

PUBLIC ADMINISTRATION

CONSTITUTIONAL-LEGAL BASES OF REALIZATION OF ELECTORAL RIGHTS OF THE CITIZENS OF UKRAINE

Deydey Daryna Myhaylivna,

Postgraduate Student of the Department of Public Administration and Public Service of the National Academy of Public Administration under the President of Ukraine, Kyiv, Ukraine.

ORCID:0000-0003-2713-4538

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ABSTRACT

The periodic conduct of elections and the renewal of the electoral legislation attest to Ukraine's emergence as a democratic and rule of law state. The purpose of the article is to analyze the constitutional-legal foundations of the exercise of the electoral rights of the Ukrainian citizens. It is noted that one of the oldest and most widespread and effective forms of direct democracy is elections, an institution of democracy that allows one to vote and be elected. However, it is noted that in Ukraine from 1991 to 2020 there were several independent electoral systems, which implies the use of proportional and majoritarian systems, as well as mixed ones – their varieties for holding different types of elections.

The constitutional provisions stated in the article testify to the orientation of the Ukrainian society to ensure in Ukraine the implementation of the constitutional guarantees regarding the electoral rights of the citizens and the importance of this right, along with other guaranteed rights. Attention is paid to the Electoral Code of Ukraine, adopted on December 19, 2019, which is a codified legislative act that defines the guarantees of electoral rights of the citizens of Ukraine to participate in the formation of the composition of representative bodies of the state power, representative body of the Autonomous Republic of Crimea and representative bodies and elected officials of the local self-government of Ukraine, regulates the organization and holding of different types of elections.

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Introduction. The periodic conduct of elections and the renewal of electoral legislation attest to Ukraine's emergence as a democratic and rule of law state. However, it should be noted that at the current stage of development of the Ukrainian legislation, the existence of a new electoral law adopted in 2015 by the Law of Ukraine "On Local Elections" did not lead to effective elections at the local level. If you compare all the legislative acts on elections, we can see some inconsistencies in the regulation of the same issues. In particular, these inconsistencies relate to the determination of the subjects of the electoral process, the order of stages of the electoral process, the order of drawing up of lists of candidates, the procedure for nomination of candidates, the beginning and end of the electoral process of different types of elections, the system of election commissions, voting procedures (beginning of voting, closing of polling stations), election commission activities, procedures for challenging actions, inaction during elections, and more.

Repeatedly by reputable international organizations, in particular the Venice Commission, scholars and practitioners, the issue of codification of the electoral law of Ukraine has been raised. It would help to unify the election procedures for the presidential, parliamentary and local elections. Such a legislative act would facilitate the establishment of unified electoral procedures, make it impossible to change the electoral rules during the election process in Ukraine, etc. Some issues of the development of the political rights and freedoms of the citizens; elections, their safeguards and legal responsibility; theoretical aspects of the implementation of electoral legislation are covered in the works of scientists and practitioners O. Boyko, M. Kozyubra, Yu. Klyuchkovsky, V. Pohorilka, M. Smokovych, M. Stavniychuk, A. Savkov, O. Sushynsky, O. Titarenko, V. Fedorenko, O. Frytsky, V. Shapoval, Y. Shemshuchenko and others.

Research results. The civil society is formed in the process of turning the “subjects” into citizens, in other words, those members of the community of citizens of the state who have felt their dignity and have been able to make political choices, based on understanding what their natural rights are. Thus, this formation begins with the transformation of the ethnic union into a sovereign nation, that recognizes itself as a nation whose justice has risen to an understanding of the need to realize the natural and inalienable human and citizen rights, on the one hand, and the subordination of the public authorities to the other, since only a sovereign nation is a legitimate source of power.

One of the oldest and most widespread and effective forms of direct democracy in Ukraine is elections, an institution of democracy that allows one to vote and be elected. As M. Kozyubra rightly pointed out, “one of the most important human rights - the election of their representatives to parliament or other representative body and the granting of their mandates to exercise the sovereign rights of the people, as well as the legitimation of power in general, should not be exercised in any way, even formally defined in the electoral law, but in a way that ensures freedom of choice for the voter” [5].

