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Research on the System of Challenging Electoral Violations & Adjudication of Disputes Related to Local Elections in Ukraine

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RESEARCH ON THE SYSTEM OF CHALLENGING ELECTORAL VIOLATIONS AND ADJUDICATION OF DISPUTES RELATED TO LOCAL ELECTIONS IN UKRAINE

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I. General remarks

The subject of this research is quite a topical one. The Code of Good Practice in Electoral Matters adopted by the Venice Commission of the Council of Europe in October 2002 calls for the establishment of an ***effective system*** for ***challenging violations*** of the electoral law (the Code refers to this as "the system of appeal"). This Code provides for the basic ***standards*** that govern a procedure for challenging violations during the electoral process. The Report on the Cancellation of Election Results adopted by the Venice Commission in December 2009 anticipates corresponding recommendations regarding this subject too. Also, the case law of the European Court of Human Rights shall be regarded as a substantial source of the recognized standards and criteria towards the system of challenging electoral violations. For example, it was underlined by the European Court of Human Rights in the judgment in the *Case of Namat Aliyev v. Azerbaijan*, that the existence of a domestic system for ***effective examination*** of individual complaints and appeals in matters concerning electoral rights is one of the essential ***guarantees*** of ***free*** and ***fair*** elections. Such a system ***ensures*** an effective ***exercise*** of individual ***rights*** to vote and to stand for election, maintains general confidence in the State's administration of the electoral process, and constitutes an important device at the State's disposal in achieving the fulfillment of its positive duty under Article 3 of Protocol # 1 to the European Court of Human Rights to hold democratic elections.

It should be underlined that this analysis of the system of challenging electoral violations and adjudication of disputes related to the local elections functioning in Ukraine, has been developed in accordance with the methodology similar to the one presented in the OSCE/ODIHR Handbook on election disputes - *Resolving Election Disputes in the OSCE Area: Towards a Standard Election Dispute Monitoring System*, developed in 2000. Two main purposes of conducting such a research are, first of all, to understand a ***legal nature*** of the entire complex of norms governing the relevant procedures, and, the second, and that is even more important, to reveal ***gaps*** and ***deficiencies*** of legal norms governing the relevant procedures.

Starting from 2002, the above mentioned methodology was applied during the course of numerous events organized by the Venice Commission of the Council of Europe, OSCE, and elections projects funded by the US Agency for International Development (USAID), for different categories of participants: including judges, election commissioners, candidates running for elections, and official observers in different countries.

For the purpose of this report we do not touch upon the issues of imposing a legal liability for the different types of electoral violations. We are of the opinion that such approach to the certain extend corresponds with the approach outlined in the Report on the Cancellation of Election Results. For example, it is mentioned in the paragraph II.4 of this document that cancellation of election results ***does not*** include ***fines*** or other ***punishments*** for violations of the electoral process.

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Additional help was provided to Mr. Kalchenko in the preparation of this report by the IFES election dispute resolution team, which is currently preparing IFES' forthcoming publication *Guidelines for Understanding, Adjudicating and Resolving Disputes in Elections* (GUARDE), a manual of international legal standards and practices in election complaint adjudication. GUARDE is funded by USAID.

II. Brief historical overview and basic overview of the legal basis for the 2010 local elections

Ukraine witnessed its contemporary rebirth to independence on August 24, 1991 when the Supreme Soviet of the Ukrainian Soviet Socialist Republic adopted a Declaration of Independence by an overwhelming majority. As the Soviet Union fragmented and faded away in the latter months of 1991, Ukraine's Parliament (the Verkhovna Rada) and other governmental structures worked frantically to establish the full range of attributes and institutions typical of a fully sovereign contemporary nation-state. The Constitution of the Ukrainian Soviet Socialist Republic, adopted in 1978 following the 1977 adoption of the last Soviet Union Constitution, was heavily amended throughout the 1991-95 period. Work in Parliament progressed on an entirely new Constitution, with a Constitutional Accord (in effect a *petit* Constitution) adopted in 1995, followed in 1996 by a full-scale and contemporary Constitution with a presidential-parliamentary form of republican government. In 2000 the administration of then-President Leonid Kuchma sought to make major amendments to that document in a national referendum that was not recognized as legitimate by major international organizations (campaigning for and administration of the referendum was marked by abuse of executive powers, broad manipulation and fraud).

In December 2004, in the middle of the disputed presidential election period, the Verkhovna Rada adopted controversial major systemic amendments to the 1996 Constitution – Law on Amendments to the Constitution # 2222, transforming Ukraine's system of governance into a parliamentary-presidential republic. Unfortunately, the 2004 changes included numerous provisions that have, in practice, given rise to major conflicts both within the executive branch (the Presidency vs. the Cabinet of Ministers) and among the executive, legislative and judicial branches (including a running battle over the powers of the Constitutional Court of Ukraine). The 2004 amendments were, arguably, the prime legal enabler of the 2007 pre-term parliamentary election. It should be noted that many legal experts believe that the 2004 revision of the Constitution was not conducted in compliance with the procedure required by the relevant constitutional provisions. However, even though a Constitutional Court challenge to the Law on Amendments to the Constitution was widely discussed among a political "*beau monde*" during the administration of President Yuschenko, the president himself abstained from lodging a constitutional appeal. The effort to annul these modifications to the Constitution and return to the legal situation that existed before December of 2004 proceeded after Viktor Yanukovych came to power in the presidential election of 2009-10 when a group of MPs brought appeal to the Constitutional Court. The Constitutional Court announced its decision on the merits of the case on September 30, 2010, while this report was still in development. The Court has ruled that when Law # 2222 was adopted, procedures anticipated by the Constitution were not observed. As a result the Court has recognized Law # 2222 as unconstitutional. Correspondingly, it has lost its legal force as of September 30. In its decision, the Constitutional Court announced that the legal force of the previous Constitution as adopted in 1996 has been restored.

