the secret ballot, the procedure of tallying votes, and tabulation of results; threats of physical violence made toward all participants in the electoral process—voters, officials, candidates, their family members and relatives; falsification of the election results or any other condition which the court deems to substantially affect the outcome of an election. The right to appeal applies to the following: candidates for deputy or president, political parties, voting blocs, and groups of voters formed from residential or labor collectives who nominated a candidate for

deputy or president.

The above-referenced instances of judicial review of situations arising during the electoral process were placed within the jurisdiction of the Supreme Court of Ukraine. In doing so, legislators wanted to demonstrate the significance of political events, such as free elections based upon democratic principles, and their importance to an emerging nation. Yet, as a result of Parliament's decision, a serious problem developed. In giving the Supreme Court jurisdiction over these cases (in essence making it the beginning and the end of the judicial cycle), the legislators indirectly denied voters their sacred right to appeal, a condition which is intolerable in any democratic society. Although it is impossible to speak with full authority on the subject, the same problem exists with the elections at the local level.

Noteworthy changes have taken place regarding the Code of Civil Procedure, which was supplemented with Chapter 30-A "Complaints Against the Decisions and Actions of Constituency Election Commissions Regarding the Election of Deputies and Representatives of Village, Rural Settlement, District, City, Districts within Cities, and Oblast Councils and the Petition to Repeal the Decision of Said Election Commissions"; Chapter 30-B "Complaints Against the Decisions and Actions of the TsVK and Constituency Election Commissions Regarding the Election of the President of Ukraine and the Petition to Repeal the Decision of the TsVK"; Chapter 30-C "Petition for the Repeal of the Decision of the Constituency Election Commission on the Registration of Candidates for People's Deputy of Ukraine"; and Chapter 30-D "Complaints Against the Decisions and Actions of the TsVK."<sup>4</sup> The established procedure accurately reflects the various types of cases which emerge during electoral campaigns and supports the courts' fundamental role in the electoral process. Pursuant to the procedural standards contained in the aforementioned provision of the law, all actions which are under the jurisdiction of the Supreme Court are reviewed by a panel of three judges of the civil division in open session over a seven-day period, but not less than one day prior to the elections. The process is well-founded, and as a result, the petitioner and respondent are summoned before the court and are required to present their positions, followed by the presentation of evidence, and legal arguments.

The court's decision is made in the deliberation chamber in written form and signed by all three judges, including any judge who may have dissented from the decision. The dissenting judge retains the right to write his or her own opinion, which will be included in the final written record, but not included in the final public announcement. Only the final decision is announced at this point. In reviewing these cases and keeping in mind that the Court's decisions are final and without right of appeal, there arises some doubt regarding the requirement to set forth a dissenting opinion, since there is no instance where this document has ever elicited any reaction.

The Supreme Court can decide in one of two ways: (1) reverse the decision of the TsVK or, (2) reject the appeal and leave standing the decision of the TsVK on invalidation of the elections. In its ruling, the Court is required to issue a written decision. After the announcement of the

decision by the court, both petitioner and respondent are presented with a full copy of the decision of the court in a timely fashion.

The laws on the elections of the president and deputies (in particular Articles 37 and 51), contain a list of regulations concerning the administrative and criminal accountability for individuals accused of violating the election law. These regulations were issued for the protection of the democratic foundations of the electoral process.

In noting some of the more positive aspects of the new election law of Ukraine, it must be remembered that a great deal of improvement is still

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officials to this day. For this reason, the idea of legal protection from bureaucrats in the election commissions should be the focal point of all legislation. Since this has not occurred, there is a need for further improvement of the election laws.

Let us refer to some situations regarding the context of the articles of the law “On the Election of People’s Deputies of Ukraine”, keeping in mind that the process of elections in Ukraine has achieved a somewhat endless character and that electoral campaigns will, undoubtedly, continue until the expiration of the four-year term of the presently authorized Supreme Rada. In fact, aside from the previously mentioned right of appeal of the rejection of a candidate’s registration, by law it is possible to appeal a decision of the TsVK to the Supreme Court only in cases in which a decision has been made regarding the invalidation of elections. The law, however, does not address the Court’s review of other unlawful activities by the TsVK.