Election concepts have traditionally been associated with the concept of “electoral right”, which is used in both objective and subjective terms. According to V. Fedorenko, “in the objective sense, electoral right is an institution of the constitutional law that unites the norms and institutions of the constitutional and other branches of law, which define the concepts, types, principles of elections, the procedure for their organization and holding, as well as legal responsibility for the violation of the election law” [12]. Therefore, in an objective sense, the term “electoral right” is a set of legal rules that govern the elections in a particular country (the right to vote, to contest results and election irregularities, etc.).

The electoral right in the subjective sense consists of active and passive, where active (voting right) is the right of a citizen to become an active participant in the state-legal relations that arise during elections, in the exercise of the right to withdraw deputies in those countries where it is provided by law. Therefore, this means that the right to vote is used when voting in elections of the state and self-governing bodies, as well as elected persons (officials). Passive electoral right is the right to be elected, to be elected to the state and local self-government bodies or to elected office, and provides for the opportunity to stand for election or to agree to the nomination. Thus, one has the right to be registered as a candidate, to conduct election campaigns, to work in constituencies with the voters, etc.

Articles 38, 70, 71 of the Constitution of Ukraine disclose the content of the subjective electoral right of the citizens. Subjective electoral right is the constitutional right of the Ukrainian citizens to freely choose and be elected to the state and local governments [7]. It is the right of the Ukrainian citizens to participate in all kinds of elections at all stages of their organization and holding. Stavniychuk M. states that electoral right is a system of legal norms that regulate the formation of the electoral bodies of the state power and local self-government bodies through free voting [6]. Electoral right is a sub-branch of the constitutional law of Ukraine.

We agree with Yu. Klyuchkovsky that the electoral right is directly related to the electoral system. The choice of the type and specific type of electoral system is one of the determinants of the constitutional plan. The type of electoral system directly relates to the development of the party system, the principles of formation of the executive power, relations between the executive and the legislative power, and the form of the state. A successful election system can ensure the formation of a parliament that reflects the main directions of the public opinion, the formation of a government whose activities will be in accordance with the will of the majority of voters, the election of representatives whose personal qualities are optimal for the performance of power. [4]

The most widespread electoral systems in the world are majoritarian, proportional and combined. Majoritarian (relative, absolute, qualified majority) applies in the elections of single-person and collegial representative bodies of the state and local self-government bodies and provides for the

formation of single-member constituencies into which the whole territory of the country or the territory of the respective administrative-territorial unit is divided, in which the citizens vote for a specific candidate seeking a representative mandate. Proportional is used in the elections of collegial representative bodies of the state power and local self-government bodies and provides for the formation of electoral lists of candidates from organizations of political parties and their election blocs. Combined (mixed) involves combining proportional and majoritarian electoral systems within one state, sometimes for one type of election.

In Ukraine, the electoral system underwent many transformations from 1991 to 2020: the majoritarian electoral system, that was established after Ukraine's declaration of independence, changed after the 1996 Constitution of Ukraine to mixed, and since 2006 for the election of the People's Deputies of Ukraine, deputies of the Verkhovna Rada of the Autonomous Republic of Crimea, city, district and city deputies, regional and the Kyiv City Council was introduced a proportional electoral system. During the next local elections in 2010, the proportional electoral system was changed to a mixed one (majoritarian-proportional).

After the Revolution of Dignity, the elections to the Verkhovna Rada of Ukraine in 2014 were conducted under a mixed system. Instead, a new electoral system was used for the 2015 local elections, which is sometimes called "German" by experts due to its proximity to certain types of local elections in Germany. Thus, the Law of Ukraine "On Local Elections" of 2015 defined a complex multi-level electoral system [8]:

- elections of deputies of village and town councils are conducted by majoritarian system of the relative majority in single-mandate constituencies;
- elections of deputies of the Verkhovna Rada of the Autonomous Republic of Crimea, regional, district, city. District in the city councils are held on a proportional electoral system by a multi-mandate constituency according to the election lists of the local organizations of political parties;
- election of a city (cities with a number of voters equal to or exceeding 90 thousand) heads is held by majoritarian system of absolute majority in a single single-mandate constituency;
- elections of village, town, city (cities with fewer than 90 thousand voters) heads are held by majoritarian system of a relative majority in a single single-mandate constituency;
- elder elections are conducted by a majoritarian system of a relative majority in a single single-member constituency, which includes the territory of the respective settlement (village or town) within a unified village, town, city territorial community;
- for election of deputies of the city, district in the cities, and the Kiev city council was introduced a proportional electoral system.