It is well known that Ukraine possesses a Continental system of law. Article 8 of the Constitution of Ukraine also explicitly recognizes the principle of the rule of law. The Constitution is the supreme law of the land; all laws and other regulatory and normative acts are adopted on its basis and must comply with it. Furthermore, Article 55 guarantees the right to bring court challenges over the decisions, actions, or inactivity of state power, local self-government bodies, officials and officers. Article 124.2 further provides that the jurisdiction of the courts extends to all legal relations that arise in Ukraine.

"***Judicial lawmaking***" plays an important role in the jurisprudence of lower courts. In addition, ***precedential*** case law of the European Court of Human Rights makes a major impact on the adjudicative practice of the national courts. In light of the need to guarantee an effective system of challenging electoral violations and adjudicating electoral disputes, the recommendations and explanations of the higher courts concerning practical application of procedural norms is a significant factor in securing legal certainty. For instance, in one case in 2005 the procedural rules required by two different laws contradicted each other. The Plenum of the High Administrative Court of Ukraine addressed this conflict by adopting a Resolution on the Practice of Application of the Code of Administrative Adjudication of Ukraine for use by administrative courts while adjudicating electoral disputes. This document was adopted on April 2, 2007.

In accordance with Articles 124 and 125 of the Constitution, judicial proceedings are carried out (adjudicated) by the Constitutional Court and the courts of general jurisdiction. The system of general jurisdiction courts is built on the principles of territoriality and specialization, and the court of final appeal within the system of general jurisdiction courts is the Supreme Court of Ukraine. The higher specialized adjudicative bodies are the relevant

higher courts. Thus, all the courts of Ukraine (save for the Constitutional Court), both *"**general**"* and *"**specialized,**"* comprise a single system of ***general jurisdiction*** courts.

Per Article 92.1.20 of the Constitution, in Ukraine the organization and conduct of elections are regulated ***solely*** by laws. These include the Law on Election of People's deputies of Ukraine, the Law on Election of the President of Ukraine, the Law on Election of Deputies of the Verkhovna Rada of the Autonomous Republic of Crimea, Local Councils, the City, Settlement, and Village Mayors (hereinafter the Law on Local Elections). Over the coming years, Ukraine held regular parliamentary elections in 1994, 1998, 2002 and 2006, a pre-term parliamentary election in 2007; a pre term presidential election in 1994, and then regular presidential elections in 1999, 2004 and 2009-2010. So far, regular local elections have been held nationwide ***in parallel*** with regular parliamentary elections. So, the 2010 local elections scheduled for October 31, 2010, will be the ***first*** example of conducting a regular local electoral process not simultaneously with parliamentary elections. This time the respective territorial election commissions will have to perform the duties they were technically assigned by the law but which have so far not been implemented in practice due to the relevant procedures being arranged by the district election commissions in charge of parliamentary elections. Specifically, during the course of this electoral process the territorial election commission will be required to form polling stations and establish the polling station commissions.

Claims and complaints stemming from election law violations and election disputes generally are addressed via two available mechanisms: ***judicial*** (to the relevant court) and ***administrative*** (to the relevant election commission). What's more, per the noted constitutional provisions and certain Constitutional Court rulings, those who file administrative complaints with election commissions may continue seeking justice within the judicial system should their administrative complaints be rejected by an election commission or commissions. During election campaigns, the ***choice of forum*** is up to the claimant. Such a situation ***does not*** correspond with the recommendations of the Venice Commission. Paragraph II.3.3.c of the Code of Good Practice in Electoral Matters states that ***neither*** the appellants ***nor*** the authorities should be able to ***choose*** the appeal body. However, the legal framework in Ukraine ***may not*** be changed in the manner advised by the Venice Commission because Article 55.1 of the Constitution states that everyone shall be guaranteed the right to challenge in court the decisions, actions, or inactivity of state power, local self-government bodies, officials and officers. It means that everyone has the right to appeal to a court no matter what alternative non-judicial procedures are established by law. At the same time, according to Article 22 constitutional rights and freedoms shall be guaranteed and shall not be abolished. The content and scope of the existing rights and freedoms may not be diminished by an adoption of new laws or by introducing amendments to existing laws. As stated in Article 157, the Constitution of Ukraine shall not be amended if the amendments foresee the abolition or restriction of human and citizen rights and freedoms.

As noted earlier, ***election commissions*** and ***courts*** are authorized to adjudicate electoral disputes. In Ukraine, a three-tier system has been established to administer ***national*** elections (i.e. presidential and parliamentary),[2] and a two- or three- tier system is in place for ***local*** elections, depending on the particular type of election.[3] The status of election commissions at various levels is defined by the Law of Ukraine "On the Central Election Commission" and relevant election and other laws.

