

Combating misuse of administrative resources in the electoral process: case study from Ukraine

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INTRODUCTION

Use of administrative resources for the purpose of obtaining advantage within an election campaign is currently a widespread phenomenon. This is also true for countries with developed democratic traditions. Certain political parties and candidates resort to the misuse of their authoritative powers and capabilities.

The above-mentioned problems are particularly acute in emerging democracies. Shortage of stable democratic traditions, as well as high levels of political culture and stable standards of public administration ethics together create an environment where formal legislation constitutes the major tool for misuse prevention. Accordingly, the forms and tools of the use of administrative resources in the electoral process advance incredibly fast. It is common that in such countries administrative resources are applied via advanced tools requiring an instant response as well as the introduction of new restrictions and prohibitions. International standards and domestic legislation are simply unable to respond to such new challenges due to lack of time.

Nevertheless, should the adjustment of national legislation be carefully and relatively quickly carried out, new forms and manifestations of officials' misuse of power to achieve their political goals undertake other forms.

The Ukrainian experience of combating misuse of administrative resources in elections is challenging and indicative. National legislation contains a number of instruments that implement international standards and solid election management practices. The experience of the application of such tools is also quite rewarding and demonstrates a vast amount of achievements. At the same time, the named tools still leave gaps illegally utilised by politicians and officials.

The classical understanding of the administrative resource in the election process is based on the following definition:

Administrative resources are human, financial, material, in natural and other immaterial resources enjoyed by both incumbents and civil servants in elections, deriving from their control over public sector staff, finances and allocations, access to public facilities as well as resources enjoyed in the form of prestige or public presence that stem from their position as elected or public officers and which may turn into political endorsements or other forms of support.¹⁶⁴

Nevertheless, this concept requires a wider and more comprehensive consideration in Ukrainian realities. These are not only the powers and resources that may be illegally used during the election process, but also the resources that can be used long before the elections and after they have been conducted and require solid in-depth consideration. Therefore, in addition to the "classic" blocks on election administration, political financing and campaign restrictions, we will analyse two additional irregular blocks: misuse of the legislature and ensuring the inevitability of legal liability.

MISUSE OF LEGISLATIVE POWERS

The functioning of the parliament as a representative political body presupposes the active political parties' functioning. Unfortunately, representatives of the political parties are trying not only to ensure that parliament performs its functions, but also to take measures to improve their legal status and simplify the conditions for their participation in the future elections.

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164. Report on the misuse of administrative resources during electoral processes adopted by the Council for Democratic Elections at its 46th meeting (Venice, 5 December 2013) and the Venice Commission at its 97th Plenary Session (Venice, 6-7 December 2013), [www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2013\)033-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)033-e).

In the Verkhovna Rada of Ukraine, it often happens that the adoption and/or non-adoption of certain legislative regulations directly affects the ability of parliamentary parties to facilitate their participation in elections. Generally, such activities can be viewed as the misuse of parliamentary/legislative resources. Several blocks of possible violations may generally be outlined here.

FREQUENT CHANGES IN ELECTORAL LEGISLATION

Changes to the Ukrainian electoral legislation is a continuous process. Almost every election is conducted under the revised legislation. In some cases, such new legislation becomes “revolutionary”. The relevant experience from the last decade is particularly worth analysis:

- ▶ Prior to the 2012 parliamentary elections in November 2011, a new Law of Ukraine “On Elections of People’s Deputies of Ukraine” was adopted. This law has significantly revised the system of territorial organisation of elections, the basic principles of election commissions activity, as well as other election procedures. However, the most significant issue was the change of the election system – from proportional to a mixed election system.
- ▶ During the 2014 presidential elections in Ukraine, the Law of Ukraine “on the Presidential Elections of Ukraine” was amended six times. The last changes were made five days before the election day.
- ▶ Prior to the regular local elections in October 2015, a new version of the Law of Ukraine “on Local Elections” was adopted in July 2015. This law provided for the introduction of new election systems for the election of certain local councils, as well as for mayors of large cities.
- ▶ Prior to the local elections in October 2020, a new Electoral Code of Ukraine was adopted in December 2019, which has been substantially amended in July 2020 – in fact, a month before the start of the election process. The rules regulating local elections have also been amended twice during the ongoing election process (those amendments were narrowly focused, however).

In fact, even minor changes in electoral procedures and conditions for participation can significantly affect the course of the electoral process and the equality of its participants. Ultimately, the stability of electoral legislation is the key to free and fair elections. Obviously, certain changes can be objective and critical. As an example, amendments to the Law of Ukraine “on Elections of the President of Ukraine” in May 2014 have been made due to the occupation of the Crimea by the Russian Federation and its armed aggression in Donetsk and Luhansk oblasts, and therefore the impossibility of organising elections on respective territories. At the same time, a prohibition to change electoral legislation less than a year before the election is considered an essential guarantee for the implementation of the principles of electoral law.¹⁶⁵

Political parties involved in parliamentary activities (with their representatives there) are definitely in a better position. It is not only changes to the election legislation that they can immediately find out about, but also the opportunity they have with respect to drafting such changes. This, obviously, provides them with an opportunity to better prepare for the application of the new legislation. This is critical, especially during national elections when even the slightest change in electoral legislation requires the engagement of a high number of people across the country. At the same time, the election process is very limited in time, so parliamentary parties are able to use this “resource” much faster and gain some benefits during elections.

In addition, frequent changes to the legislation violate the principle of legal certainty as an element of the rule of law. The lack of legal certainty and protection of trust in stable legislation significantly limits the actions and activities of political parties, which learn about the adopted changes only during the election process after their adoption. However, the issue of the quality and objectivity of such changes requires more significant consideration and is discussed below.

IMPACT ON LEGISLATION QUALITY

Errors and inaccuracies

Untimed adoption of changes to electoral legislation constitutes a kind of “patching holes”. Should this happen on the eve of elections, or already during the election process, such changes usually raise serious doubts

165. p.II.2.b. Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report – Adopted by the Venice Commission at its 51st and 52nd sessions (Venice, 5-6 July and 18-19 October 2002) (CDL-AD(2002)023, rev2-cor-e), [www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2002\)023rev2-cor-e#](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2002)023rev2-cor-e#).

regarding their quality and substantive unity. It is obvious that such drawbacks of the legislative process primarily affect the content of the adopted laws and the quality of the organisation and conduct of elections. However, focus should also be made on the aspect of deliberate poor regulation of relations at the legislative level, when a mistake or “incompleteness” made by the parliament will be corrected by election administration bodies that are formed by political parties and can still reflect party interests in one way or another (this issue is analysed further in the text).

In practice, such mistakes, conflicts and gaps in the Electoral Code or other law are corrected by the CEC during the adoption of additional by-laws. In some cases, there also can be the adoption of special clarifications on the application of the provisions of the electoral legislation.

As an example, in the course of preparation for the 2020 local elections, the CEC officially adopted nearly 20 clarifications on the application of electoral legislation. Quite often, such explanations and by-laws are aimed not only at clarifying the provisions of the Electoral Code, but also lead to its evolution. For example, the CEC Resolution No. 249 of 11 September 2020¹⁶⁶ provides clarifications on the provisions of Article 216 of the Electoral Code and defines levels of local councils where simultaneous running of candidates as local councilors is not allowed. The CEC by its decision has applied the provisions of the Electoral Code which *de facto* sets a rule which should be specified in law.

In fact, this is a case when parliament self-withdraws from regulating certain issues in legislation. The legislative procedure and the nature of law significantly limits possible misuse further on. While by-laws adopted by the CEC or even adopted in the process of application of the law by other election commissions leave “room for manoeuvre” and possible misuse.

Thus, in such situations, parliament leaves excessive discretionary powers to the CEC, which under certain political conditions may lead to misuse. This issue definitely needs to be carefully studied in separate research.

Untimely decision making

Even those decisions of parliament, adopted in compliance with the requirements of their form and content, may be made too late for their proper consideration by parties and candidates running in the elections. Just two examples of the latter are the calling of local elections and changes into the administrative-territorial division.

According to the Constitution of Ukraine, the parliament calls for local elections to be held on the day clearly specified by the constitution (the last Sunday of October of the fifth year of the powers of local self-government bodies elected upon the results of previous regular elections). Obviously, the function of the parliament here is more formal. However, failure to do so creates uncertainty for the participants of future elections. On 15 July 2020, the Verkhovna Rada of Ukraine called for regular local elections on 25 October 2020. Such a delayed call is made within the minimum term required. However, the main problem is that such a decision of the parliament was not final and underwent significant changes later.