The Law "On Local Elections" of Ukraine has been repealed, except for the provisions on organization and holding of repeated, mid-term, additional elections and replacement of the deputies elected in a multi-mandate constituency whose powers are terminated ahead of time, until the next regular or early elections of deputies of the local councils on the basis of the Electoral Code of Ukraine dated 19.12.2019 No. 396-IX.

The Electoral Code of Ukraine stated that according to the Constitution, the following 10 types of elections are held in Ukraine [1]:

- President of Ukraine;
- People's Deputies of Ukraine;
- local elections:
- deputies of the Verkhovna Rada of the Autonomous Republic of Crimea;
- deputies of the village, town, city council;
- village, town, city mayor;
- deputies of the district council;
- deputies of the regional council;
- deputies of district in the city council (in cities where district in the city council are formed);
- village, town elder.

Thus, in Ukraine from 2015 to 2020, there were several independent electoral systems, which involved the use of proportional and majoritarian systems, as well as their variants for holding different types of elections. After analyzing the content of the election laws, it was concluded that unification at the legislative level requires rules on the principles, subjects, terms, order of stages of the election process; the procedure for drawing up and clarifying the voter list; territorial organization of elections, the procedure of

formation and organization of the activity of the election commissions; nomination and registration of the candidates; the procedure of voting and the counting of votes; the procedure for official announcement of the election results; order of appealing the decisions, actions, inaction of the subjects of the electoral process, etc. Therefore, the adoption of the Electoral Code of Ukraine was a necessity.

The modern international law regards human rights as natural and inalienable. That is, human rights are not a gift of the state. The international community is taking various measures to prevent and remedy human rights abuses in a particular country. There are international legal means of monitoring the observance of human rights that have the competence to deal with human rights violations in the states. One of them is the UN Human Rights Commission, a functional commission of the UN Economic and Social Council (ECOSOC), consisting of 53 representatives of the UN member states, within which various working groups, special rapporteurs on human rights operate. Its functions include research, presentation of ECOSOC recommendations. The Commission promotes the codification and progressive development of the international human rights law by drafting international declarations, treaties and other instruments. Under the auspices of the Commission a procedure for the handling of private complaints under the ECOSOC Resolution 1503 of May 27, 1970, which is universal and does not depend on the consent of the state, it can be accessed by a citizen from any state.

Therefore, the constitutional right to free elections is guaranteed to the citizens of Ukraine by the national legislation and a number of international-legal instruments. According to Article 25 of the International Covenant on Civil and Political Rights, ratified by the Decree of the Presidium of the Verkhovna Rada of the Ukrainian SSR of October 21, 1973 No. 2148-VII [9], every citizen should have the right and the opportunity to take without any discrimination and without justification participation in the conduct of public affairs, both directly and through the mediation of freely elected representatives, and to vote and be elected in genuine periodic elections held on the basis of universal and equal electoral right by secret ballot, guaranteeing the free expression of the voters.

Based on the 1966 International Covenant on Civil and Political Rights and the Optional Protocol, the Human Rights Committee is composed of 18 experts. The Committee deals with individual complaints of violations of the rights enshrined in the Covenant of the states that have ratified the Optional Protocol. Upon receipt of the complaint, the Committee brings this fact to the attention of the offending state that must provide written explanations of the infringement and the measures to be taken to restore the rights within 6 months.

An important step in establishing Ukraine as a rule of law was the adoption by the Verkhovna Rada of Ukraine of the relevant Law of July 17, 1997 No. 475/97-BP "On Ratification of the Convention for the Protection of the Human Rights and Fundamental Freedoms of 1950, the First Protocol and Protocols No. 2, 4, 7 and 11 to the Convention" (the Convention), which, under the provisions of Article 9 of the Constitution of Ukraine, has acquired the status of a part of the national legislation. As a result of the ratification of the Convention, Ukraine has fully recognized in its territory the jurisdiction and without concluding of a special agreement the jurisdiction of the European Court of Human Rights in all matters concerning the interpretation and application of the Convention (Article 46 of the Convention). Article 3 of the First Protocol to the Convention ("the right to free elections") establishes the obligation of the states to hold free elections at reasonable intervals by secret ballot in conditions that ensure the free expression of the people's opinion in the choice of the legislature. [10]

The European Court of Human Rights was established in accordance with the 1950 European Convention for the Protection of Rights and Fundamental Freedoms, concluded by the Council of Europe [2]. With the entry into force of the Protocol No. 11 to the Convention in 1998, the original mechanism for dealing with individual complaints was reformed to simplify and improve efficiency. The Convention provides for a complaint procedure and conditions for the inadmissibility of complaints: anonymity; complaints of violations of the rights not mentioned in the Convention; consideration of the same complaint in another procedure of international review; not all domestic remedies have been used; omission of 6 months after the date of the final domestic decision on the case. The decisions of the Court are binding on the state and are followed by the Committee of the Ministers of the Council of Europe.

