

Voting Rights of IDPs in Ukraine: International and Domestic Legal Perspectives

Ukrayna'da Ülkesinde Yerinden Edilmiş Kişilerin Oy Hakları: Uluslararası ve Yerel Yasal Perspektifler

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Abstract

Voting rights of internally displaced persons (IDPs) in Ukraine's elections have become an increasingly relevant topic with the high number of people fleeing from the East of the country and from the Crimean Peninsula after the Russian aggression. The unprecedented number of IDPs exposed Ukraine to many challenges in upholding the rights of these people and ensuring their integration on national and local level. The voting rights of IDPs became particularly affected as a result of gaps and shortcomings in Ukraine's legislative framework for elections which, in certain areas, is at odds with international standards for democratic elections. This had very concrete implications on the integration of IDPs and national reconciliation in Ukraine for which full participation of IDPs in elections is instrumental. With new elections in sight, there is a chance that Ukrainian lawmakers will address the problematic parts of domestic laws, putting the relevant legal provisions in line with Ukraine's international commitments for political participation rights of its citizens, including IDPs. There are however many unknowns in this process and it remains to be seen whether IDPs will be able to participate in Ukraine's upcoming elections.

Key words: Ukraine, Voting Rights, Elections, Democratic Participation, IDPs, Crimea, Donbas

Özet

Ukrayna seçimlerinde ülkesinde yerinden edilmiş kişilerin (ÜİYOK'lerin) oy hakları, Rus saldırısından sonra ülkenin Doğu bölgesinden ve Kırım Yarımadası'ndan kaçan insanların sayısındaki ciddi miktardaki artış ile giderek daha güncel bir konu haline geldi. Eşi görülmemiş sayıdaki ÜİYOK, Ukrayna'yı bu kişilerin haklarını korumak ve ulusal ve yerel düzeyde entegrasyonlarını sağlamak adına birçok zorluğa maruz bıraktı. ÜİYOK'lerin oy kullanma hakları, demokratik seçimler için uluslararası standartlara aykırı olan Ukrayna'nın seçimler için yasal çerçevelerindeki boşluklar ve eksiklikler nedeniyle özellikle etkilenmiştir. Bu durumun, ÜİYOK'lerin entegrasyonu ve Ukrayna'daki ÜİYOK'lerin seçimlere tam katılımının aracı olduğu ulusal uzlaşma üzerinde çok somut etkileri olmuştur. Yeni seçimlerde, Ukraynalı milletvekillerinin yerel yasaların sorunlu kısımlarını ele alma ve ilgili yasal hükümleri Ukrayna'nın ÜİYOK'ler de dahil olmak üzere tüm vatandaşlarının siyasi katılım haklarına yönelik uluslararası taahhütlerine uygun hale getirme şansı vardır. Bununla birlikte, bu süreçte birçok bilinmeyen olmakla birlikte, ÜİYOK'lerin Ukrayna'nın yaklaşımakta olan seçimlerine katılıp katılamayacağı da henüz bir muammadır.

Anahtar Kelimeler: Ukrayna, Oy Hakkı, Seçimler, Demokratik Katılım, ÜİYOK'ler, Kırım, Donbas

**This review is based on previous work of the author, both in his current capacity at the Council of Europe and during his studies at the European Inter-University Centre for Human Rights and Democratisation (see Drnovsky, 2017, 2019).*

INTRODUCTION

Voting rights of internally displaced persons (IDPs) have become an increasingly relevant topic as the total number of IDPs worldwide doubled in size over the last two decades. In Europe, majority of IDPs are concentrated in Ukraine as a result of Russia's aggression in the East of the country and the annexation of Crimea. The massive internal displacement exposed many of the affected people to significant challenges, including disenfranchisement in elections. This has resulted in reduced accountability of government and further marginalization of IDPs. The lack of engagement and integration of IDPs subsequently exacerbates possible reconciliation needed for durable resolution of conflict. Last but not least, disenfranchisement of IDPs is at odds with international human rights law that protects voting rights of IDPs on grounds of citizenship. The failure to protect voting rights of IDPs thus amounts to violation of international law. In the following lines, this review provides a legal perspective on the voting rights of IDPs with a view to the elections in Ukraine.