The reason is that administrative and territorial reform has been carried out simultaneously with the development of a comprehensive reform of the electoral legislation in Ukraine. On 17 July 2020 (after calling for regular local elections), the Verkhovna Rada of Ukraine adopted a resolution on the liquidation of 490 *rayons* and the formation of 136¹⁶⁷ new ones. The main problem was that these processes had not taken place in public and the final *rayon* boundaries had been unknown both to the parliamentary parties and all other parties having planned to participate in elections until the final decision was taken. It was only the parliamentary ruling majority which fully understood the situation, as its representatives drafted the respective resolution of the parliament jointly with the government.

A similar situation occurred with the elections at the primary basic level (village, settlement and city). The Cabinet of Ministers of Ukraine has also radically changed the boundaries of all communities in Ukraine. The composition, territory and number of voters in almost all communities of the country has changed. This decision was made by the government on 12 June 2020. However, this decision was made public and was submitted to the CEC for the appointment of the respective first elections only on 27 July 2020. This means that for more than a month and a half, neither political parties, nor future candidates were aware about the borders and format of the elections and, consequently, could prepare to participate in the elections. As a

166. Resolution of the Central Election Commission “On Clarification of the Application of Certain Provisions of the Electoral Code of Ukraine Concerning the Nomination of Candidates in Local Elections”, No. 249 of 11 September 2020.

167. Resolution of the Verkhovna Rada of Ukraine “On the formation and liquidation of districts” of 17 July 2020, No. 807-IX, <https://zakon.rada.gov.ua/laws/show/807-20#Text>.

result, the CEC only called for the first elections in all communities within the country on 8 August 2020,¹⁶⁸ and the elections of *rayon* councils on 14 August 2020.¹⁶⁹

Thus, territorial organisation of elections (*rayon* boundaries, community boundaries, number of voters and other important information to prepare for the elections) were unknown to the public and parties' representatives. Such information was available only to the government, which is formed by the representatives of the parliamentary ruling party. As a result, most political parties did not have time to re-register their local organisations in cities and *rayons* to participate in the elections. Consequently, the nomination of election commissioners, as well as candidates were often carried out by the parties not at the respective level of the city or *rayon*, but only at the oblast level where the only "legitimate" party organisations existed.

Obviously, the above-mentioned action and inaction are not classic examples of administrative resource misuse in elections. However, the development and implementation of such comprehensive reforms by the government on the eve of the election creates a situation of undue advantage to the ruling party and a situation of discriminatory uncertainty for all other parties and candidates because of the lack of access to respective information and public resources.

LEGISLATIVE INACTION

Legislative inaction of the parliament can also be considered as a new noteworthy form of the misuse of power. Generally, the parliament has a degree of discretion on the law drafting with respect to different issues. This comes from the theory of parliamentary sovereignty. However, there are certain issues for which the right of the parliament to pass a law should become a duty. Failure to do so in a situation where it would help a particular political party gain more support in elections should be regarded as a new and extraordinary form of administrative resource.

The misuse of parliamentary power is clearly illustrated by the situation of legislative regulations on campaigning on the internet via social and online media. The current Electoral Code of Ukraine does not contain any clear provision on campaigning on the internet. Such campaigning is partially regulated by general restrictions set out in the Electoral Code with respect to election campaigning. However, most current features of internet and modern digital technologies require a separate legal regulation. The absence of such specific regulations actually undermines the influence of the state on this sphere and leaves such campaigning in the "shadows".

The issue of outdoor advertising, targeted advertising, spreading aggressive advertising, placing hidden political ads, using fake news, and so forth remains outside of the legal framework. Of course, full and comprehensive regulation of these issues is currently hardly possible. Moreover, not all countries with developed democratic traditions have already developed the appropriate regulatory mechanisms. However, the Ukrainian Parliament did not even attempt to resolve these issues.

In December 2019, the Electoral Code was adopted as the only document that regulates all types of elections. This is undoubtedly the most significant electoral reform in the history of Ukraine. New electoral and large-scale amendments were made to the Electoral Code in July 2020. All these electoral legislation reforms have not advanced towards setting the rules for campaigning on the internet or at least providing for general requirements with regard to restrictions. The problem here is not a "backwardness" nor unpreparedness of society, however.

It is difficult to believe that it could have happened coincidentally. After all, the activity of political parties on the internet during the 2019 presidential and parliamentary elections and during the 2020 local elections was extremely high. Political parties have been incredibly active in using a variety of formats to disseminate information about themselves. The most commonly used were Facebook, Instagram, YouTube, Tik Tok and Telegram.¹⁷⁰ The parliamentary party, "Servant of the People", having a ruling majority in the current convocation of the parliament, outlined its "digital direction"¹⁷¹ as an important tool in their election campaign during the last parliamentary elections. It was also decided to use digital tools in election campaigning for the 2020 local elections, and a special information technology (IT) department was set up to develop an "innovative

168. Resolution of the Central Election Commission "On the first elections of deputies of village, settlement, city councils of territorial communities and relevant village, settlement, city mayors on October 25, 2020" of 8 August 2020, No. 160, <https://zakon.rada.gov.ua/laws/show/v0160359-20#Text>.

169. Resolution of the Central Election Commission "On calling the first elections of deputies of district councils to October 25, 2020" of 14 August 2020, No. 176, <https://zakon.rada.gov.ua/laws/show/v0176359-20#Text>.

170. See, for example, "Candidates in social networks: what political technologies look like online", <https://rubryka.com/article/political-technology-online/>.

171. "Servant of the People": press conference of the party, https://ze2019.com/blog/press_conf_sluga_narodu.

product”.¹⁷² Thus, the ruling political party, having actively used and using digital technologies, has not suggested any even simple general regulation of these issues in the Electoral Code.

At the same time, a different approach is taken regarding other aspects of digitalisation and use of electronic services. The Verkhovna Rada of Ukraine, while amending the Electoral Code in July 2020, provided a step forward in this direction. In this regard, provisions regarding the possibility of electronic submission of certain documents and certificates to election commissions, the possibility of drawing up protocols on voting results (Articles 18, 155, 222- 224, 236 of the Electoral Code), the requirement to publish certain information in the form of a dataset organised in a format that allows its automated processing by electronic means (machine reading) for repeated use (in the form of open data) (Articles 23, 47, 106, 161 of the Electoral Code) and some other issues were included.

The Electoral Code does not provide for any regulation of hidden political advertising due to indirect campaigning, which may be contained in social advertising, television shows, television series, feature films or documentaries. On the eve of the 2019 presidential elections, a television show, television series and a film were actively broadcasted with the main character being played by the candidate for the President of Ukraine who went on to win the elections. Moreover, this happened even on a Day of Silence, on Saturday, the day before election day,¹⁷³ and one of the highest-rated television channels broadcast the feature film “Reagan”, where the voice-over of the main character was performed by the candidate for the President of Ukraine.¹⁷⁴

Thus, the forms of direct and indirect campaigning actively used by the pro-presidential party, having a ruling majority in the parliament, remain for some reason unresolved and beyond the legal framework, even given the largest, with respect to its scope, electoral reform in Ukrainian history – the adoption of the Electoral Code.

MISUSE OF POWER AND LOBBYING OF PARTY INTERESTS

This element of misuse of power is probably the most clear and obvious. Parliamentary parties have the opportunity to consider their own needs in the law-making process and to adopt a legal framework for elections that will be comfortable for them and will ensure their success in elections. Of course, such misuse of power is unacceptable in a democratic society. Unfortunately, in the Ukrainian context, this happens quite often. The advantages for certain political parties in the text of the electoral legislation can sometimes be spotted very easily. Here are just a few brief examples of the role of parliamentary political parties and their interests in elections.

Adjusting the electoral system is probably the most common example of misuse of power. Such manipulations have occurred very often in Ukraine. This leads to relatively frequent changes to the electoral legislation mentioned before.

The July 2020 amendments to the Electoral Code have adjusted certain elements of the proportional system for the elections of oblast and *rayon* councils, as well as local councils in large communities. In particular, in order to support large national political parties, the threshold for the application of the respective electoral system was lowered. Previously it was used only in large cities, where the number of voters is 90 000 and more voters. Thereafter, the legislative changes have lowered this threshold to 10 000 voters. Accordingly, even in relatively small cities and villages, where the majority electoral system had to be applied, it was decided to hold elections under the proportional representation electoral system.