The Universal Declaration of Human Rights [3] declared the right to participate in elections to the representative bodies, which is one of the most important rights, since a person, in exercising this right, is directly involved in building a democratic state and a just society [11]. Ukraine, integrating into the world democratic community, practically unchanged transposed these norms into its Basic Law – the Constitution.

The Constitution of Ukraine stipulates that the bearer of sovereignty and the sole source of power in Ukraine is the people who exercise power directly and through the state and local governments [7]. The right to determine and change the constitutional order in Ukraine belongs exclusively to the people and cannot be usurped by the state, its bodies or officials. The third section of the Constitution enshrines the guarantees of the electoral right of every citizen of Ukraine. People's will is expressed through elections, referendums and other forms of direct democracy. The citizens of Ukraine who have attained the age of eighteen have the right to vote in elections and referendums. Elections to the public authorities and local governments are free and take place on the basis of universal, equal and direct electoral right by secret ballot [7]. Thus, the Constitution of Ukraine proclaimed the principle of democracy and established the natural right of every citizen of Ukraine to govern the state, recognizing elections as the most important institution of democracy, the main form of direct expression of the people and their exercise of power.

The aforementioned constitutional provisions testify to the orientation of the Ukrainian society to ensure in Ukraine the implementation of constitutional guarantees regarding the right to vote and the importance of this right, along with other guaranteed rights. The elections are the main instrument of control of the people of Ukraine over the activities of the political and public institutions, elected citizens regarding the implementation of the programs proposed by them in the state bodies and local self-government bodies.

The Electoral Code of Ukraine (the Code) [1] is a codified legislative act that defines guarantees of the right of the citizens to participate in the formation of the representative bodies of the state power, the representative body of the Autonomous Republic of Crimea, and representative bodies and elected (officials) of the local self-government of Ukraine, regulates the organization and holding of different types of elections. On November 7, 2017, the Verkhovna Rada adopted the Electoral Code in the first reading by a minimum of 226 votes. This came as a surprise to both the public and the deputies themselves. On June 6, 2019, in the final days of its work, the Verkhovna Rada of the VIII convocation began consideration of the project in the second reading. On July 11, 2019, it was approved by the Verkhovna Rada of Ukraine of VIII convocation by 230 votes, and after the presidential and parliamentary elections, overcoming the President's veto – December 19, 2019 was finally adopted by the votes of 330 deputies of the newly elected Verkhovna Rada of Ukraine IX, taking into account the President's proposals.

The Code has incorporated the provisions of the main legislative acts related to the electoral process: "On Election of the President of Ukraine", "On Election of the People's Deputies of Ukraine", "On Local Elections". However, the laws "On Central Election Commission" and "On State Voter Register" remain in force.

As noted in the explanatory note, the need for the drafting and adoption of the Electoral Code has been repeatedly drawn to the attention of the international institutions – the Parliamentary Assembly of the Council of Europe, the European Commission "For Democracy through Law" (Venice Commission), the Office for Democratic Institutions and Human Rights of the OSCE.

The draft law was drafted on the basis of the draft Electoral Code of Ukraine by a working group under the leadership of Yu. Klyuchkovsky, registered as early as March 2010. That project received a positive opinion from the Venice Commission.

One of the main problems that the representatives of the working group - the authors of the project – tried to solve was the detachment of the deputies from the voters due to the lack of influence of the voters on the personal composition of the Verkhovna Rada of Ukraine or the local council. Therefore, it was proposed to use an electoral system that allows personalization of voting (the so-called "open candidate lists"), that requires the introduction of regional constituencies. It is proposed to use the same electoral system also in the elections of deputies of the Verkhovna Rada of the Autonomous Republic of Crimea, regional councils, as well as city councils of large cities, in which the number of voters exceeds 90 thousand.