Prior to the 2006 parliamentary election, many of the legal underpinnings bearing on election dispute resolution were significantly altered as a result of partial judicial system reforms, the adoption of new procedural codes, and the establishment of a sub-system of specialized administrative courts within the courts of general jurisdiction. The new Code of Administrative Adjudication of Ukraine took effect on September 1, 2005. Its provisions regulate, among other things, election dispute resolution. The High Administrative Court of Ukraine began its work at that time, as well. The Code anticipated that district administrative courts and administrative courts of appeal would also be established.

[2] For the national elections the system of election commissions consists of the Central Election Commission, district election commissions, and polling station election commissions

[3] For the purpose of this research we do not review the Central Election Commission as an integral part of the systems of election commission, since it is granted with an authority to establish the results of elections only under extraordinary circumstances. Whether two- or three- tier system of election commissions is applied depends on a particular territorial and administrative division of the state. For instance if a city is divided into raions, elections of a city mayor and a city council deputies are administered by a city territorial election commission, raion election commissions, and polling station commissions. If there are no raions within a city, these elections are administered by a city territorial election commission and polling station commissions only.

Unlike the 2004 presidential election, the electoral processes in 2006 saw very few cases where election commissioners were expelled from commissions in an arbitrary, capricious or clearly unlawful manner or circumstance. On the other hand, there were serious commissioner shortages at many Precinct Election Commissions and some District Election Commissions, and very high commissioner turnover. This was the result, in many cases, of poor party/bloc organization and inadequate financing, while in some cases parties/blocs purposefully "rotated" their commissioners to degrade the effectiveness of various commissions. The locus of election litigation changed significantly after the 2004 electoral process. Though trials of complaints taken from all voter list inaccuracy cases and the vast majority of precinct-level cases continued to take place in local general courts (acting as "administrative courts," since the district administrative courts were not established at that time), appeals from such decisions and trials of higher-level complaint cases (District Election Commissions, for example) were undertaken in appellate courts (acting as administrative appeal courts), with the High Administrative Court of Ukraine assuming its new role of general final arbiter of election cases.

The situation with judicial review changed during the pre-term parliamentary election in 2007. First of all, more than 10 of the 27 district administrative courts had begun operation, as well as 6 of 7 planned administrative courts of appeal. Therefore, in regions with these new courts operational virtually all electoral disputes were reviewed by these new courts. In other regions (those without operational administrative courts per this new framework), judicial review continued as in 2006. Finally, the High Administrative Court of Ukraine reviewed cases in trial and appellate stages per the Code of Administrative Adjudication of Ukraine, as in 2006. Also, in some cases electoral process participants during the 2006 and 2007 elections blindly copied the mass litigation practices that proved pivotal in assessing the legal standing of the 2004 presidential election, without realizing that the much more transparent and clearer legal environment in 2006 and 2007 did not in fact call for the use of mass litigation in a contest that, for all its high temperature, did not come close to reaching the heights (and depths) of the 2004 election.

The recent presidential election was conducted in 2009-10. As a result of the amendments introduced to the Law on Election of the President of Ukraine the scope of complaint examination that falls under the authority of the election commissions was decreased. Particularly, the commissions lost their power to adjudicate complaints brought against state and local governmental bodies, their officials and officers, as well as concerning violations committed by mass-media, legal entities, etc. Also, participants in the election and their legal teams were quite passive in lodging their claims to courts and complaints to the respective election commissions regarding violations committed by their competitors. Candidates were also not so active to challenge many decisions of the Central Election Commission (CEC) in the courts on grounds of their non-compliance with the Law on Election of the President. As a result a majority of resolutions of the CEC of a so-called ***normative*** nature went unchallenged. At the same time, some experts believed that a substantial amount of the relevant norms contradicted the Law. Also, some experts who had a chance to be present at the meetings of the CEC on adjudication of complaints over the actions of some candidates pointed out a truly unfriendly attitude of the Commission towards certain candidates, including then-President Viktor Yuschenko and then-Prime Minister Yulia Tymoshenko. A vast majority of the complaints against both of these candidates were granted by the CEC, even though almost all of them were further quashed by either the Kyiv Administrative Court of Appeal or the High Administrative Court of Ukraine.

As far as the judicial procedure is concerned, the courts' practice during the recent presidential election revealed the existing shortcomings of the electoral law. For instance, it is related to the issue of the right of candidates to get the ***quotas*** of the positions of the chairman, deputy chairman, and secretary of the district and polling station election commissions. The rights for such quotas should be observed for the moment of establishing the commissions by an election commission of a higher level. However, the law did not state that the right for these quotas shall be also kept by candidates further on during the entire course of the electoral process. For instance, there is a need to provide legal regulation for a situation when an election commission as a collegial body simply abstains from executing a court decision. The High Administrative Court ***twice*** ordered the CEC to examine the application of the Embassy of the Republic of Georgia for registration of international observers and adopt a decision on the matter. Both times the Commission abstained from adopting such a decision. Some experts think that under such circumstances the law should require an election commission chairman to execute the court order ***personally***. The courts' practice also exposed a gap in procedural legislation given the very limited grounds when a court is empowered to order an immediate execution of its decision. For election-related disputes they are only the cases regarding ***inaccuracies*** in voter lists. In this category of cases a court is empowered to order an

immediate execution of its decision even before its decision takes legal effect. In all other cases a court's decision may not be executed until two days after it is announced, or after it has been reexamined by a higher court.