Similarly, the threshold for “getting a mandate” by a candidate within the party list was increased. If previously, according to the election results, the party’s electoral list of candidates was “rearranged” depending on the votes’ cast in support of a particular candidate, with the new changes, only those candidates having received 25% (of the electoral quota) and more votes in their constituency could be placed higher in the party’s list. Thus, the role of party nomination was strengthened, and therefore, the party leadership was given additional opportunities to influence the election results. These examples show quite clearly that when the amendments

172. “Looks like a ministry.” The “Servant of the people” tells about the headquarters and preparation for local elections, <https://babel.ua/news/48241-viglyadaye-yak-ministerstvo-u-sluzi-narodu-rozpovili-pro-shtab-ta-pidgotovku-do-miscevih-vivoriv>.

173. On the “day of silence”, the 1 + 1 TV channel shows a show and a film with Zelensky’s participation, www.radiosvoboda.org/a/news-den-tyshi/29878886.html; On the “day of silence”, 1 + 1 again shows programmes and a film with Zelensky, www.ukrinform.ua/rubric-elections/2680534-u-den-tisi-11-znovu-pokaze-programi-ta-film-iz-zelenskim.html; Channel 1 + 1 explains the broadcast of Zelensky’s show on the “day of silence”: he is an actor there <https://hromadske.ua/posts/kanal-11-poyasniv-translyaciyu-shou-zelenskogo-u-den-tishi-vin-tam-aktor>.

174. On the “day of silence”, the projects of candidate Volodymyr Zelensky are shown on the 1 + 1 channel, https://zaxid.net/u_den_tishi_na_kanali_11_pokazivatimut_proekti_kandidata_volodimira_zelenskogo_n1478157.

to the Electoral Code were adopted, the electoral system was adjusted to satisfy the interests of certain political powers and their more comfortable participation in elections.

The formation of election commissions (election management bodies) is another example of how the electoral legislation implies the interests of the parliamentary parties. In Ukraine, a system of election commissions is formed for the organisation and conduct of elections. They function for a limited period of time, mainly during elections. Election commissions are formed on the basis of propositions from political parties (for local elections – local party organisations). At the same time, parliamentary parties have the right to include their representative in the election commission in both national and local elections, while candidates from non-parliamentary parties can be included in the commission only if there are vacancies for them and only after the appropriate draw (so as not to exceed the maximum composition of the commission).

The July 2020 amendments to the Electoral Code provided parliamentary parties with the right to nominate not one but two candidates to election commissions. In this case, both candidates shall be included in the composition of the election commission. Therefore, parliamentary parties have provided their local organisations with an unconditional organisational advantage in the 2020 local elections. An even more significant situation is provision of the nomination right to two parliamentary groups¹⁷⁵ of deputies with the condition of mandatory inclusion of one candidate in each election commission. According to the legislative amendments, a parliamentary deputies' group transfers its right to nominate candidates to election commissions to a political party with which it concludes a co-operation agreement.

Thus, while revising the Electoral Code, there were not only parties having their factions in the current parliament, but also two parliamentary groups which obtained preferences in the process of formation of election commissions.

Control over ballot paper printing is already a traditional aspect of electoral procedures carried out by parliamentary parties as a matter of priority. Special control commissions are set up during both parliamentary and local elections in order to carry out an external control over the ballot paper printing, proper functioning of the printing company, and the destruction of defective ballot papers and printing forms. Only parliamentary political parties have the right to be represented in such commissions (Articles 169 and 242 of the Electoral Code). There are no other additional tools of control for other parties or candidates.

Setting the amount of electoral deposit: the Electoral Code provides for the payment of an election deposit in order to run for elections. In general, this practice is quite common in European countries and can be applied. However, the amount of the election deposit during the adoption of the Electoral Code, back in December 2019, was disproportionately increased in order to meet the interests of parliamentary large "network" political parties.

Civil society and experts have repeatedly drawn attention to the inadmissibility of using such a large amount of deposit at local elections. For example, the election deposit for a mayor candidate in Kyiv exceeded the amount of the election deposit for candidates for the post of the President of Ukraine. Some political parties, not having adequate representation in the regions and an extensive system of territorial organisations, have also insisted on reducing the amount of the election deposit. In fact, when the amendments to the Electoral Code were adopted in July 2020, the amount of the election deposit was also reduced, although it still remains quite high. Accordingly, a high level of election deposit, especially at local elections, can be considered as a property qualification, as it can be an excessive obstacle for participation in elections. Obviously, large parties, by setting such an additional barrier, were trying to achieve less competition and more comfortable conditions for themselves.

Unfortunately, these and some other aspects of the electoral legal framework are under the direct influence of parliamentary political parties. Of course, such aspects do not fully correlate with the common understanding of the misuse of administrative resources during elections, but also require additional consideration and research.

ORGANISATION OF ELECTION PROCEDURES

International experience in combating the misuse of administrative resources and international standards in this area prove that the field of organisation and conduct of elections is often subject to administrative influence. At various stages of organisation of elections, the interference of public authorities can have significant

175. A deputies' group is a voluntary association of deputies in the Verkhovna Rada of Ukraine. Such a group includes non-party (independent) deputies who were elected without a party nomination or were expelled from a certain parliamentary faction. Such an association is not a parliamentary faction but enjoys all the rights of the faction in parliamentary procedures.

consequences. Ukraine has quite well-written legislation in this regard. In order to look deeper into this issue, it is worth analysing the main blocks related to combating the misuse of administrative resources during organisation of elections.

Election administration

Formation of election commissions: elections are organised and conducted by special collegial bodies – election commissions, which are formed based on the nominations made by various political parties participating in elections, as well as by candidates running for elections. It helps to ensure impartiality of these bodies. The CEC plays a central role in the administration of elections. This is a collegial body formed by the Verkhovna Rada of Ukraine (parliament) based on the proposals of parliamentary factions supported by the President of Ukraine. The procedure for establishing the CEC and the principles of its activities are determined by the Law of Ukraine “On the Central Election Commission”. The Ukrainian Parliament appoints the CEC members by majority of votes and by open ballot. However, two thirds of the constitutional composition of the Verkhovna Rada of Ukraine is required for early termination of the powers of the entire CEC. Such a regulation, in general, makes it possible to ensure the CEC’s objectivity and impartiality in the conduct of basic election procedures.

Other election management bodies include the system of district (territorial – at local elections) and precinct election commissions. State executive bodies or local self-government bodies, formally, do not have any influence on the formation of such commissions. Although in practice, obviously, certain influence is possible, it is neither, however, systemic nor on a large scale.

Laws of Ukraine “On Elections of People’s Deputies of Ukraine” No. 2766-III as of 18 October 2001 and “On Elections of the President of Ukraine” as amended by Law No. 1630-IV of 18 March 2004 have radically changed the procedure for forming election commissions, namely, excluding relevant local councils from the nomination process and delegating this function to higher-level election commissions. This approach to the formation of election commissions has created conditions which help to prevent interference by public authorities and local self-government bodies into the activities of election commissions, as well as to ensure their impartiality to political parties and candidates.

The same approach to the formation of election commissions has been introduced at local elections: territorial election commissions of regional (*oblast*) and district (*rayon*) levels are formed by the CEC, territorial election commissions of villages, settlements, cities, districts-in-the-city – by relevant *rayon* or city territorial election commissions, and precinct commissions – by respective village, settlement, city, district-in-the-city territorial election commissions.

At the same time, the current provisions of the electoral legislation stipulate that an election commission may not include, in particular, officials and staff of state authorities, authorities of the Autonomous Republic of Crimea and local governments, judges, court employees and law-enforcement agencies (Part 3 of Article 34 of the Electoral Code). The CEC carries out very careful control over the observance of this rule with the assistance of special software. In practice, sometimes isolated cases of violation of this rule happen. However, they are neither large scale nor widespread.

The situation is somewhat more complicated with the inclusion of secondary school teachers, librarians, employees of cultural institutions and others in the election commissions. These employees are still subordinated to local self-government bodies. Specifically, in rural areas, such people are the “core” personnel who may potentially be employed by election commissions. However, such persons cannot be viewed as being directly dependent on local self-government officials, and no serious cases of illegal influence on election commissions have yet been identified this way.