CURRENT SITUATION OF IDPS IN UKRAINE

As of April 2019, the security situation in eastern Ukraine remained tense and a number of ceasefire violations continued to affect civilians on both sides along the line of contact (OSCE SMM, 2019). Throughout the whole period of conflict, fighting has had devastating impacts on everyday lives of civilians residing in the occupied territories of the eastern regions of Donetsk and Luhansk affected by the Russian aggression (non-government controlled areas, NGCA) as well as along the line of contact in the government-controlled areas in the east (GCA) (UNHCR, 2019a). In addition, people's lives have been negatively affected by political changes following the formation of self-proclaimed People's Republics of Donetsk and Luhansk (DPR, LPR) and Russia's illegal

annexation of Crimea which forced many to flee (CoE Parliamentary Assembly, 2016; OHCHR, 2017). As a result of these developments, there are currently over 1,3 million officially registered IDPs in Ukraine of whom around 20 000 fled Crimea after annexation in 2014, half of them Crimean Tatars, while the rest originates from the occupied territories of Donetsk and Luhansk (OSCE, 2016; UNHCR, 2019b). Yet, some de facto IDPs remained excluded from official figures, while others registered only in order to retain pensions and social benefits that cannot be accessed in the territory of NGCA (IDMC, 2016).

Territorially, most of IDPs are concentrated mainly in urban centres of Donetsk and Luhansk that are under government's control, as well as in the region of Kharkiv and the capital Kyiv (UNHCR, 2019b). Large number of people registered as IDPs in the GCA of Donetsk and Luhansk remain close to their original homes located in NGCA in hope to return soon. They are often residing in GCA immediately surrounding the zones of ongoing military operations. Especially these IDPs, as well as de facto IDPs that are not registered, face chronic insecurity (IDMC, 2017). Registered IDPs permanently residing in GCA face a lack of socio-economic security due to the high unemployment and rising costs living (IOM, 2018). A general problem is the overall reluctance of public authorities to genuinely address many issues that IDPs are coping with. A symptomatic display of this problem is the infringement on IDPs' voting rights in Ukraine's elections which has deprived many IDPs of the chance to participate in and have influence on decisions that have impacts on challenges they face. This issue also represents a significant setback in local and national (re)integration of IDPs by means of political participation which is detrimental to reconciliation in the country and peacebuilding.

PERSPECTIVES ON VOTING RIGHTS OF IDPS IN UKRAINE

Participation of IDPs in elections at all levels of government is one of the key elements of reintegration of IDPs into the Ukrainian society as a whole and also their integration into the local communities to which IDPs have been displaced from their places of origin (Council of Europe, 2018; Shujaat, Roberts, & Erben, 2016). Voting rights are a precondition for full emancipation of IDPs as full-fledged citizens which they rightfully are. In turn, election participation of IDPs is necessary for national and local reconciliation as well as for peacebuilding in the areas most affected by conflict (Lacy, 2004). The effective right to vote is clearly valued by IDPs themselves as a majority of surveyed IDPs expressed an intent to vote in elections if possible and allowed by law (IOM, 2018). Importantly, there is also an international legal dimension to this issue stemming from the fact that the right to political participation is broadly recognised as an inherent right for every citizen of state. Thus, from the international law perspective, IDPs as full-fledged citizens have not only legitimate but also legal right to vote. Their voting rights are directly derived from the international standards and commitments undertaken by Ukraine which were also incorporated into its domestic legal framework and as such should be legally enforceable in accordance with domestic laws.