III. Analysis of the system for challenge electoral violations and adjudication of disputes related to local elections

Ukraine's legislature has not heeded the Venice Commission's recommendation that election laws not be amended for significant periods of time prior to or during the course of electoral processes. On July 10, 2010, the Parliament of Ukraine adopted a new Law on Local Elections, which was subsequently amended on August 30, 2010. The regular elections scheduled for October 31, 2010 are to be held in accordance with this new law.

The Ukrainian system of electoral dispute resolution began developing in a serious fashion with the 2002 parliamentary election. Although Ukrainians are more than skeptical at times about the independence and objectiveness of the courts, this is less the case in the electoral context, and electoral process participants use the courts and other elements available for dispute resolution with considerable vigor to restore rights that have been violated.

With the aim of analyzing the system for challenging electoral violations and adjudication of election-related disputes the following set of questions should be addressed:

1) **Which law?**

The law at issue, could be a "***material***" law (that is an election law or electoral code) or a "***procedural***" law (or, a code of procedure), and this provides for the rules to govern the procedures for challenging violations and adjudication of electoral disputes.

The Law on Local Elections (hereinafter the Law) is a basic Law that governs the preparation and conduct of local elections in Ukraine. Articles 85-90 of this Law regulate the procedures for challenging violations and adjudication of disputes by election commissions at different levels. Also, Article 85.10 states that the relevant claims shall be adjudicated in accordance with the Code of Administrative Adjudication of Ukraine (hereinafter the Code). Corresponding rules are anticipated by Articles 172-75, and 177-79 of the Code.

2) **Who?**

Only certain people, respectively named ***claimants*** and ***complainants*** in the statutes, have the standing to lodge claims or complaints.

Paragraph IV.49 of the Report on the Cancellation of Election Results states that the ***right*** to vote and the right to be elected are ***guaranteed*** by the possibility of applying to the competent court. In case the elections are carried out unlawfully, the individual constitutional right to vote or to be elected is violated. This right should be ***protected*** by ***individual*** complaint. Also, Paragraph II.3.3.f of the Code of Good Practice in Electoral Matters anticipates that all ***candidates*** and all ***voters*** registered in the constituency concerned must be entitled to file an appeal. However, a reasonable ***quorum*** may be imposed for appeals by voters of the results of elections. Current Ukrainian legislation provides for a ***wider*** list of relevant persons.

As required by the Code, the ***scope*** of persons who enjoy the right to challenge the violations ***varies*** depending on the particular ***respondent*** (defendant). For instance, according to Articles 172.1 and 172.2 of this Code the ***participants*** of a corresponding electoral process (voters, candidates, local branches of political parties, and official observers from the participants of elections) shall enjoy the right to challenge decisions, actions, or inactions of election commissions. Besides that, Articles 174.1 and 174.2 empower a voter, election commission, candidate, or local branch of political party to challenge decisions, actions, or inactions of the bodies of the state executive power and local self-governance, their officials and officers, mass-media, legal entities, and their officials and officers that violate electoral legislation. Also, Articles 175.1 and 175.2 of this Code provide that a voter, candidate, or local branch of a political party may challenge actions or inactions committed by candidates and their proxies, local branches of political parties, their agents and authorized representatives, and official observers that violate electoral legislation. At the same time a voter (i.e. a citizen with a right to vote in an election) may challenge a decision, action or inaction of the above mentioned respondents ***provided*** that such decision, action or

inaction violates his or her personal voting rights or interests related to the electoral process. Article 173.1 of the Code states that ***anyone*** who enjoys the right to vote in the ***relevant*** election shall have the right to lodge a claim regarding ***inaccuracies*** in the voter lists.

In its turn, Article 85.1 of the Law provides that a candidate and his or her proxy, local branch of a political party and its agents or authorized representatives, and voters whose rights or interests related to the electoral process are violated, shall enjoy the right to challenge decisions, actions, or inactions committed by the certain defendants within the corresponding election commissions.

3) **To Whom?**

The Law provides a list of persons whom a claimant or complainant may "attack" in response for committing a violation according to the legislation, namely the ***respondents*** (defendants).

Provisions of Articles 172, 174, and 175 of the Code require that violations committed by the following ***persons*** may be challenged to a court in accordance with the rules applicable for ***electoral*** disputes:

- election ***commissions*** and their ***members***;
- ***bodies*** of the state executive power and local self-governance, and their ***officials*** and ***officers***;
- ***mass-media***;
- legal ***entities***;
- ***candidates*** and their ***proxies***;
- local ***branches*** of political parties and their authorized ***agents***;
- official ***observers***.

Article 173 of the Code governs a procedure for challenging inaccuracies in the voters lists, but ***does not explicitly*** provide for a potential respondent. At the same time, the Resolution of the Plenum of the High Administrative Court recommends that a court bring the respective ***polling station commission*** as a respondent to a trial.

The corresponding rules are in Article 85.2 of the Law, which states that a complaint against the following ***persons*** may be lodged with the relevant election commission:

- election ***commissions*** and their ***members***;
- ***local branches*** of a political party whose candidates running for local elections have been registered, except decisions or actions that belong to so-call internal statutory activity of a political party;
- ***candidates***;
- ***proxies***, ***agents***, official ***observers***.

2-3b) **Representatives**

Only certain persons enjoy the right to act as the ***representatives*** of the claimant (complainant) and the respondent (defendant). Article 178 of the Code states that authorized representatives and agents of local branches of political parties, as well as proxies of candidates registered by a relevant election commission shall enjoy the right to ***represent*** interests, correspondingly, of a branch of party and candidate without any power-of-attorney. At the same time, the general norms establishing the rules of representation of parties laid out in Article 56 of this Code may be applied as well.