A more acute problem is the dependence of election commissioners on the political parties having nominated them. This is often accompanied by illegal extra payment from political parties and the use of other instruments of the party’s full control over the activities of election commissioners. Unfortunately, there are legal preconditions for this, including provisions of the Electoral Code. Although this problem is not related to the misuse of administrative resources, it requires separate research through the prism of anti-corruption and criminal legislation.

Activities of election commissions

The activities of election commissions are obviously based on the territorial organisation of elections. Previously, in each election, local self-government and executive bodies participated in the formation of precincts. Large

numbers of cases of administrative misuse were reported at this stage. Quite often the boundaries of precincts and the number of voters were disproportionate. However, the Law of Ukraine “On Elections of People’s Deputies of Ukraine”, adopted in 2011, obliged the CEC to establish precincts that will exist on a permanent basis. This was done during the 2012 parliamentary elections. Since then, such polling stations have been in existence on a permanent basis and are used for all types of elections. The CEC has the right, if necessary, to adjust the boundaries of such precincts, liquidate them or create new ones. The centralisation of this process at the CEC level has made the use of administrative resources practically impossible on this aspect of the organisation of elections.

The principles and requirements for the activities of election commissions are also set on a fairly high level. Election commissions must meet, act collegially, openly and transparently. Of course, certain violations of these principles do occur during both national and local elections, but this is unlikely to be the result of misuse of administrative resources.

In order to protect election commissioners from administrative pressure, the legislation also lays down an exhaustive list of persons who may be present at an election commission meeting at the polling station on election day without the permission or invitation of the commissioners, including during vote counting and the establishment of voting results (Article 36 of the Electoral Code).

All others, including government officials, may attend meetings only with the permission of the relevant election commission.

The precinct election commission shall be responsible for organising the voting process and maintaining proper order at the polling station, ensuring the secrecy of the ballot during voting. In case of violation, which is liable under the law, a chair or a deputy chair of a precinct election commission has the right to invite a police officer to the polling station, who shall take measures with respect to the perpetrator and then leave the polling station. The presence of police officers in the polling station is prohibited in other cases.

Law-enforcement officers ensure legal order during the voting and vote counting, only being physically present outside the polling station. In case of violation of the law and legal order, a chair, a deputy chair or a secretary of the election commission may call for law-enforcement officers only to perform actions necessary to restore legal order and for a period necessary for such actions.

A voter may stay in the polling station only for the time necessary for voting.

Thus, employees of state bodies and local self-government bodies are completely excluded from the organisation of the election process. They cannot control the work of election commissions, be present at their meetings, and put pressure on voters during voting by their presence.

Voters’ lists

An important stage in protecting the process of securing elections from the influence of government officials was the creation of the State Registry of Voters in Ukraine.

Compiling voters’ lists at polling stations is a crucial step in the electoral process, which should provide guarantees for citizens to exercise active suffrage, as electoral law stipulates that a voter may exercise the right to vote at only one polling station where he or she is included in the voters’ list.

In Ukraine, voters’ lists for each election were traditionally compiled by the executive bodies of local councils (bodies that perform these functions) or by other bodies upon their submission. Thus, the local authorities compiled voters’ lists based on which voters exercised their voting rights at local elections. As a result, “twins” and “dead souls” often appeared on such lists.

Until 2006, local elections in Ukraine were held on the same day as parliamentary elections. Such misuse of administrative resources has also affected the national elections. In addition, the practice of “election tourism” was widespread, namely, it was possible to organise voting of one voter in several polling stations using just one absentee ballot.

The OSCE/ODIHR Parliamentary Election Observation Mission’s report of 31 March 2002 stated that according to more than 33% of observation reports persons not included in the voters’ lists could register on the election day and vote in the parliamentary elections without absentee ballots and in violation of the law. In some cases, the number of people who registered this way was quite significant. This shortcoming, providing the possibility of filling out ballots to persons who did not have the right to do so, was a matter of serious concern.

Election observation missions have repeatedly issued their recommendations stating that the Law on the National Registry of Voters should be adopted.¹⁷⁶ This law should ensure the establishment of a centralised voters' database, which would be regularly updated; at the local level, the compilation of voters' lists was supposed to later be incorporated into a single civil registry, maintained by a body separate from the system of election commissions.¹⁷⁷

The adopted Law of Ukraine of 22 February 2007 No. 698-V "On the State Registry of Voters" (as amended) provided for the compilation of a national registry of voters, which is regularly updated and is designed to create voters' lists and for other purposes related to the election process and provided by the Law. The Venice Commission and the OSCE/ODIHR noted in their joint opinion that this law was to "make a significant contribution to the protection and realization of the right to vote in Ukraine".¹⁷⁸

The creation of the State Registry of Voters in the form of an automated information and telecommunication system was designed to store and process data containing information required by the law, and use those data, but it also greatly simplified the mechanism to ensure the right to vote at national elections beyond the voters' place of registration, as well as made the creation of permanent precincts and territorial districts possible over time.

Additionally, the amendments to the law on the State Registry of Voters adopted before the 2020 local elections allowed voters to change their voting address without the slightest explanation of the reason for such a change. This has led to the return of the "electoral tourism" practice. The law-enforcement bodies should take an active part in combating such practices. However, its impact on the results of the elections of 25 October can no longer be changed. Moreover, such a legislative change reduces all positive outcomes from the introduction of the State Registry of Voters.

Election observation

To ensure control over the subjects of the electoral process and the legality of the organisation and conduct of elections in Ukraine, an institute of official observers nominated by candidates and political parties (local organisations of political parties), being subjects of the electoral process, has been introduced for the first time by Ukraine Law No. 474-XIV of 5 March 1999.

Official observers are authorised to observe at all stages of the organisation and conduct of elections: immediately after the registration of the relevant candidates (in local elections) or the formation of district election commissions (in national elections) until the election results are established.

Given the widespread attitude of Ukrainians towards the elections as: "it is not important how you vote at elections, but how your vote is counted", it is the official observers' crucial function to observe the vote counting at polling stations.

At the same time, the law defined official observers as subjects of the electoral process. They are authorised to draw up acts on violations of electoral legislation, as well as to appeal against decisions, actions and inaction of election commissions and other subjects of the electoral process.

The Law of Ukraine "On Elections of People's Deputies of Ukraine" of 17 November 2011 has also added to the subjects of the electoral process official observers from civil society organisations, whose statutory activities include issues of the election process and observation. They have been able to observe the elections since 2004.

The following amendments were in line with the recommendations of the Venice Commission, OSCE/ODIHR election observation experts, whose reports state that the election law provides for observation of the election process by international and civic observers who exercise broad and comprehensive rights throughout the election process, including the right to be present at meetings of district and precinct election commissions and to receive copies of protocols on the voting results, and that the active involvement of a large number of civic observers throughout the election process has increased its overall transparency.¹⁷⁹

176. Final Report of the OSCE/ODIHR Election Observation Mission on 31 March 2002, www.osce.org/odihr/elections/ukraine/14947.

177. Final Report of the OSCE/ODIHR Election Observation Mission to the Verkhovna Rada of Ukraine, 26 March 2006, www.osce.org/odihr/elections/ukraine/19595.

178. Joint Opinion on the Draft Law on State Register of Voters of Ukraine by the Venice Commission and the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) adopted by the Venice Commission at its 71st Plenary Session (Venice, 1-2 June 2007) CDL-AD (2007) 026, [www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2007\)026-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2007)026-e).

179. Final Report of the OSCE/ODIHR Election Observation Mission on 26 October 2014, www.osce.org/odihr/elections/ukraine/132556.

The introduction of an institute of official election observers has become a valuable and effective means of combating the misuse of administrative resources. Since its introduction, different NGOs¹⁸⁰ have been tasked to carry out systematic and focused election observation in Ukraine.

Election financing

Traditionally, election financing is one of the most risky areas in which administrative resources can be misused. The use of budget funds for campaign purposes of candidates and parties, being subjects of the electoral process, is one of them. It can be prevented by introducing an effective mechanism for monitoring the financing of political parties and election campaigns.

Ukraine employs a range of regulatory tools to prevent such misuse. In October 2015, the Verkhovna Rada of Ukraine adopted the Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine Concerning the Prevention and Counteraction of Political Corruption," No. 731-VIII (hereinafter Law No. 731-VIII). This law introduced rather strict requirements in the field of political parties and election campaign financing.