However, despite strong normative, practical and legal justifications, IDPs' right to vote was in the previous electoral cycles for presidential, parliamentary and local elections seriously infringed upon. This happened to various degrees but most dramatically in the 2015 local elections where IDPs were deprived of voting completely (OSCE/ODIHR, 2014b, 2014a, 2015). Among other negative effects, IDP disenfranchisement clearly had a detrimental impact on integration of IDPs who were often seen by other citizens as well as by local residents in communities, and sometimes even by themselves, as second-class citizens which

hampered building of positive relations in Ukrainian society in general and between IDPs and native communities at local level in particular (OSCE, 2016). Furthermore, as demonstrated above, IDPs in Ukraine are often in vulnerable situation with respect to their access to basic needs, struggling to have a chance to live their lives in dignity. Without having the right to vote, IDPs' interests at political level are underrepresented as politicians and authorities have no direct incentives to consult them and to protect their rights (OSCE, 2016). As a result, policies that would tackle challenges that IDPs face are lacking and implementation of existing measures is pending (IOM, 2018). Last but not least, this situation arguably amounts to a violation of Ukraine's own laws as well as international commitments. In the following lines, the issue of IDP voting rights is regarded from the legal perspective, both at domestic and international levels.

International commitments of Ukraine for IDP participation in elections

Noticeably, international treaty law binding for Ukraine contains no explicit reference to IDPs. Their voting rights are nonetheless protected by general principles providing for rights for all citizens. Voting rights of every citizen in elections at all levels are guaranteed by Article 25 of the ICCPR establishing the right and the opportunity to vote in free and fair elections. The "opportunity dimension" of the right to vote requires states to take positive measures in ensuring that every citizen can vote, including that residency requirements necessary for voter registration must be reasonable (Bagshaw, 2000, p. 4; United Nations Human Rights Committee, 1996, para. 11). In addition, states are obliged to facilitate voting of eligible voters who face impediments to freedom of movement preventing them from exercising their right to vote effectively (United Nations Human Rights Committee, 1996, para. 12). This puts an onus on states to adopt special measures enabling groups that face specific difficulties, such as

IDPs, to participate in elections in the past or present place of their residence (Long, 2010, para. 27). Further, Article 26 requires states to actively protect against discrimination which serves as a basis for subsequent treaties that guarantee rights foresaw in ICCPR, including the right to vote, for specific vulnerable groups, namely women, persons with disabilities and minorities.

The lack of explicit provisions on IDPs is partly compensated in the UN Guiding Principles on Internal Displacement which, though not formally binding, reflect and are consistent with international law by analogy (Kälin, 2008; United Nations, 2004). The Guiding Principles reaffirm and set forth states' commitments concerning equal rights of all citizens and provide for a clear definition of IDPs. Importantly, the Guiding Principles regard the status of IDP on basis of the ICCPR Article 2 that prohibits discrimination on enlisted grounds including "other status" which allows to be interpreted broadly, encompassing also IDPs (Bagshaw, 2000, pp. 6–7; Bossuyt, 1987, p. 486). Principle 22(1)(d) then provides a generic protection for IDPs against overly stringent residency requirements and Principle 29(1) reaffirms the right of IDPs to vote at all levels of government. Besides referring to existing rights protected by international treaties, the Guiding Principles provide guidelines and best practices on implementing full voting rights of IDPs living in both camp and non-camp situations regardless of whether they choose to return to their areas of origin, integrate locally, or resettle elsewhere in the country (United Nations, 2004, paras. 1, 22, 29).

On the level of European regime of human rights protection, Article 3 of the First Protocol to the European Convention on Human Rights (ECHR) binds Ukraine to "hold free elections (...) which will ensure the free expression of the opinion of the people in the choice of the legislature". The case law of the European Court of Human Rights (ECtHR) has interpreted Article 3 as implying voting rights to the same extent as provided for in the ICCPR