Article 85.1 of the Law allows a complaint to be lodged on behalf of a candidate by his or her proxy.

4) **What?**

The legislation permits certain topics as ***subject matter*** of a claim (complaint). There is a traditional ***"triad"*** of subject matters: ***decision***, ***action***, or ***inaction*** (omission, negligence) of the respondent (defendant). Inaction may be considered a violation of the law provided that a relevant ***obligation*** (duty) to adopt a decision or to perform an act was ***not observed***.

Inaccuracy in the ***voter lists*** is a special matter that is handled according to the European standards. Paragraph I.1.2.iv of the Code of Good Practice in Electoral Matters suggests that there should be an administrative procedure – subject to ***judicial control*** – or a ***judicial procedure***, allowing for the registration of a voter who was not registered. Article 173 of the Code regulates these procedures.

Articles 172.1, 172.2, 174.1, and 174.2 of the Code provide the opportunity to challenge ***all*** possible violations: decision, action, or inaction. At the same time Articles 175.1 and 175.2 permit the challenges to actions and inactions ***only***. These are fully justified provisions, since participants of electoral processes cannot simply adopt any legally meaningful decision that would constitute a subject matter for a relevant claim. However, the claimants shall enjoy the right to ***combine*** several interrelated demands in their claims, for instance, challenging a decision ***and*** action of a respondent.

Article 85 of the Law states that any "component" of the "triad" may be challenged in the respective election commission. At the same time, Article 85.2.2 of the Law states that only the decisions of local branches of political parties that do not relate to so-called internal statutory activity of a relevant party branch may be challenged. Articles 31.3 and 31.4 of the Law relate to inaccuracy in the voter lists. Unlike other electoral laws of Ukraine (namely, the Law on Parliamentary Elections and the Law on Presidential Elections), and unlike a previous version of the Law on Local Elections, the current Law ***does not*** anticipate that correcting inaccuracies in voter lists is achieved by lodging a complaint. In contrast to these laws Articles 31.3 and 31.4 of the Law state that a voter shall enjoy the right to appeal to a polling station commission (PSC) or to a body of the State Registry of Voters with an ***application*** to correct a preliminary voter list.

5) **Where to lodge?**

A ***claim*** (complaint) must be lodged in the proper forum according to the legislation.

Paragraph II.3.3.a of the Code of Good Practice in Electoral Matters anticipates that the ***appellate body*** in electoral matters should be either an ***electoral commission*** or a ***court.*** For elections to Parliament, an appeal to Parliament may be provided as a first instance. In any case, ***final*** appeal to a ***court*** must be possible. To determine the proper forum, the following aspects must be determined:

6.1 ***Subject matter*** jurisdiction of courts empowered to resolve particular disputes.
6.2 ***Territorial*** jurisdiction of courts empowered to resolve particular disputes.

We can conclude that in general these are addressed by Ukrainian national legislation. The courts that are empowered by law to adjudicate electoral disputes as administrative courts of the ***first instance*** are the district administrative courts, local general courts, the Kyiv Administrative Court of Appeal, or the Higher Administrative Court of Ukraine ***depending*** on the particular respondent and subject matter.

For instance, the ***district administrative*** courts are empowered to adjudicate claims against the following respondents:

- the Election Commission of Crimea, an oblast, raion, or city territorial election commission (TEC), a member of the commission;
- a body of the state executive power or local self-governance, their officials or officers;
- a local branch of a political party, candidate for deputy of an oblast, raion, or city council, a candidate for a city mayor.

The ***local general*** courts as administrative courts adjudicate cases at the first instance against the following respondents:

- a village or settlement TEC, a member of the said commission;
- a mass-media source, legal entities, or their officials;
- a candidate for deputy of a village or settlement council, or a deputy for a village or settlement mayor, or their proxies; and
- in cases of disputes over inaccuracies in the voter lists.

The ***Kyiv Administrative Court of Appeal*** acts as a court of the first instance in cases regarding the CEC or its members, excluding cases related to challenging the final results of elections. A complaint concerning a decision of the CEC on the final results of elections shall be adjudicated by the ***Higher Administrative Court of Ukraine***. The CEC is empowered to establish the final result of local elections provided that a relevant TEC has failed to adopt a decision on the results.

Articles 85.2, 85.4, 85.5, and 85.7 of the Law envisage an authority of the relevant election commissions on adjudicating the following disputes:

- ***Central Election Commission*** – a permanent state body with 15 commissioners, appointed by the Parliament per candidacies submitted by the President, with 7 year terms in office. The CEC is the supreme electoral body with reference to all other election commissions. It is empowered to review complaints stemming from ***inactions*** of the respective TEC to establish the results of local elections. The CEC is also charged with establishing ***all*** oblast, raion, and city with raion status' TECs.
- ***Territorial Election Commission*** – a permanent body with between 9 and 18 members, including up to 15 members who are nominated by the local branches of those political parties which either establish a parliamentary faction itself or with other parties, as well as up to 3 members nominated by the local branches of other political parties. TEC is empowered to examine a complaint versus an action or inaction of a candidate, local branch of political party; a decision, action or inaction of a TEC of a "lower" level on a particular type of local elections, a member of such a TEC; a decision, action or inaction of a PSC, its member provided that a particular PSC is established by a relevant TEC.
- ***Polling Station Commission*** – a temporary body with between 10 and 16 (for a small polling stations), 14 and 20 (for a medium size polling stations), and 18 and 24 (for a big polling stations) members nominated by the local branches of political parties, and candidates running for the relevant elections. A PSC is empowered to adjudicate a complaint versus action or inaction of a candidate, local branch of political party; action or inaction of agents, proxies, or official observers that occurred during the course of voting. Also, as it was mentioned before a PSC enjoys a competence to examine an appeal for correctness of the voter lists.