Political parties' financing and reporting

Law No. 731-VIII has introduced a fairly clear and unambiguous algorithm for political financing, which makes it impossible, or at least significantly more difficult, to use illegal funds.

The key legislative novelty was the introduction of state funding of the political parties' statutory activities. Until then, political parties did not receive any regular support from the state. This step was aimed at strengthening the financial independence of political parties, reducing the level of dependence of parties on funding from private donors (oligarchs, industrial and financial groups, and so on) and reducing the corresponding corruption risks.

The major forms and limits of private donations to political parties were also regulated in detail. At the same time, the concept of donation included not only money, but also any property, property rights, and even intangible objects in the form of benefits, advantages or services. Thus, the opportunities for political parties to resort to illegal resources have been significantly limited.

Political parties are required to submit a quarterly report to the National Agency for the Prevention of Corruption for all their funds, donations and property. The submitted reports of political parties on property, income, expenses and liabilities of a financial nature are included in the Unified State Register of reporting of political parties on property, income, expenses and liabilities of a financial nature, formed and maintained by the National Agency on Corruption Prevention. Such reports are immediately published on a special public website, and are then apparently checked. Such measures have significantly limited the use of public funds to fund the activities of political parties and/or their participation in elections.

Election campaign financing

The Electoral Code contains sufficiently clear rules on the possibility of financing elections exclusively from the state (or local) budget or from the election funds of parties/candidates. According to part 5 of Article 12 of the Electoral Code of Ukraine, only funds from the party's electoral fund (in case of local elections, it refers to a local party organisation) and/or candidates may be used to finance the election campaign. As defined in part 4 of Article 51 of the Electoral Code of Ukraine, campaigning is carried out at the expense of election funds of candidates, parties (party organisations) participating in elections.

After the July 2020 amendments to the Electoral Code, the possibilities of using funds from the electoral funds of parties/candidates were broadened. Such funds before were used to cover the expenses for campaigning purposes only. Currently, the Electoral Code explicitly provides for the possibility of financing from the electoral fund of other expenses for a party's/candidate's participation in elections.

The Electoral Code provides for a special mechanism for opening electoral fund accounts, managing them (appointing administrators), accumulating and spending funds from such accounts. One of the essential factors is that the funds from the election fund can be used only in non-cash form. This should help to monitor possible violations and misuses more effectively.

Parties/candidates submit an interim financial report (five days before the voting) and a final one after election day (different deadlines for different types of elections have been set) on all revenues to the election

¹⁸⁰. For example, the all-Ukrainian NGO "Civil Network OPORA", the all-Ukrainian NGO "Committee of Voters of Ukraine" and others.

fund and expenditures from such a fund. Such reports are submitted to the relevant election commission. At national elections, such reports should be submitted to the CEC, and at local elections they are supposed to be submitted to the relevant territorial election commission. After receiving the interim or final financial report, respective election commissions analyse it and publish a report together with publishing the analysis on their website. The major problem here is the lack of time for proper and detailed analysis of reports, as well as the lack of qualified specialists during local elections for proper analysis of reports at the local level.

Effective control and responsibility

These innovations, both in terms of party funding and in terms of campaign finance, were also ensured by rather strict mechanisms of administrative and criminal liability. Indeed, Law No. 731-VIII simultaneously amended other special legislation and provided for new types of administrative and criminal penalties. Sanctions for such offences were set at a fairly high level. This has made it possible to discipline parties with respect to their financial activities in general and their activities during elections in particular.

Immediately after putting all those new rules into practice during the 2015 local elections, some national experts made a range of critical remarks regarding such tools to ensure financial transparency and accountability.¹⁸¹ Following the monitoring of financing of the election campaigns during the 2019 presidential and parliamentary elections, experts expressed a number of critical reservations about the proposals for further improvements to be made. Therefore, it is quite common that elections are won with funds mainly from fictitious donors, and political forces bear neither legal nor electoral responsibility for this.¹⁸² International experts were no less critical in assessing the level of practical application of the requirements of the legislation on financial transparency.¹⁸³

In particular, due to such critical statements, the parliament has adopted the Law of Ukraine “On Amendments to Certain Legislative Acts of Ukraine to Improve Electoral Legislation” (of 16 July 2020 No. 805-IX), which, among other things, provides for strengthening criminal liability for violating the rules on political parties’ financing: submission of knowingly false information in the report of a political party on property, income, expenses and liabilities of a financial nature; intentional making and receipt of an “illegal” donation in support of a political party.

Despite significant difficulties with the practical application of the relevant rules regarding the procedure for political parties and election campaign financing, as well as accountability mechanisms for its violation, respective legislation is a serious step forward to ensure democratic tools for organising and conducting elections.

Complaints and appeals in the electoral process

Until 2005, the specifics of complaints and appeals in the electoral process were laid down by the provisions of electoral legislation. The adoption of the Code of Administrative Proceedings of Ukraine No. 2747-IV of 6 July 2005 was an important step in the legislative regulation of these issues within court proceedings, as it was codified into one piece of legislation and it introduced unified provisions with the specifics of electoral dispute resolution during the fast-paced electoral process, including with respect to territorial jurisdiction, terms of appeal, securing of an administrative claim, peculiarities of proceedings, terms of consideration of cases, and so forth.

The relevant provisions of the Code of Administrative Proceedings, as amended by the Law of Ukraine (of 3 October 2017 No. 2147-VIII), are in line with the recommendations of the OSCE/ODIHR, made upon the results of election observation of early parliamentary elections in Ukraine on 26 October 2014, on the consideration of possible changes in procedural formalities in higher courts which may ensure that electoral disputes are considered by one panel of judges, or on the provision of other safeguards to prevent inconsistent application of the law by the same court.

At the same time, the OSCE/ODIHR election observation missions in Ukraine have repeatedly stated that “the election dispute resolution mechanism should be reviewed. The election law should clarify which cases can

181. Final report on the results of monitoring of election finances in the 2015 local elections in Ukraine, www.cvu.org.ua/nodes/view/type:news/slug:finalnyi-zvit-za-rezultatamy-monitoryngu-vyborchychk-finansiv-2015.

182. No party showed financial report for the second quarter, “CHESNO”, www.ukrinform.ua/rubric-politics/3110173-zodna-partia-nepokazala-finzvitu-za-ii-kvartal-cesno.html.

183. International observers are concerned about vote buying, the report, https://lb.ua/news/2019/07/22/432805_mezhdunarodnie_nablyudateli.html.

and cannot be filed and with which body, including where they can be appealed. The complainant should not be allowed to choose the venue for filing a complaint.”¹⁸⁴

Therefore, the Electoral Code now clearly defines which decisions, actions or inaction by which subjects of the electoral process can be appealed only before a court. For example, Article 64 of the Electoral Code defines that actions or inaction of candidates; decisions or actions of a party (local party organisation); decisions, actions or inaction of the authorities; decisions, actions or inaction of media and some other entities can be appealed only before a court.

In fact, the extension of court jurisdiction to most electoral relations and procedures is a positive factor. Although an administrative (extrajudicial) appeal is faster, in the Ukrainian reality it may be subject to greater threats of administrative influence from the authorities. Thus, more effective involvement of the court in the election dispute resolution system not only allows a quality decision upon the results of consideration of a particular case to be obtained, but more importantly, the election commissions, knowing about the “threat” of the appeal before a court, try to act more carefully and responsibly.

Thus, electoral legislation has been gradually improved in its provisions regarding procedural guarantees for a fair, open electoral process, unification of the provisions on the formation and status of election commissions, the principles of their activities, mechanisms to ensure financial transparency, creation and operation of an effective system of appeals, powers of respective official observers from the subjects of the electoral process, public organisations, foreign states and international organisations. The systematic application of these legislative provisions with respect to election management obviously contributes to limiting, and in some cases even preventing, the misuse of administrative resources in elections.

LIMITATIONS ON CAMPAIGNING

Campaigning involves, first of all, the free dissemination of information about parties and candidates. Such information should directly or indirectly encourage voters to vote for or against a particular party/candidate. From the point of view of counteracting the misuse of public resources, the major idea here is to separate the public activities of the authorities and their officials from campaigning. Such a distinction should be made at least regarding separating information on the activities of bodies and officials from the election campaign, as well as the establishment of special restrictions for candidates holding public office.