as elaborated above, with an exception in the scope limited in Article 3 merely to voting rights in elections to legislatures (see European Court of Human Rights, 1987). The term "legislature" is then in accordance with ECHR interpreted as any elected authority that exercises legislative powers, i.e. enacts laws (see Grabenwarter, 2014, para. 4). Besides elections to national legislature bodies, the ECHR protects voting rights of IDPs in local elections (to local legislatures) on a basis of the non-discrimination principle enshrined in the Article 14 of the Convention which has been multiple times applied by the Court to the rights of IDPs (cf. CoE Parliamentary Assembly, 2009, paras. 27–28). Although not in the scope of the ECtHR, Ukraine has ratified the 2009 Additional Protocol to the European Charter of Local Self-Government on the right to participate in the affairs of a local authority which is of relevance for local elections. The existing binding obligations for guaranteeing the right to vote are complemented and specified for the situation of IDPs by a series of "soft law" instruments produced by the Parliamentary Assembly and the Committee of Ministers of the Council of Europe as well as by the Venice Commission (CoE Committee of Ministers, 2006, para. 9; CoE Parliamentary Assembly, 2005, 2009; Venice Commission, 2002, p. 15). Specifically for local level, a report including recommendations on IDP voting rights was adopted by the Congress of Local and Regional Authorities of the Council of Europe (Council of Europe, 2018).

Voting rights may be, however, subject to restrictions on grounds of residency requirements that are generally permissible unless arbitrary and/or unreasonable. In this regard, Article 3 of the First Protocol and pertinent case law of the ECtHR provide general parameters on determining justified residency requirements (Council of Europe, 2009, pp. 4–5). In examining compliance with Article 3, the Court has put focus primarily on two criteria, namely whether there has been arbitrariness or a lack of proportionality, and whether the restriction has interfered with the

free expression of the opinion of the people (Council of Europe, 2017, pp. 6–7). The ECtHR decisions on the permissibility of residency requirements on the right to vote provide debatable implications for IDP voting rights. On the one hand, restrictions on the right to vote are generally not allowed if they impair the very essence of the right to vote by excluding certain groups of the general population (European Court of Human Rights, 2004a, para. 28). Furthermore, restrictions on the right to vote require a wider assessment of the proportionality than is the case for restrictions of the right to stand for elections (European Court of Human Rights, 2004b, para. 57). On the other hand, restrictions intended to ensure that elections reflect the will of the population are not in itself unreasonable as non-residents may be considered less directly or continuously concerned by day-to-day problems and the acts of the elected political bodies (European Court of Human Rights, 2005, paras. 48, 50, 51, 56). In sum, the case law of the ECtHR indicates that IDPs should be given unrestricted access to all levels of elections on equal terms with other citizens which should be reflected in national legislations of Council of Europe member states (cf. European Court of Human Rights, 2013, paras. 109–115).

Domestic legal framework for elections and IDPs' right to vote in Ukraine

The Constitution of Ukraine provides in Articles 69 to 71 for voting rights of all eligible citizens at all levels of government in line with international standards and enumerates general voter eligibility criteria. Interestingly, the general eligibility criteria for voting do not include residency requirements which is of relevance in view to the voting rights of IDPs. However, referring specifically to local elections as stipulated further in the Constitution, members of local self-government bodies are in accordance with Article 141 elected “by residents of a village, settlement, city, district and oblast (...)”. There is,

nonetheless, no clear definition of “residents” provided in the text which, as shown below, is of importance for IDPs. On the level of statutory laws, Ukraine’s legislation as well as the legislative process in general are problematic in several respects concerning voting rights of IDPs. Traditionally, election law in Ukraine is subject to constant changes resulting in different electoral frameworks in almost every election (see Tkachenko & Halling, 2017). The changes are often introduced shortly before new elections take place and are accompanied by a lack of transparency and consultation which contradicts international best practices. Ukraine’s legal framework for elections is not unified in a comprehensive piece of legislation but remains dispersed into separate legal norms. In turn, this leads to inconsistencies and gaps which may have detrimental effects on the constitutionally guaranteed right to vote (Tkachenko & Halling, 2017).