For example, Article 14.7.3 requires the TsVK to produce an explanation of its application of the election law. But how is this accomplished in the case when the explanation is incorrectly issued, and the Supreme Rada does not respond (as in the case when it is adjourned), although campaigns are still in process (the experience of 1994)? Who should respond to the unlawful acts of the TsVK? Such contingencies are not addressed in Ukraine’s law.

The following is an example from the April 1994 races for the Supreme Rada. In Suvorov constituency No. 300 of Odessa, a runoff election was called between the two candidates who received the greater number of votes. Only five days prior to election day, the top vote-getter from the first round withdrew his candidacy, leaving the second place contender—the president of the shipping company Blasko, P. Kudyukin (one of the more influential members of then Ukrainian President Leonid Kravchuk’s team)—unchallenged. The TsVK explained that in this situation, when one of the candidates withdraws his candidacy during runoff elections, the

required, especially in the area of the judiciary’s role regarding violations and irregular legal situations. Our society suffered greatly at the hands of the regime of the Communist apparatchik bureaucracy, and the past continues to cause incorrect, unjust actions of election

ballots are to include only the name of the remaining candidate. Yet this explanation clearly contradicts the intent of Article 46 of the law "On the Election of People's Deputies" which outlines procedures regarding repeat voting (runoff elections). Article 46 clearly states that repeat voting will take place between the two candidates who received the greatest number of votes in the first round of voting. Although it does not account for the contingency when one candidate is removed from the ballot for any reason, the corresponding Article 26 of the law does concern candidates removed from the ballot through renouncing their candidacy or in the instance of the death of a candidate.

In determining the proper procedure regarding the removal of a candidate's name from the ballot during runoff elections, Constituency Election Commission No. 300 should have concluded that there must be two names on the ballot regardless of the withdrawal of one of the candidates. It only makes sense that upon removal of the name of the top vote-getter from the first round, the runoff election should take place between the second and third vote-getters from the first round. Taking into account the TsVK's explanation, the constituency election commission refused to include the name of the third vote-getter on the ballot.

At the first session of the Ukrainian Supreme Rada, it was decided that the explanation of the TsVK was not in accordance with the law and, subsequently, the Supreme Rada did not support the seating of P. Kudyukin as a deputy since he was elected in violation of the election law. The fault, however, rests with the TsVK, whose improper explanation of the application of the law created the dispute in the first place. Unfortunately, the law does not empower the courts with the right to review the decisions and actions taken by the TsVK which violate the right of an individual to be elected.

There is another aspect to the aforementioned story. Pursuant to Article 46, the candidate of constituency No. 300 who occupied the third position in the first round of elections demanded to be included in the runoff elections. However, the constituency election commission refused to do so. The candidate then appealed the refusal to the TsVK. However, the TsVK did not even review the complaint until the day of the elections. Clearly, this case reflects a premeditated inaction by the TsVK. But the law does not provide relief from such institutional inaction.

As a result of this infringement of his rights, the third candidate attempted to seek relief in court. He appealed to the Supreme Court of Ukraine from the decision of the TsVK, but the Supreme Court refused to accept jurisdiction. Referring to the formal side of the law, the Court cited as grounds for declining jurisdiction that, by right, it may only review the TsVK's decisions in pronouncing the elections as invalid (or the rejection of candidate's registration). However, it should be noted that if the Supreme Court established itself as the third branch of power and was guided by democratic principles of the legal systems of civilized states, it would be able to find grounds for jurisdiction over such a suit and then examine the decision from a constitutional vantage point (i.e., test the conformity of the

TsVK ruling with the Constitution of Ukraine). Nonetheless, this situation serves as a graphic example for the need to amend the election law. This author will now present the most essential proposals on supplementing and changing the three laws that regulate the electoral process.