Differentiation between campaigning and information support of elections

The first aspect in this section is the need to distinguish between election information and campaigning. This is a crucial aspect that contributes to ensuring equal opportunities for parties and candidates in elections. The Venice Commission also applies guidelines, which are prerequisites for preventing the misuse of administrative resources, in particular, the principle of transparency and freedom of information and the principle of equality of opportunity.¹⁸⁵

The Code of Good Practice in Electoral Matters defines that ensuring the freedom of voters to form their opinion is one of the components of the principle of free elections. For this purpose, it is assumed that public authorities are primarily obliged to be impartial, in particular, with regard to media, visual agitation, freedom of assembly, and the financing of parties and candidates.

Public authorities should also have a number of positive obligations. In particular, they are required to make the names of the nominated candidates public; provide voters access to the lists of candidates and individual candidates running in the elections, for example, through the proper placement of visual campaigns. This information should also be available in the languages of national minorities, at least where they constitute a certain part of the population.

Violation of the obligation to observe the neutrality or restriction of the freedom of voters to form their opinion should entail the application of sanctions.

At the same time, the principle of equal elections includes, in particular, equality of opportunity, which according to the Venice Commission means that all parties and candidates must be guaranteed equal opportunities,

184. Final Report of the OSCE/ODIHR Election Observation Mission to Ukraine on 17 January and 7 February 2010, www.osce.org/odihr/elections/ukraine/67844.

185. Report on the misuse of administrative resources during electoral processes adopted by the Council for Democratic Elections at its 46th meeting (Venice, 5 December 2013) and the Venice Commission at its 97th Plenary Session (Venice, 6-7 December 2013), [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2013\)033-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)033-e).

which also refers to the impartial attitude of public authorities to the election campaign; media coverage, including publicly owned media; public funding of parties and campaigns. The principle of freedom of expression entails that the law should provide for a certain minimum access of all participants in the election campaign and in campaigning to private electronic media. Political parties' candidates' and election campaign funding should be transparent. At the same time, the principle of equal opportunities may, in certain circumstances, be the basis for limiting the overall costs of political parties, in particular, for campaigning.¹⁸⁶

Thus, the legislative regulation of election information and campaigning in the electoral process should be analysed separately and in the context of ensuring equal and free elections.

These international standards are reflected in Ukrainian national legislation. In Ukraine, the provisions on pre-election campaigning were separate from provisions on information support of elections for the first time at the legislative level with the adoption of the Law of Ukraine (of 17 November 2011 No. 4061-VI) "On Elections of People's Deputies of Ukraine". The relevant provisions were also reflected in the Law of Ukraine "On Elections of the President of Ukraine", as amended by the Law of Ukraine (of 13 March 2014 No. 879-VII), and by the Law of Ukraine (of 14 July 2015 No. 595-VIII) "On Local Elections".

The respective provisions are included in the Electoral Code of Ukraine and currently valid. A separate Chapter VII (Articles 47-50) of the Electoral Code is focused on these issues. Such norms provide that voters have access to comprehensive, objective and impartial information necessary for making informed and free choices. In practice, the implementation of these rules generally does not face any significant obstacles or violations.

Differentiation between information about government activities and election campaigning

National legislation generally contains fairly comprehensible regulatory restrictions on the inadmissibility of using the official information about the body's activities as a tool for direct or hidden campaigning. However, in practice, these rules are not always applied properly.

According to parts 3 and 6 of Article 51 of the Electoral Code of Ukraine, election campaigning does not include official notifications during the electoral process (without comments, which may be of a campaign nature, as well as video, audio, film, photo illustrations) about the actions of candidates related to the performance of official (service) duties laid down by the constitution or laws of Ukraine.

Official notifications during the electoral process about the actions related to the performance of a candidate's official powers laid down by the Constitution of Ukraine and laws of Ukraine, being prepared in the manner prescribed by the Law of Ukraine "On the procedure for covering the activities of public authorities and local governments in Ukraine by mass media" do not belong to election campaigning. Such official messages should not contain comments of an agitational nature, nor video, audio, film, photo illustrations of the actions of these persons as candidates.

Such notifications shall not refer to these persons' participation in elections or their intentions on certain activities in case of being elected.

Therefore, the information about candidates being officials at state authorities, authorities of the Autonomous Republic of Crimea or local self-government bodies is not considered by the legislator as part of an election campaign, although in practice it is difficult for a voter to distinguish information reported by such a candidate as an official from that of the same person as a candidate, as it comes from one and the same person and, thus, citizens perceive everything they do as the actions of one person.

The OSCE/ODIHR election observation mission in Ukraine on 17 January and 7 February 2010 stated in its final report that "rules on the coverage of candidates holding institutional positions in the news should prohibit broadcasters from giving preferences to such candidates. It is recommended to consider any appearance of a candidate holding an official position as election campaigning and to consider this time as allocated for the candidate's election campaign".¹⁸⁷

Unfortunately, the relevant recommendations are not properly reflected in national legislation. In practice, the said provisions of the Electoral Code are violated quite often. In cases when candidates do not refer to such activity as campaigning, it often is campaigning, nonetheless.

186. Code of Good Practice in Electoral Matters CDL-AD (2002) 023 [www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2002\)023rev2-cor-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2002)023rev2-cor-e).

187. Final Report of the OSCE/ODIHR Election Observation Mission to Ukraine on 17 January and 7 February 2010, www.osce.org/odihr/elections/ukraine/67844.

For example, during the 2020 local elections, the President of Ukraine made a number of official business trips to various regions. Such trips were accompanied by mass events using the symbols of the presidential party “Servant of the People”. The president himself did not consider such actions to be election campaigning.¹⁸⁸ However, experts and civic observers considered this to be indirect campaigning and the president’s attempt to support his party’s candidates during the local elections.¹⁸⁹ This is a very illustrative and large-scale example. There is a high number of similar examples at the local level.

Limitation of campaigning with the involvement of government resources

The establishment of campaigning restrictions is a solid precaution against the use of administrative resources in the election campaign.

The Electoral Code defines the concept of “election campaigning” as any activity to encourage voters to vote or not to vote for a particular candidate, party (party organisation) who are the subjects of the electoral process. The election campaign may be conducted in any form and by any means that do not contradict the Constitution and laws of Ukraine. At the same time, the Electoral Code does not limit the list of forms of campaigning. Thus, that election campaigning can be conducted in almost any form¹⁹⁰ that does not contradict the Constitution of Ukraine and the laws of Ukraine.

Campaigning, distribution of campaign materials, showing campaign films or videos, distribution of election leaflets, posters, other printed campaign materials or printed publications containing campaign materials, public appeals to vote or not to vote for parties being subject to the electoral process, candidates at respective elections or public assessment of their activities during events organised by the state authorities, authorities of the Autonomous Republic of Crimea, local self-government bodies, state or municipal enterprises, institutions, establishments, organisations (paragraph 2 of part 1 of Article 57 of the Electoral Code of Ukraine) is prohibited.

The Electoral Code also prohibits using “official” public resources by candidates. Candidates holding office during respective elections, including part-time positions, in the executive authorities, authorities of the Autonomous Republic of Crimea and local self-government bodies, state, municipal enterprises, institutions, establishments, organisations, military units (formations), are prohibited from involving subordinates in election campaigning, using official transport, communications, equipment, premises, other facilities and resources at the place of work, as well as using official or working meetings and staff meetings for campaign purposes (part 12 of Article 57).

These norms regulate the restrictions on the use of administrative resources in elections quite adequately. However, the practical possibility of identifying all possible cases of the named requirements’ violation is extremely difficult. Civic activists and official observers in the local elections did, nonetheless, record a high number of violations of these requirements by local authorities.

Perhaps the best example worth mentioning here is the nationwide poll/questionnaire initiated by the President of Ukraine (not an official referendum, but just a regular unofficial poll) that was supposed to take place on the day of local elections at all polling stations.¹⁹¹ Experts believe that such an initiative has every reason to be considered a violation of the rules of campaigning and the actual use of administrative resource.¹⁹² After all, the initiative of a poll focusing on popular issues on election day by the president and entailing the presence of activists conducting the poll at each polling station creates a reminder for voters about the president, his and his party’s election campaign promises. However, the proper legal response to such an initiative has not been undertaken.

