

Citation

CHICAGO: K. Eckhardt, *The Concept of Electoral Process in the Light of the Electoral Code of Ukraine and Ukrainian Doctrine*, „Przegląd Prawa Konstytucyjnego” 2023, no. 5, pp. 255–266, <https://doi.org/10.15804/ppk.2023.05.18>

APA: Eckhardt, K. (2023), *The Concept of Electoral Process in the Light of the Electoral Code of Ukraine and Ukrainian Doctrine*, „Przegląd Prawa Konstytucyjnego” no. 5, pp. 255–266, <https://doi.org/10.15804/ppk.2023.05.18>

Krzysztof Eckhardt

ORCID ID: 0000-0003-3338-9836

WSPiA University of Rzeszów

E-mail: krzysztofeckhardt@gmail.com

**The Concept of Electoral Process in the Light of the
Electoral Code of Ukraine and Ukrainian Doctrine**

Keywords: elections, electoral process, subjects of electoral law, principles of electoral process

Słowa kluczowe: wybory, proces wyborczy, podmioty prawa wyborczego, zasady procesu wyborczego

Abstract

The aim of this paper is to outline an analysis of the codal formulation and doctrinal interpretation of the concept of electoral process in Ukraine. The author analyzes the concept of electoral process, its temporal, subjective and procedural aspects. He also presents the regulations of the Electoral Code of Ukraine on the principles of electoral process. A properly regulated electoral process is the starting point in any democratic state for holding free and fair elections with effective public scrutiny. In Ukraine, this is extraordinarily important for a number of reasons. The provisions of the Election Code passed in 2019 have never been applied in parliamentary or presidential elections to date, and therefore their evaluation is possible only from a doctrinal point of view, and the views of Ukrainian doctrine are the most significant on this issue for obvious reasons.

Streszczenie**Pojęcie procesu wyborczego w świetle Kodeksu wyborczego Ukrainy i doktryny ukraińskiej**

Celem artykułu jest zarys analizy kodeksowego ujęcia i doktrynalnej interpretacji pojęcia procesu wyborczego w Ukrainie. Autor analizuje pojęcie procesu wyborczego, jego temporalny, podmiotowy i proceduralny aspekt. Przedstawia także regulacje Kodeksu Wyborczego Ukrainy dotyczące zasad procesu wyborczego. Właściwie uregulowany proces wyborczy jest w każdym demokratycznym państwie punktem wyjścia do przeprowadzenia wolnych i uczciwych wyborów przy efektywnej kontroli społecznej. W Ukrainie z wielu powodów jest to nadzwyczajnie ważne. Przepisy uchwalonego w 2019 r. Kodeksu Wyborczego nie były jeszcze nigdy stosowane w wyborach parlamentarnych czy prezydenckich więc ich ocena możliwa jest tylko z punktu widzenia doktrynalnego a poglądy doktryny ukraińskiej są w tej kwestii z oczywistych powodów najbardziej znaczące.

✱

I. Introduction

Ju.B. Kluczkowski, an expert on electoral law and the main author of the draft Electoral Code of Ukraine, points out that in Polish constitutional doctrine little attention is paid to the electoral process¹. Indeed, the term “electoral process” is not used in Polish legislation², and it also appears relatively rarely in legal academic studies³. If it is already used, it is defined as a broad-

¹ Ju.B. Kluczkowski, *Principy wyborczego prawa: doktrynalne rozumienia, stan ta perspektywy zakonodawczoji realizaciji w Ukraini*, Kyjiw 2018, p. 558.

² But they can be found in the justifications of legislative drafts, see, e.g., the justification for the parliamentary bill on amending certain laws to increase the participation of citizens in the process of electing, functioning and controlling certain public bodies (Sejm of the 8th legislature, print no. 2001) or the justification for the parliamentary bill on amending the Electoral Code and certain other laws (Sejm of the 9th legislature, print no. 2897).

³ See, e.g., A. Sokala, A. Szymt, *Polski model administracji wyborczej sukcesem demokratycznej transformacji*, “Przeгляд Wyborczy” 2013, no. 8–9, pp. 34–41; A. Pyrzyńska, *Zmiany w sądownictwie a uczciwość procesu wyborczego* <https://www.batory.org.pl/wp-content/uploads/2022/10/Zmiany-w-sadownictwie-a-uczciwosc-procesu-wyborczego.pdf> (25.04.2023);

er concept than electoral law in the subjective sense, meaning “a set of legal and extra-legal phenomena that are in a causal relationship with the holding of elections”⁴. It seems that it can be considered synonymous with the term “election” understood as “a process consisting of many stages and various electoral activities (...)”⁵. Which means that: “It includes, in addition to the voting, all procedures and activities aimed at holding elections, such as the election campaign or the formation of election commissions”⁶. Among the most important activities undertaken in the electoral process by authorized entities are “registration of political parties and individual candidates, conducting the election campaign, voters going to the polls, and counting the votes”⁷.