#### **The Law and the Electoral Process**

Among the principles and conditions on the conduct of elections of all individuals holding power, one more principle should be stated—the legal procedure of deciding all the matters connected with interpreting and explaining the standards of election law. Having this principle included in the law, we will arrive at a point where the need of court decisions for governmental bodies and officials of the entire nation has precedential and legal significance in blocking bureaucratic anarchy in the application of the law's standards which, at present, officials seem to interpret through their own understanding of particular circumstances or, perhaps, due to political motives. In addition, there must be a philosophically adopted principle, that for any administrative decision in a state which desires a democratic and legitimate image, the right of appeal must exist through a readily accessible legal procedure.

The present election law, despite its progress, was adopted by deputies of the Supreme Rada who, for the most part, are still considerably saturated with the spirit of the command-administrative system of old and who hold the highest regard for the position and title of a bureaucrat. This outlook is not so much a fault as a malady of a significant portion of the population; it is the inheritance of the ideology of totalitarianism. This is why it was so difficult to persuade deputies to adopt standards of law which would allow the right to appeal decisions of the election commissions on any level which concern voting rights of the citizen. It is a question regarding the standards dealing with human rights, and the internal actions of the constituency election commissions and polling station commissions that will, nonetheless, remain in their sphere of competence. Consequently, there is a need to set forth in the election laws a provision that all decisions of election commissions concerning the realization of the constitutional right to vote and to be elected may be appealed to the courts through established legal procedures.

It is necessary to address both the appeal of actions of election commissions, as well as the active and passive ways in which they hinder, limit, or incapacitate the voting rights of citizens. This is especially important with regard to the existing law which has yet to ensure elections on a multi-party basis and where election commissions are created without regard for the principle of each party's representation in all constituency election commissions and polling station commissions. During the spring and summer rounds of the elections of deputies to the Ukrainian Supreme Rada, there were cases of bias against those candidates for deputy who opposed those parties and groups that were in power in local councils, since these election commissions were formed for the most part by the very groups which, in turn, appointed their most loyal members to these commissions. As a result, demands were placed upon the candidates



undesirable to the groups in power which were not only unfounded by law, but had no bearing with stipulated TsVK regulations.

As an illustration of active bias, there are such pretentious examples as the quizzical coincidence where the surnames of voters on the rolls were signed in remarkably similar handwriting, while in other election commissions, quite the opposite. All the handwriting was remarkably different, and in varied inks (black, dark blue, blue, purple). In different election commissions, they even displayed different-sized photographs of each candidate as well as different forms of their biographies.

In the eastern oblasts of Ukraine, where the population for the most part does not speak Ukrainian, but rather only Russian, it was required that each candidate issue his election documents in Ukrainian for the voters, even though such a requirement is not stated in the law, but, rather, quite the opposite is required—either in the Ukrainian language or in that language spoken by the majority of the population of a given region. Such claims could rebound as a propaganda windfall for the opponents of Ukrainian independence, to be used by any number of supporters of pro-Russian chauvinistic organizations, which purposefully manipulated the issue of two official languages during the elections of ensure the victory of their candidates in the electoral marathon. Because of similar actions of the election commissions, candidates and support groups turned out in a potentially ugly atmosphere, thereby making the electoral campaign chaotic and disruptive.

Inaction by election officials is also on the rise. The example was already given in which the Central Election Commission ignored the complaint of the third candidate of the Suvorov electoral constituency No. 300 of Odessa concerning his omission from the ballot. There were many reports about tardy preparation of voter lists. In addition, the invitations sent to voters, which provide instructions on where to vote, and the time and procedures for voting, were presented to voters too late, or sometimes not at all. Constituency election commissions performed their duties improperly regarding the dissemination of informational materials on the candidates, ensuring the participation of the state mass media in introducing the voters to their candidates for deputy, and by not reacting to the violations during campaign activities. In order to avoid similar situations in future electoral campaigns, there should be a precedent established in the law which provides for the right of appeal to the courts from the acts or the failure to act of the election commissions.