At the level of local self-government bodies, the number of cases of misuse of public status and activities of public authorities is also quite common. The Ukrainian NGO “Civic Network ‘OPORA’”, in its interim report on the results of observation of the local elections during September 2020, indicated the fact that officials and

188. Zelensky stated that he could not campaign for anyone in the local elections, https://lb.ua/news/2020/09/08/465500_zelenskiy_zayaviv_shcho_mozhe_ni.html.

189. Zelensky’s election tour: does the president have the right to campaign? www.dw.com/uk/peredvyborchi-hastroli-zelenskoho-chy-maie-prezydent-pravo-ahituvaty/a-54932367; The Committee of Voters stated that Zelensky uses working trips to campaign for the “Servant of the People”, www.unian.ua/elections/miscevi-vibori-2020-zelenskiy-agituye-za-slugu-narodu-kvu-11119418.html.

190. The code even provides an indicative list of the most common forms of campaigning, such as meetings with voters; publication of political advertising; distribution of election leaflets, posters and other printed campaign materials, and so forth.

191. Volodymyr Zelensky announced all the questions of the national poll on October 25, www.president.gov.ua/news/volodimir-zelenskij-ogolosiv-usi-zapitannya-zagalnonacionaln-64629.

192. Analytical information on the presidential initiative to poll the society on October 25 www.oporaua.org/news/vybory/mistsevi-vybory/mistsevi_2020/opytuvanya.

elected representatives have access to the staff of public authorities and local governments, manage resources of state and local budgets, material and technical means and objects of public property, carry out and control staff appointments, and it is crucial for the purposes of election campaigns as it can lead to non-competitive advantage of certain individuals being subjects of the electoral process. Observers have recorded a large number of cases where various forms of administrative resources (personnel, material, budget) have been used. Many officials and civil servants have resorted to this type of misuse or misconduct according to reports.¹⁹³ Unfortunately, there is no prompt and proper legal response to such cases.

Restrictions for public officials

Article 57 of the Electoral Code prohibits participation in election campaigning by executive authorities, authorities of the Autonomous Republic of Crimea and local self-government bodies, law-enforcement agencies and courts, and their officials during office hours (unless such a person is a candidate running for respective elections).

While with regard to the executive authorities, the authorities of the Autonomous Republic of Crimea and local self-government bodies, this rule is not contested, it seems ambiguous with regard to officials.

It should also be noted that this norm is not a novelty introduced by the Electoral Code of Ukraine. It was laid down in the electoral legislation well before the adoption of the Code. The words “during office hours” recently supplemented the relevant legislative provisions, while previous versions of the electoral legislation provided for a complete ban on the participation of officials of state bodies in the election campaign.

At the same time, the norm of the election legislation on the complete ban on campaigning, both by public authorities and their officials, was the subject of interpretation by the Constitutional Court of Ukraine.

As the Constitutional Court of Ukraine pointed out in its judgment, this prohibition is aimed, primarily, at preventing the use of the resources of these bodies and official positions by relevant officials during campaigning for a particular candidate... , and secondly, at preventing pressure on voters. Such a ban is reasoned by the need to create conditions for the voters’ free expression of will during elections.¹⁹⁴

It should also be noted that the vast majority of officials of the executive authorities, the authorities of the Autonomous Republic of Crimea, law-enforcement agencies and courts are public servants. In view of this, the named provisions of the Code do not appear to be consistent with the Law of Ukraine “On the Public Service”, because the fourth part of its Article 10 provides that a public servant has no right to organise and participate in campaigning at any time, not just during office hours.

Consequently, paragraph 2 of part 1 of Article 57 of the Electoral Code of Ukraine states “except in cases, when such person is a candidate running for respective elections”. It means that if a public servant is a candidate running for respective elections, he/she may participate in election campaigning, including during office hours.

However, the Law of Ukraine “On the Public Service” does not provide for any such exception. The exception is only made for a person having taken leave.

Moreover, this provision of the Electoral Code is not in line with the principle of political impartiality, which is preventing the influence of political views on the actions and decisions of public servants, as well as refraining from demonstrating their attitude to political parties, demonstrating their own political views in office (paragraph 8 of the part 1 of Article 4 of the Law of Ukraine “On the Public Service”)¹⁹⁵.

Additionally, the aforementioned provisions of the Electoral Code do not comply with the International Code of Conduct for Public Officials, while paragraph 11 of the Code stipulates that public officials may engage in political or other activities outside their official duties in accordance with laws and administrative regulations so as not to undermine the faith of the public in the impartial implementation of their functions and responsibilities.¹⁹⁶

In this case, other provisions of the Law of Ukraine “On the Public Service”, providing for leave of a public servant if he/she is registered as a candidate for deputy, could be a safeguard against the participation of

193. Interim report of the OPORA Civic Network on the results of non-partisan observation of the September 2020 local elections [www.oporaua.org/report/vybory/mistsevi-vybory/mistsevi_2020/21113-promizhnii-zvit-gromadianskoyi-merezhi-opora-za-rezultatami-pozapartiinogo-sposterezhennia-na-mistsevikh-viborakh-za-veresen-2020-roku#_Toc52526876](http://oporaua.org/report/vybory/mistsevi-vybory/mistsevi_2020/21113-promizhnii-zvit-gromadianskoyi-merezhi-opora-za-rezultatami-pozapartiinogo-sposterezhennia-na-mistsevikh-viborakh-za-veresen-2020-roku#_Toc52526876).

194. Judgment of the Constitutional Court of Ukraine of 24 March 2005, No. 3-rp/2005 (case on elections of the President of Ukraine), <https://zakon.rada.gov.ua/rada/show/v003p710-05#Text>.

195. Law of Ukraine “On Civil Service”, <https://zakon.rada.gov.ua/laws/show/889-19#Text>.

196. International Code of Conduct for Public Officials, https://zakon.rada.gov.ua/laws/show/995_788#Text.

public servants in the election campaign. However, these rules provide for the right and not an obligation of a public servant to take his/her leave.

Nevertheless, civil society activists and observers have reported numerous cases of public officials being candidates running for elections and at the same time violating the requirements of political neutrality. "Public activity of the most incumbent mayors of regional centers, running for local mayors, is manifested in a combination, on the one hand, of them actively performing their duties accompanied by hidden campaigning and, on the other hand, of their formal participation in election campaigning during non-office hours."¹⁹⁷

It should also be noted that any prohibitions on the organisation and participation in campaigning imposed on public servants do not apply to members of the government, as their positions are political. This allowed the Minister for Health of Ukraine to run for the Odesa Regional Council representing one of the political parties in the 2020 local elections,¹⁹⁸ and to be able to use the information available to him as a high-ranking official which set him in an unequal position with other political forces having nominated candidates for regional councillors. Similar reservations can also be made with respect to a large number of other mayors, as most of them did not take leave during the elections and continued their activities.

In view of the above, the current legislation of Ukraine needs to be seriously revised in order to create additional barriers and prevent the use of administrative resources in elections by officials of public authorities and local self-government bodies. In particular, it is necessary to amend the Electoral Code of Ukraine with a provision on a complete ban on campaigning for officials and officials-candidates during office hours. It is also necessary to introduce the European practice of mandatory leave of officials running for elections during the election campaign. This will allow the differentiation between the performance of official duties by a person as an official and campaigning as a candidate.

LEGAL LIABILITY

Current Ukrainian legislation does not only regulate, in a very detailed manner, the electoral procedures that should prevent the misuse of administrative resources, but it also provides for a set of rules on legal liability for such violations. Indeed, a number of special types of offences and crimes are foreseen in the provisions of the Code on Administrative Offences¹⁹⁹ and the Criminal Code of Ukraine that should prevent the misuse of administrative resources. However, these rules do not fulfil their function. There are at least two issues raising concerns: the quality of the legislation on legal liability itself and the lack of political will to change the situation.

Quality of legislation

The provisions of the Criminal Code of Ukraine and the Code on Administrative Offences in the electoral sphere are probably the ones that are the most frequently changed. Only throughout the last five years have the respective provisions been significantly changed at least three times.