6) **How?**

Legislation provides for the method of developing a claim (complaint, lawsuit, appeal, or grievance). Such requirements are ***preconditioned*** by the provisions of Paragraph II.3.3.b of the Code of Good Practice in Electoral Matters which states that the procedure must be ***simple*** and devoid of formalism, in particular concerning the ***admissibility*** of appeals. Thus, the condition of simplicity of the admissibility of claims (complaints, appeals, lawsuits, or grievances) ***stipulates*** a normative requirement for simplicity of developing claims (complaints, appeals, lawsuits, or grievances).

Article 106 of the Code provides for the rules regarding the ***substance*** of a claim. In its turn Article 87.1 of the Law anticipates the legislative requirements for a complaint. To some extent both articles envisage more or less similar norms. However, the rules of the Code could be defined as more "liberal" towards a claimant, since the Law, for instance, obliges a complainant to indicate a phone number and e-mail of a defendant should the defendant possesses either. At the same time it is not always easy to learn the phone number or e-mail of the other party. Article 87.1 of the Law provides for a requirement to indicate "clearly formulated demands and the very core of a decision of an election commission which a complainant is looking for." Thus it seems to be technically easier to develop a claim to be lodged with a court than a complaint that is to be lodged with an election commission.

Also, the issue of the ***provision*** of ***claim*** seems to be of a significant importance in challenging electoral violations in a court. It concerns the power of a court to ***stop*** the ***legal effect*** of the challenged decision or to ***prohibit*** to ***carry out*** certain actions. We are of the opinion that this aspect is ***essential,*** especially as far as the ***parliamentary*** elections are concerned. Article 13 of the European Convention on Human Rights reads as follows: "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an ***effective remedy*** before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity." The European Court of Human Rights ruled that "remedies available to a litigant at domestic level for raising a complaint about the length of proceedings are "effective", within the meaning of Article 13, if they "[***prevent]*** the alleged ***violation*** or its ***continuation***, or [provide] adequate redress for any violation that [has]

already occurred" (judgment in the *Doran v. Ireland*). Even though the electoral rights emerging from local elections are not protected by Article 3 of Protocol 1 to the European Convention on Human Rights, a general conceptual approach and legal position of the European Court of Human Rights on the application of Article 13 has to be taken into consideration. Thus, the power of the court to impose the measures providing the claim should be considered an ***integral part*** of an ***effective remedy*** for the purposes of preventing the alleged violation, or its continuation.

The relevant provisions are contained in Ukrainian procedural legislation. Particularly, Article 117 of the Code states that a court by the motion of a claimant or upon its ***own initiative*** may resolve to take measures for providing the administrative claim, if there is obvious ***danger*** to the rights, freedoms and interests of a claimant before the decision is made on the administrative case, or protection of these rights, interests will become impossible without taking such measures, or for renewing them it will be necessary to spend much effort and expenses, and also if there are obvious signs of unlawfulness of the decisions, actions or inactivity of the holder of authority (Article 117.1). Also, according to Article 117.3 a court in the procedure of provision of administrative claim may ***stop*** the legal effect of the disputed decision of the ***holder of authority***. The last norm leads to the conclusion that the measure may be applied ***only*** for the respondent that is the holder of authority. As it is stated in Article 117.4 an administrative claim may be provided by ***prohibition*** to carry out certain actions as well.

7) **When?**

In fact, there are two ***time-***related aspects, namely the following ones:

> 8.1. WHEN shall a claim (complaint, lawsuit, appeal, or grievance) be ***lodged*** according to the legislation: ***period of time*** (days).
> 8.2. WHEN shall a claim (complaint, lawsuit, appeal, or grievance) be ***adjudicated*** (examined) according to the legislation: ***period of time*** (days).

The documents of the Venice Commission provide for the relevant recommendations in this important area too. Paragraph IV.B.4.59 of the Report on the Cancellation of Election Results anticipates that the ***effectiveness*** of the judicial procedure depends mainly on two indicators, including the ***time limit*** for the court to ***decide*** on the matter brought before it. Also, in the Explanatory Report to Paragraph II.3.3.g of the Code of Good Practice in Electoral Matters the appeal proceedings should be ***as brief as possible*** concerning decisions to be taken before the election. On this point, ***two pitfalls*** must be ***avoided***:

- first, that appeal proceedings retard the electoral process; and
- second, that, due to their lack of suppressive effect, decisions on appeals which could have been taken before are taken after the elections.

In addition, decisions on the results of elections must not take too long, especially when the political climate is tense. This means both that the time limits for appeals must be very short and that the appellate body must make its ruling as quickly as possible. Time limits must, however, be long enough to make an appeal possible, to guarantee the exercise of rights of defense and a reflected decision. A time limit of ***three*** to ***five*** days at first instance (both for ***lodging*** appeals and making ***rulings***) seems reasonable for decisions to be taken before the elections. It is, however, permissible to grant a little more time to Supreme and Constitutional Courts for their rulings.