A special study of the enforcement of election law is needed. Previously referenced procedures for summoning individuals for administrative or criminal accountability, were actual and essential, but nonetheless insufficient. Emphasis needs to be placed on not only administrative and criminal accountability, but on those forms of accountability which have been adopted in democratic civilized countries—civil proceedings (assessing penalties and fines), proceedings on the abuse of office (annulling the official's government registration; the invalidation of votes at the polling station, constituency, or national level; the dissolution of constituency or

polling station election commissions and the formation of new ones with possible changes in the way they are formed) and disciplinary proceedings (the sentencing of officials failing to fulfill the requirements of the law in performing their duties according to the standards set forth in the law). The standards of election laws should be referenced, and those standards stipulating accountability should be set forth in the form of a certain statute or procedural guidelines, as with the Criminal Code. Only after this is done can we speak of election laws with confidence, and pass legislation which will include not only immediate laws governing elections, but in the standards of statutes or guidelines containing provisions for accountability.

Sorting through some other provisions, Article 29 of the law "On the Election of People's Deputies" outlines the right of a candidate for deputy to be free of the demands of his or her profession with the full retention of his or her salaried position during the campaign in order to facilitate meetings with voters. The same right was also stipulated for the candidate's authorized agents (Article 31.5). But what if the manager of an enterprise does not comply with the law? What form of action can be taken against him? This type of action is not stated in the law. To ensure compliance with the law in an appropriate manner, the court must be able to rule on the types and degrees of accountability for violation of the law. The following provides an illustration of the need for a judicial approach to such violations.

During the spring and summer campaigns for the Supreme Rada, many candidates campaigned by employing mass advertising through the use of television and radio and received contributions which grossly exceeded the maximum limit of a private campaign fund as stipulated in Article 36 (six million karbovantsi). If legislators have gone to the trouble of affixing a maximum to the size of private and group support funds, then it follows that it is essential to also stipulate the accountability for possible violations of this requirement. Or, if a constituency election commission decides to invalidate a candidate's registration because of this violation, at least they should carry out the decision by forbidding television from providing continued coverage of that candidate who has already exhausted his fund. Once a procedural requirement is set by law or statute, it should be strictly followed in responding to all those violations that were allowed at polling stations and constituency election commissions during the elections, even more so if these violations were documented by observers.<sup>5</sup>

Legislation must clearly establish accountability for such violations. The optimal type of accountability would be to pronounce the elections invalid at the constituency level or at least at particular polling stations. There is one more positive aspect to this approach. When pronouncing the elections invalid, for example, as in the case of the fraudulent use of absentee ballots, or altering the election results, the court, in rendering its decision, provides the basis for the bringing of an action against those who tampered with the election results.

Ukraine's election law requires the detailed innovations mentioned throughout this article—innovations upon which specialists in the judicial

field continue to labor. The difficulty of this process is that it is the responsibility of the deputies who make up the Supreme Rada of Ukraine to oversee the formation of a new electoral system according to methods concerned with ensuring democratic and just principles. These methods include judicial oversight of compliance and enforcement of the election laws and legal recourse in response to the violation of the law or deviation from what is prescribed through its standards.

### Notes

<sup>1</sup> *Konstitutsinhi akti Ukraini: 1917-1920* (Kiev: Filsofska i sotsiologhina dumka, 1992); *Nevidomi konstitutsii Ukraini* (1919, Article 21) p. 230.

<sup>2</sup> The author's article on the official presentation of the project on this law was published with a report to a session of the Supreme Rada of Ukraine in 1991.

<sup>3</sup> It must be noted that the current presidential electoral law requires candidates for president to declare their income. Providing false information on this declaration is grounds for the TsVK to address the Supreme Court with a petition for the rejection of the registration of a candidate for president (Article 29.2). The law "On the Election of People's Deputies of Ukraine" does not contain such a provision.

<sup>4</sup> The A, B, C, D of Chapter 30 correspond to the first four letters of the Ukrainian alphabet А, Б, В, Г (—editor).

<sup>5</sup> There was an especially large number of violations during run-offs which took place ahead of schedule; the principle "one voter—one vote" was not carried out; there was one place where duplicated ballots were used.