The latest changes were adopted by the Verkhovna Rada of Ukraine in July 2020. These changes, amongst other things, provide for enhancing the administrative liability for violation of restrictions on election and referendum campaigning (Article 212-10 of the Code of Ukraine on Administrative Offences). Amendments were also made to the Criminal Code of Ukraine, namely:

- ▶ the possibility of deprivation of the right to hold certain positions as an additional punishment is established in cases when a person is convicted of crimes against the voting rights and freedoms of citizens provided for in Articles 157-160 of this Code for a term of five years (Article 55);
- ▶ the liability for submission of knowingly false information in the report of a political party on property, income, expenses and liabilities of a financial nature or in the financial report on receipt and use of funds of the electoral fund of a political party, local organisation of a political party, candidate running in elections, whereas the term for deprivation of the right to hold certain positions or engage in certain activities has been increased from three to five years (Article 159-1);

197. Interim report of the OPORA Civic Network on the results of non-partisan observation of the September 2020 local elections, [www.oporaua.org/report/vybory/mistsevi-vybory/mistsevi_2020/21113-promizhnii-zvit-gromadianskoyi-merezhi-opora-za-rezultatami-pozapartiinogo-sposterezhennia-na-mistsevikh-viborakh-za-veresen-2020-roku#_Toc52526876](http://oporaua.org/report/vybory/mistsevi-vybory/mistsevi_2020/21113-promizhnii-zvit-gromadianskoyi-merezhi-opora-za-rezultatami-pozapartiinogo-sposterezhennia-na-mistsevikh-viborakh-za-veresen-2020-roku#_Toc52526876).

198. Stepanov to head list of "Servants of the People" in Odessa regional council (updated), https://lb.ua/news/2020/09/16/466052_stepanov_ocholit_spisok_slugi.html.

199. This code establishes the types of administrative offences (misdemeanors), the sanction for such violations, as well as the procedure for bringing to justice.

- ▶ enhanced liability for providing voters, referendum participants, legal entities with illegal benefits, accompanied by election or referendum campaigning, mentioning a name of a candidate, a name of a political party having nominated a candidate for the elections, or using the image of a candidate, symbols of a political party having nominated a candidate for the elections (part 3 of Article 160).²⁰⁰

It should also be noted that such changes were adopted and promulgated almost one month before the start of the local election process. It is obvious that such frequent changes to the legislation do not contribute to its proper application. After all, the peculiarities of the qualification of new *corpus delicti*, determining the features and nuances of such crimes, requires additional trainings to be delivered to representatives of the national police, prosecutors, other law-enforcement agencies and judges. The lack of stable, clear and predictable legislation is not the major, but still very important factor that determines the inevitability of liability for the violation.

Another problem is the lack of a relevant provisions that would provide for liability for certain misuse or violation of the law. The example is the situation with public servants violating the requirement not to campaign using their official position. The current legislation of Ukraine does not provide for any accountability mechanisms in case of a public servant's failure to submit an application for unpaid leave for the period of his/her participation in the election campaign. However, according to paragraph 8 of part 2 of Article 65 of the Law of Ukraine "On the Public Service", non-compliance with the requirements of political impartiality by a public servant shall be considered just a disciplinary offence.

If a public servant commits disciplinary offences, including the one related to political impartiality, the appointing authority or the head of the public service may warn the public servant of incomplete compliance with the position (part 4 of Article 66 of the Law of Ukraine "On the Public Service"). In this case, in accordance with the second part of Article 74 of this law, a disciplinary sanction may be imposed only if the fact of a disciplinary offence and the guilt of a public servant is legally established.

There is a similar problem with the legislation restricting campaigning on the internet. The Electoral Code does not even set a general framework for such a restriction. Concepts such as "targeted advertising", "fake news", "hidden advertising" and a number of others remain outside the parliament's scrutiny and are not subject to strict regulation. Accordingly, accountability mechanisms for such actions are not provided for.

The absence of provisions establishing legal liability for certain actions does not, of course, violate the principle of equality of parties or candidates, but it may, under certain conditions, create unjustified advantages for a ruling party by combining a lack of regulation with other elements of administrative resources.

Presence/absence of political will

This issue is even more acute than all those described in the previous sections as it is a question of not even applying existing sanctions for violation of electoral legislation, procedures and illegal campaigning.

In fact, there is a number of cases in Ukraine when violations of legislation, even if officially reported, unfortunately, remain unnoticed by the law-enforcement authorities. This is specifically true if such notifications and reports are made with respect to violations committed by the ruling party or its candidates. This, of course, is not a unique practice and, probably, it is not only Ukraine where such an approach is widespread. For almost the entire period of independence, such "selective" prosecution of electoral offences has unfortunately become quite common.

The OSCE/ODIHR election observation mission on the 21 July 2019 parliamentary elections in Ukraine stated in its final report that "further law-enforcement efforts are required to ensure the freedom of voters to form their own opinion by effectively preventing and punishing the misuse of administrative resources during campaigns."²⁰¹

There is a number of formal reasons and circumstances for not imposing sanctions on perpetrators of electoral legislation. One of the most common is jurisdictional disputes between various public authorities as

200. Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine Concerning the Improvement of Electoral Legislation" of 16 July 2020, No. 805-IX, <https://zakon.rada.gov.ua/rada/show/805-20#Text>.

201. ODIHR Election Observation Mission, Final report, Extraordinary elections of people's deputies on 21 July 2019, www.cvk.gov.ua/wp-content/uploads/2020/05/2019_osce_ndu.pdf.

to whether or not they have the authority to take certain strict measures. Civil society experts²⁰² warn about certain measures to be taken as a response to the named problems. The situation is more global and complex, however. Ignoring violations and the deliberate non-prosecution of perpetrators clearly makes a new large-scale form of misuse of public resources.

Obviously, this form of misuse of power is possible only due to the fully fledged support at a high political level. It poses more threats for the elections and the development of democracy in general, as it violates the principles of free and equal elections.

CONCLUSIONS

The adoption of the Electoral Code of Ukraine in December 2019 has made it possible to carry out a comprehensive reform of the electoral legislation, its systematisation and generalisation. Currently, this Code contains common approaches with respect to the regulation of issues related to the prevention of misuse of administrative resources at all types of elections.

Long-lasting work on the implementation of international electoral standards into the national legislation has led to quite decent results. A number of issues related to the administration and organisation of elections in Ukraine enjoy a decent regulation by the relevant provisions of the Electoral Code and other related acts, for example:

- ▶ the formation of election management bodies (election commissions) without explicit influence of local state authorities or local self-government bodies;
- ▶ the compilation, maintenance and use of a voters' lists with the help of a single automated State Registry of Voters –the introduction of this voters' registration tool has made it possible to prevent cases of misuse that have been previously extremely common with respect to incorrect voters' lists;
- ▶ the introduction of the basic principles of activity of election commissions as collegial bodies, which should adhere to the principles of transparency and openness in their work, while being independent from local authorities –the right to be present at election commission meetings and during voting is regulated quite clearly, and does not provide grounds for influence by public authorities or even police or other law-enforcement agencies;
- ▶ the introduction of a fairly clear and effective distinction between election information support and election campaigning;
- ▶ the introduction of a rather strict legislation on the procedure for political parties and election campaign financing, as well as mandatory reporting on expenditures in order to achieve financial transparency.

At the same time, a number of issues require additional efforts and measures to be taken in order to prevent the misuse of administrative resources during elections.

First, the so-called misuse of legislative power is a rather serious problem. It primarily concerns the adoption of laws or individual provisions that will directly or indirectly give preference to certain political actors during elections.

Secondly, the restriction of forms of election campaigning has not been fully implemented. National legislation does not contain any adequate response to the current challenges as regards regulation of campaigning on the internet, social media, digital tools, and so on. The lack of such regulation is combined with the extremely active use of these tools by ruling party and other political actors.

Thirdly, the legislation restricting the use of administrative resources during elections, even in cases already well prescribed in the Electoral Code, does not correlate with the actual practice of its application. A high number of examples where good election law is simply ignored in practice is still a reality.

Fourthly, the inaction of law-enforcement authorities with respect to bringing perpetrators of the electoral legislation to justice diminishes all other outcomes and achievements. The inevitability of liability for violations should be the solid ground for the law-enforcement activities. "Selective justice" can destroy not only electoral standards, but also the core foundations of democracy.

202. The process of Ukraine's implementation of election recommendations provided by international and national observation missions, international organisations and foreign partner countries, www.oporaua.org/report/vybory/45461-protses-vykonannya-ukrayinoyu-rekomendatsiy-u-sferi-vyboriv-nadanykh-mizhnarodnyimi-ta-natsionalnymi-sposterezhnymi-misiyamy-mizhnarodnyimi-orhanizatsiyamy-ta-inozemnymi-krayinamy-partneramy.