As regards electoral system and its implications on voting rights of IDPs, the situation differs depending on the type of election. The president of Ukraine is elected by a majoritarian system with possible second round. The presidential election takes place in a single-district constituency across the whole country and as such is generally conducive to participation of IDPs since it is comparatively less cumbersome for voters to change their place of voting. However, registration to vote needs to be renewed for the second round which constitutes an unnecessary burden for IDPs (OSCE/ODIHR, 2019). The parliamentary elections are based on a parallel proportional-majoritarian electoral system in which half of the seats are elected on the basis of proportional representation in one single nationwide constituency, and the other half are elected in single-mandate districts under a first-past-the-post system. Thus, while the proportional element of parliamentary elections generally allows for voting of IDPs, participation in the majoritarian part is due to single-mandate districts conditioned by voter’s residency registration in the district of voting.

This effectively prevents IDPs from voting (OSCE/ODIHR, 2014a). Finally, the electoral system for local elections in Ukraine is a mixed parallel system based on proportional and majoritarian element. Mayors and councillors in settlements and villages are directly elected under a first-past-the-post system in places with fewer than 90,000 voters while in cities with more voters, mayoral elections take place by a two-round majoritarian system. and region, district, city, and city district councils are elected under a multi-member constituency by a proportional system. The voter eligibility for all levels of local elections is conditioned by a permanent residency in a given constituency. This proved to be a barrier for IDP voting in the 2015 local elections (OSCE/ODIHR, 2015).

However, the core problem rests not in the electoral system itself but in the strict residency requirements on voting, as stipulated in the Article 3 of the Law on Local Elections, Article 2 of the Law on the Parliamentary Elections and respective resolutions of the Central Election Commission. In line with these provisions, address at which an individual is registered as a permanent resident is also his or her voting address within the respective constituency. Therefore, IDPs displaced outside of the electoral district of their permanent residence need to register as permanent residents in the constituency where they are displaced in order to be able to produce certificate of permanent residency that is necessary for voter registration in the constituency of voting. Change of permanent residence is for IDPs administratively extremely burdensome and in practical terms next to impossible. Behind this, there is a more profound issue called “propiska system” which in general terms burdens any resident in Ukraine seeking to change the permanent residency with a difficult administration and other obstacles which make such a task effectively impossible for IDPs (Council of Europe, 2016, pp. 49–50). This provision is generally in contradiction to the Law on Ensuring of Rights and Freedoms of IDPs that allows IDPs in Article 8 to participate in any

type of elections without changing their permanent address. According to this provision, it is sufficient for IDPs to change their place of voting by officially registering as IDP in the area of their actual residence upon which they obtain an IDP certificate to vote in the respective polling station. This was made impossible by the abovementioned provisions of the law. IDPs were thus deprived of their right to vote as the law insisted on the stringent residency requirements. This clearly demonstrates the existing inconsistencies and gaps in Ukraine’s legal framework for elections. Importantly, the situation was found discriminatory by the national Ombudsperson of Ukraine (Human Rights Information Centre, 2015).

The situation in 2015 local elections became a subject of judicial review after some IDPs tried to change their voter registration based on their temporary IDP certificates but their claims were denied by the Voter Register Maintenance Bodies. Some of these refusals were challenged in courts but decisions of respective courts were inconsistent. While some of the courts recognized the IDP certificates as a sufficient document for voting, other courts rejected these claims (OSCE/ODIHR, 2015, p. 12). Subsequently, a decision of the Lviv administrative court of appeal whereby the temporary IDP certificate has not been recognized as sufficient was reviewed by the Supreme Court of Ukraine. The Supreme Court ruled in this regard that IDPs, whose registration is by nature temporary, cannot vote in local elections that are held in territories where they only reside temporarily. The Court also found that an IDP certificate is not an appropriate document to prove actual residence and that only the national passport of a citizen voter shall be used as a proof of the permanent place of residence in the disputes related to voter registration. IDPs are thus denied the right to vote in local elections at their place of current residence unless they can prove permanent registration in the constituency (UNIAN, 2018). This decision has further

cemented the practical and legal barriers to IDP voting rights in Ukraine's elections.