Unlike in Poland, in Ukraine the concept of “electoral process” is a normative concept and subject of keen interest in the doctrine. “Electoral process” is the title of Chapter III of the Electoral Code of Ukraine of December 19, 2019⁸.

In accordance with the paper’s title, its aim is to outline the analysis of the electoral code’s approach and doctrinal interpretation of the concept of electoral process in Ukraine, and therefore a reference will be made primarily to current Ukrainian law and the views of Ukrainian scholars. A thorough

Prawo wyborcze do parlamentu w wybranych państwach europejskich, eds. S. Grabowska, K. Składowski, Cracow 2006, p. 13. In journalism, the term “electoral process” is used to describe the proceedings before the court concerning the electoral disputes that arose in the course of election campaign, see e.g.: *President Komorowski won the electoral process with Adam Hofman*, <https://www.radiopik.pl/3,28897,prezydent-komorowski-wygral-proces-wyborczy-z-ad&s=1340&si=1340&sp=1340> (25.04.2023).

⁴ J. Zieliński, *Prawo i proces wyborczy w opiniach Komisji Weneckiej* [in:] *Aktualne wyzwania prawa wyborczego*, eds. M. Zubik, M. Podkowik, Warsaw 2021, p. 47. For example, activities in cyberspace are analyzed in the context of electoral process, see J. Świątkowska, *Działania prowadzone w cyberprzestrzeni jako metoda ingerencji w demokratyczny proces wyborczy* [in:] *Walka informacyjna: uwarunkowania, incydenty, wyzwania*, ed. H. Batorowska, Cracow 2017, pp. 254–263.

⁵ A. Sokala, B. Michalak, *Wybory* [in:] A. Sokala, B. Michalak, P. Uziębło, *Leksykon prawa wyborczego i referendalnego oraz systemów wyborczych*, Warsaw 2013, p. 271.

⁶ A. Sadowski, *Spoleczna kontrola wyborów w polskim prawie wyborczym* [in:] *Aktualne wyzwania...*, p. 302.

⁷ M. Maksymiuk, G. Pastuszko, *Wstęp* [in:] *Organy stojące na straży uczciwości procesu wyborczego w kontekście zapobiegania przestępczości, jej przyczynom i uwarunkowaniom na tle prawnoporównawczym*, eds. M. Maksymiuk, G. Pastuszko, Warsaw 2022, p. 7.

⁸ *Wyborczy kodeks Ukrainy* wid 19.12.2019 (WWR 2020, № 7, № 8, № 9, st. 48 as amend.).

evaluation of the Electoral Code of Ukraine from the point of view of preserving the standards of the European Electoral Heritage, even at the stage of its drafting, was made by the Venice Commission⁹. Those comments and recommendations still remain valid¹⁰.

A properly regulated electoral process is the starting point in any democratic state for holding free and fair elections with effective public scrutiny. A comparative summary of regulations on this subject would have to be made the subject of a separate, much more extensive study.

II. Definition of the electoral process

Various definitions of the term “electoral process¹¹” can be found in Ukrainian scientific literature. Among them the electoral process is understood as an element of a separate branch of law – constitutional procedural law, i.e., a special type of legal procedure (electoral procedural law)¹². There is also another tendency – the identification of electoral process with elections in general and also the opinion that the electoral process is “a form of holding elections,” “the procedural and legal basis of the mechanism of popular expression”¹³, “the execution of the electoral procedures provided for by law by the entities considered to be subjects of the electoral process (such procedures are, e.g., the advancement and registration of candidates, the formation of electoral commissions, etc.)”¹⁴. W.Ł. Fedorenko considers the electoral process to be

⁹ *Opinion on the draft election code of the Verkhovna Rada of Ukraine* – Adopted by the Council for Democratic Elections at its 35th meeting (Venice, 16 December 2010) and by the Venice Commission at its 85th Plenary Session (Venice, 17–18 December 2010), [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2010\)047-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2010)047-e) (20.04.2023).