As far as Ukrainian legislation is concerned, according to Articles 172.6 and 172.7 of the Code a claim may be lodged within ***five days***, but not later than the last day before the day of election. In its turn Article 172.11 of this Code stipulates that a court shall adjudicate a dispute during the course of ***two days*** with some exceptions. We are of the opinion that the period of two days seems to be quite a ***limited*** time for adjudication of some categories of electoral disputes. Taking into account a limited time for adjudication and totally unacceptable practice of some courts that had left lawsuits without further adjudication when a deadline for adjudication was disregarded, such as took place in the course of the presidential election in 2004, the Plenum of the Higher Administrative Court of Ukraine made a statement, in April 2007, saying that if a court is ***unable*** to finish adjudication of a case by an established deadline, a court ***may not leave*** a case aside without adjudication unless further proceeding is strictly prohibited by law.

The norms of the Law related to the respective deadlines for lodging a complaint and adjudication of a case seem to be even in less conformity with the above mentioned European standards than the recently discussed provisions of the Code. For example, Articles 86.1 and 86.2 of the Law state that a complaint to an election commission shall be lodged during the course of ***two days***. A complaint towards a violation that occurred before election day shall be lodged not later than 10 p.m. on the last Saturday before election day. At the same time Articles 86.3 and 86.4 of the Law anticipate that a complaint regarding a violation committed on election day shall be lodged with a polling station commission before voting is closed. Also, there is a ***two-day*** term for lodging a complaint regarding a violation committed by an election commission or its commissioner on the election day, and during the course of tabulation of results of voting or elections.

As stated in Articles 88.4, 88.5, and 88.7 of the Law, a complaint regarding a violation committed before election day shall be adjudicated during the course of ***two days***, but not later than 12 p.m. of the last Saturday before election day. A complaint regarding violations that occurred on election day and during the tabulation of results shall be adjudicated by a territorial election commission within the limit of ***two days*** too.

The provisions of the Code related to judicial procedure in cases devoted to inaccuracies in the voter lists seem to be in ***conformity*** with the European standards. Paragraph I.1.2.iv of the Code of Good Practice in Electoral Matters states that there should be an administrative procedure – subject to judicial control – or a judicial procedure, allowing for the registration of the voter who was not registered; the registration ***should not*** take place at the polling station ***on*** the ***day of election***. According to Article 173.3 of the Code a claim may be lodged ***not later*** than ***two days*** prior to election day. Thus the Code does not tie the beginning of the period to lodge a claim with a moment when a violation occurred. The more important aspect is to ***eliminate*** a consequence of a violation.

The ***special*** deadline is provided for cases regarding inaccuracies in voter lists. For instance, Article 173.3 of the Code states that a claim shall be lodged not later than ***two days*** prior to the day of voting, which means not later than the end of the ***last*** Thursday before the "electoral" Sunday. According to the legal position presented in the Resolution of the Plenum of the High Administrative Court of Ukraine the ***same*** time limit shall be applied for lodging an ***appeal*** regarding a decision of a court of the first instance on this subject matter. Article 173.4 of the Code requires a court to examine a case during the course of ***two days***, but not later than ***two days*** prior to the day of voting.

8) **Any specifics for adjudication?**

With the aim to obtain a full complex of characteristics of the existing system of adjudication of electoral disputes, any and all possible ***specifics*** of examination of ***particular*** cases shall be assessed as well. For example, the legislation could call for some special features for adjudicating disputes originating from the following violations:

> 9.1. Violations committed by election commissions or their members;
> 9.2. Violations committed by candidates, parties, their agents and proxies, or electoral observers;
> 9.3. Violations of the established terms and conditions for conducting an electoral campaign committed by mass media, bodies of the state executive power and local self-governance, or their officials and officers.

In our opinion, the procedural legislation of Ukraine provides for more certainty on this subject than the legislation of some other countries. As mentioned above, the Code permits the legal opportunity to challenge violations committed, for instance, by mass media outlet. Such disputes shall be adjudicated as ***electoral*** disputes, e.g. as those emerging from ***public***-legal relations.

Paragraph IV.B.4.59 of the Report on the Cancellation of Election Results states that the ***effectiveness*** of the judicial procedure depends mainly on regulation of the presentation of ***evidence***. Paragraph IV.B.4.65 further provides that the right of the judicial body to ***collect*** additional ***evidence*** when reviewing the cases on cancellation of electoral results is important if the dispute is on facts not specified sufficiently in the protocols of electoral bodies. In those cases the success of appeals depends mainly on the proof presented by the plaintiff.

The Ukrainian legislation anticipates the rules governing respective relations. For instance, Article 71.2 of the Code states that in administrative cases on unlawful decisions, actions or inactions of the subject of the power of authority, the burden of proving ***lawfulness*** of their decision, actions or inaction is put upon the respondent. That

is why we are of the opinion that in terms of ***protection*** of the rights, freedoms, and interests of the participants of elections the Ukrainian legislation establishes ***more opportunities*** than the laws of some other states (like Moldova or Azerbaijan) for the following reasons:

- The law encompasses an entire "triad" of potential violations: decisions, actions, and inaction.
- The law imposes a duty to prove the "lawfulness" that has much ***broader*** sense which includes the finding of facts, due process, reasonable terms, and application of the relevant legislation.