CONCLUSION: PROSPECTS FOR IDP VOTING RIGHTS IN UKRAINE'S UPCOMING ELECTIONS

The considerable number of IDPs currently living in Ukraine poses fundamental challenges to the Ukrainian state and society in terms of securing basic needs of displaced people and, in the long term, managing their successful integration into the society and local communities. Importantly, many IDPs are not passive in this endeavour and pursue various activities contributing to their integration for the period of displacement. However, the socio-economic conditions the country is facing coupled with shortcomings in the current legislative framework affecting rights of IDPs often hamper these efforts (Drnovsky, 2019). The lack of implementation of voting rights for IDPs is an exemplary case of this. Positively, the voting rights of IDPs have become an increasingly relevant topic in the Ukrainian public discourse as the 2019 presidential elections recently took place and new parliamentary and local elections are in sight. At the same time, the current state of legislation clearly requires a reform that would introduce measures providing for full voting rights of IDPs in the upcoming elections. This has been highlighted in a number of international recommendations addressing the shortcomings that IDPs faced in the past elections. Now that the major inflows of IDPs faded away and the arrived people settled down in the areas of their actual residence, the government should in accordance with the pertinent recommendations embark on an electoral reform ensuring compliance of Ukraine's legislation with international commitments.

Nonetheless, at the time of writing, the prospects for voting rights of IDPs in Ukraine's upcoming elections scheduled for 2019 and 2020 remain uncertain. The currently ongoing efforts to amend existing laws have been so far unsuccessful due to the lack of political will.

On 27 March 2017, a draft law No 6240 was registered which aims to protect the voting rights of IDPs by granting the right to vote to those who currently do not reside in their original place of registration. This law, if adopted, would significantly mitigate the intricate bureaucratic procedure that IDPs have to go through in the process of changing the voting address for the place of their actual residence. However, the draft law No 6240 has not yet been advanced to the plenary for debate (IFES, 2019). On November 7, Verkhovna Rada despite expectations surprisingly approved in the first reading a draft Electoral Code 3112-1. This draft aims to amend electoral laws with regards to electoral system as well as other general aspects of electoral process, in line with some of the recommendations made by the Venice Commission and OSCE/ODIHR. Although the proposed changes do not explicitly address IDP voting rights, their intent to introduce a proportional electoral system for parliamentary elections can remove some of the barriers that prevented IDPs from voting in the past (European Platform for Democratic Elections, 2019). Moreover, a high number of amendments to the draft Election Code No 3112-1 was registered, some of them jointly developed by MPs, experts of Civil Network OPORA and IFES. The proposed amendments, among other things, aim to protect voting rights of IDPs in Ukraine's elections, including at local level (Halling, 2019). It remains to be seen whether Verkhovna Rada will approve the draft in the second reading and what amendments, if any, will be introduced and if these will have any potential impact on IDP voting rights.

The further developments of legislation in this area are difficult to predict since electoral matters in Ukraine become easily subject of politicisation. Considering the fact that a new president has been elected only recently and next parliamentary elections are scheduled for October 2019, the situation may gain a new dynamic which can affect the process in any way. Importantly, electoral participation of

IDPs seems to be overshadowed by other issues which are of concern for the current government. By many, IDPs are perceived to have certain political preferences and any discussion hence easily becomes a matter of controversy. Reportedly, many current deputies perceive any electoral reform as possibly threatening their future chances to retain their mandates as majority of proposed changes involves shift towards proportional system (Tkachenko & Halling, 2017). There is also certain reform fatigue prevailing among Ukrainian lawmakers which draws attention away from reforms (Halling & Tkachenko, 2017). The recent draft law could be thus eventually rejected and electoral reform would have to be relaunched from the very beginning. Alternatively, the legislative debate on this matter may be subject to postponing with no legislative outcomes until shortly before elections. Of special interest in this regard is the recent decision of Ukraine's Supreme Court rejecting IDPs' claim to vote in local elections. Since this decision is final there is now a possibility to file a case with the ECtHR. Nonetheless, the recent developments as well as long term legislative trends cast significant uncertainty on the full implementation of voting rights for IDPs in future elections.

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