Thus, the Code stipulates that elections of People's Deputies are conducted on the basis of a proportional system based on the single lists of candidates for deputies in the national constituency, from which regional election lists of the candidates for deputies from parties are formed. Party lists will be open at both central and regional level. Therefore, the Code provides for the use of a proportional electoral system with open lists. The voter will have the opportunity to vote not only for the party, but also for its particular candidate.

The parties will prepare two lists - nationwide and regional. Instead of more than 200 single-member constituencies in the country, they will create 27 constituencies that will coincide with the borders of Ukraine's regions. According to experts, this will "complicate the trade" checkpoints in the party lists. The parties and candidates will receive ordinal numbers, which will be published in the press and placed in each booth. Only two columns will remain in the ballot, one of them will contain the party's serial number, the other - the candidate's number from the party's regional list. If voters do not influence the position of candidates in "closed lists", voters may influence the place of candidate in the list of the party they are voting for in "open lists". That is, the party list is open to influence by the voters - and the configuration of the party list can dramatically change at the finish of the vote. Depending on the number of votes cast, the candidate will be able to occupy the highest stage in the party list, and those candidates from the party list with the highest number of voters will receive the parliamentary mandate.

The precinct election commissions will no longer determine the names of the deputies who won the election. Their responsibility will be to count only the votes cast for the political parties, and the CEC will determine the election results. The higher the number of votes the party will gain, the more it will receive parliamentary seats. The basis for counting the number of votes cast for the parties are the protocols of the precinct commissions. All the calculations will be made by the CEC, so it turns out that the CEC is adding work.

The Electoral Code has both progressive and ineffective provisions, observations and debates:

- the biggest challenge is Parliament's decision to limit the openness of the electoral rolls in parliamentary and local elections. Deputies rejected President V. Zelensky's proposal to introduce a proportional electoral system with fully open election lists;
- it is debatable to exclude provisions on the CEC and the State Register of Voters from the Code and to maintain special laws;
- the list of available election data is small and it is advisable to significantly increase the ability of the citizens to access election information;
- about the need to titrate or translate into the gesture language of the election campaigning in the media;
- no ban on the use of commercial and social advertising for campaign purposes;
- no distinction is made between direct and indirect bribery of the voters;
- election campaigning in print and audiovisual media is regulated in general and not in detail, etc.

Conclusions. The Constitution of Ukraine establishes that the bearer of sovereignty and the sole source of power in Ukraine is the people who exercise power directly and through the state and local self-government bodies. The right to determine and change the constitutional order in Ukraine belongs exclusively to the people and cannot be usurped by the state, its bodies or officials. The Constitution of Ukraine proclaimed the principle of democracy and established the natural right of every citizen of Ukraine to govern the state, recognizing elections as the most important institution of democracy, the basic form of direct will of the people and the exercise of power by them.

It is noted that the constitutional right to free elections is guaranteed to the citizens of Ukraine by the national legislation and a number of international-legal documents. To determine how voters protect their rights, you must first determine what types of voter rights may be violated. These are the right to vote in relevant elections, the right to participate in the work of election commissions as their members, to conduct election campaigning, to conduct election observation and other election-related activities, to be elected, to vote in secret.

So, in order to determine how voters protect their electoral rights, we must first determine what types of voter rights have been violated, namely: the right to vote in relevant elections, the right to participate in the work of election commissions, the right to conduct election campaigning, to observe election organization and holding, the right to be elected, the right to vote by secret ballot, etc. In order to protect their rights, the participants in the election process have the right to go to court, to bodies, institutions and organizations. Depending on what right has been violated, you have to choose what to do next, how to protect your rights. You can find out a lot of useful information on the Official Website of the Central Election Commission by going to the voter's office. Today you can learn how to vote for internally displaced persons and voters whose electoral address belongs to the temporarily occupied territory of Ukraine, how to vote not in the registered place of residence, where you can read the list of polling stations, etc. The necessary information can also be found on the services of the State Register of Voters with the following sections: "Open Data", "Feedback", "My Elections", "Inclusion Check", "Polling Station Search".

Summarizing the above, we have come to the conclusion that at the level of legislation the ways of protecting citizens of their electoral rights are determined. Electoral violations can be avoided, if the citizens are more aware and actively involved in the electoral process from the beginning, finding themselves in the voter register and checking all the data on themselves and their loved ones. The exercise of our right to free expression depends solely on each individual, so we all have to defend ourselves the fundamental constitutional right to free expression.

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