9) **Decision (resolution, judgment) as a result of adjudication (examination)**

When discussing the final ***decision*** (***judgment***) of a court adjudicating an electoral dispute, above all the following aspects must be discussed:

10.1. ***Remedies***.
10.2. ***Scope of authority*** of a court provided that a claim is granted.
10.3. ***Immediate*** execution of the court decision.

As far as the issue of ***remedies*** is concerned, again, the requirements of Article 13 of the European Convention on Human Rights should be taken into account. For example, in its judgment in *Doran v. Ireland* the European Court of Human Rights pointed out that "the scope of the Contracting States' obligations under Article 13 varies depending on the nature of the applicant's complaint; however, the remedy required by Article 13 must be "effective" in ***practice*** as well as in ***law***. The term "effective" is also considered to mean that the remedy must be ***adequate*** and ***accessible***". "The effectiveness of a remedy within the meaning of Article 13 does not depend on the certainty of a favorable outcome for the applicant. Nor does the 'authority' referred to in that provision necessarily have to be a judicial authority; but if it is not, its powers and the guarantees are relevant in determining whether the remedy before it is effective. In addition, even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may, in principle, do so."

Furthermore, we are of the opinion that the remedy is tied inseparably with the general ***scope of authority*** of a court to adopt a decision subsequent to the adjudication of an electoral dispute, including the issue of the ***manner of protection*** of the violated rights and interests, and a ***procedure*** to ***eliminate*** the ***consequences*** of wrongdoing. A scope of authority could ***vary*** for a particular country depending on the specifics on the national legislation. Particularly, one of the most topical issues is whether a law provides for an ***exhaustive*** list of remedies and types of procedure of eliminating the consequences of violation, or if a court enjoys a certain ***margin of discretion*** of its authority to decide upon these issues.

We think that one of the most topical issues is an aspect of challenging violations, which could lead to a cancellation of results of voting in one polling station, results of voting in one electoral constituency, or the entire result of an election. With regard to this aspect it is necessary to take into consideration the relevant European standards. For instance, Paragraph II.6 of the Report on the Cancellation of Election Results states that the European ***standards*** on the cancellation of election results in parliamentary elections may be found in the European Convention on Human Rights, which guarantees in Article 3 of its Additional Protocol the right to periodic elections by free and secret ballot. Also, Paragraph III.24 of this Report states that it must be possible to annul the entire election or merely the results for one constituency or for one polling station. Appellate bodies should have ***authority*** to annul elections if irregularities may have influenced the outcome, ***i.e.*** may have affected the distribution of seats. In zones where the results have been annulled, the elections must be repeated (when the allocation of seats may be different after repeated elections). This makes it possible to avoid ***two*** extremes:

- annulling an entire election, although irregularities affect a small area only, and
- refusing to annul, because the area affected is too small.

Taking into consideration the issue of ***fleetness*** of the electoral process, it is not less important to evaluate the national legislation with regard to whether a court decision may be ***executed immediately*** upon it's rendered.

As far as the national Ukrainian legislation is concerned it is worthwhile to mention the following. In comparison with the relevant provisions of ***general*** legal character, Article 177.1 of the Code stipulates that while adjudicating an electoral dispute a court is empowered to determine a ***manner of protection*** of the violated rights and

interests, as well as a ***procedure of eliminating*** the ***consequences*** of wrongdoings in ***accordance*** with a law. It means that a scope of power of a court is ***limited*** by ***law***. As far as the issue of execution of a decision is concerned, Articles 173.6 and 256.1.5 of this Code state that ***only*** decisions of cases regarding inaccuracies in the ***voter lists*** shall be executed immediately. Other decisions may be executed only after they have ***entered legal force***.

At the same time the scope of authority of election commissions seems to be ***wider*** than judicial competence. For example, Article 90.5.5 of the Law grants the commissions the power to redress the violated rights and interests of a complainant by manners ***other*** than those listed in the Law. It means that an election commission ***is not limited*** in selecting a particular manner of protection of the violated rights.

10) **Procedure to appeal decision**

The final question in the evaluated set is how ***to appeal*** a judgment of a court of first instance to a court of ***higher*** instance. For example, it is anticipated by Article 177.5 of the Code that decisions of a local administrative court may be appealed to a court of the appeal instance during the course of ***two days***, but not later than ***four hours*** before voting begins. An appeal shall be examined within ***two days***, but not later than ***two hours*** before voting begins. Decisions of the Higher Administrative Court of Ukraine sitting as a court of the first instance ***may not be*** appealed.

IV. Conclusions and recommendations

Summing up the results of the presented research we can conclude that to some extent current Ukrainian legislation corresponds to the recommendations, for instance, of the Venice Commission in the areas of challenging electoral violations and adjudication of election-related disputes. However, there are several recommendations on further improvements of the current electoral and procedural legislation of Ukraine, for example:

- A practice of adoption of new electoral laws and/or amending existing laws later than one year prior to the day of elections must be regarded as absolutely unacceptable. The Ukrainian Parliament must comply with the relevant recommendations of the Venice Commission on this issue.
- Relevant legislative requirements regarding content of a complaint that is to be lodged with an election commission should be simplified.
- Relevant deadlines for lodging claims and complaints, as well as adjudication of cases, shall be brought in compliance with the recognized standards of the Venice Commission.
- In order to increase the effectiveness of a judicial mechanism for protecting electoral rights, the authority of the courts shall be enlarged to allow an immediate execution of a court decision.

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