¹⁰ A more detailed discussion of this topic is provided in: Adoption of the Electoral Code as the next stage in evolution of the rules for electing people’s deputies of Ukraine, “Przegląd Prawa Konstytucyjnego” 2020, no. 5, pp. 325–338.

¹¹ For a comprehensive overview, see Ju.B. Kluczkowski, *Pryncypy wyborczo-ho prawa: doktrynalne...*, pp. 559–565.

¹² O.V. Sowhyria, N.H. Shuklina, *Konstytucyjne prawo Ukrainy*, Kyjiw 2019, p. 218.

¹³ Ju.B. Kluczkowski, *Wyborczy proces: prawowa przyroda i subiektywny aspekt*, “Prawo Ukrainy” 2014, no. 7, pp. 157–166.

¹⁴ *Posibnyk dla dowhoterminowych sposterihacziw za pozaczerhowymy wyboramy narodnych deputatiw Ukrainy 2014 roku*, ed. O. Sivchenko, Kyjiw 2014, p. 31.

“the system of successive procedural stages of the organization and holding of elections in Ukraine, regulated by the Constitution and laws”¹⁵. Ju.B. Kluczowski considers the electoral process to be “a non-jurisdictional legal process that is determined by the deliberate activity of relevant subjects, practically realizing in it their own rights, interests or powers inherent in electoral legal relations”¹⁶. The Higher Administrative Court of Ukraine defined the term as “carrying out the electoral process by the subjects concerning the preparation and holding of relevant elections within the time limits provided by the legislation”¹⁷. In turn, the authors of one of the commentaries to the Election Code of Ukraine believe that “according to established tradition, the electoral process as a legal phenomenon is understood as the activity, regulated by the Constitution and other laws (including the Election Code), of authorized bodies and citizens of Ukraine, which is directed to the formation of a constitutionally defined composition of the bodies of state power and local self-government”¹⁸.

The statutory definition of electoral process is contained in Art. 20 of the Electoral Code of Ukraine. According to its wording: “The electoral process is the implementation within the period of time specified by this Code by the entities indicated in Art. 22 of the Code of electoral procedures related to the preparation and holding of relevant elections, determination and official announcement (official publication) of their results (...).” This definition covers three aspects of electoral process: temporal, subjective and procedural¹⁹.

III. Temporal aspect of the electoral process

The doctrine of Ukrainian electoral law emphasizes that the temporal aspect of electoral process, compared to other legal processes, is particularly impor-

¹⁵ W.Ł. Fedorenko, *Konstytucyjne prawo Ukrainy: pidruchnyk*, Kyjiw 2016, p. 302.

¹⁶ Ju.B. Kluczowski, *Wyborczyj proces: prawowa...*, p. 166.

¹⁷ *Ibidem*.

¹⁸ O.Ju. Drozd et al., *Vyborchyi kodeks Ukrainy. Naukowo-praktycznyj komentar*, Kyiv 2020, p. 26.

¹⁹ See: *Wyborczyj Kodeks Ukrainy, Knyha persza. «Zahalna czastyna» (w redakcji stanom na 1 zowtnia 2021 roku)*, naukowo -praktycznyj komentar, ed. Yu.B. Kluczowski, Kyjiw 2021, p. 162.

tant due to the unique role of elections as a form of expression of the people's will. The period in which the electoral process takes place is characterized by a specific state of the country. It is a time of special political tension involving the entire society²⁰.

The Election Code separately for each election type sets deadlines for the start of electoral process. According to Art. 78, the electoral process for ordinary elections of the President of Ukraine begins ninety days before voting day. The Central Election Commission announces it, making its decision no later than ninety-one days before voting day. Elections are held on the last Sunday of March of the fifth year of the presidential term and the Verkhovna Rada of Ukraine orders them no later than one hundred days before election day.

The electoral process for ordinary elections of deputies to the Verkhovna Rada begins sixty days before voting day. The Central Election Commission shall announce its commencement no later than sixty-one days before the day of voting, which shall be held on the last Sunday in October of the fifth year of the term of the Verkhovna Rada of Ukraine (Art. 136 of the Code). Ordinary elections are held in relation to the expiration of constitutional term of the Verkhovna Rada of Ukraine and do not require a separate decision to order them (Art. 135 of the Code).

In the case of local elections, whether ordinary or extraordinary, the election process begins fifty days before the election day. In turn, elections are ordered: ordinary elections – no later than ninety days before the day of holding, and extraordinary elections – no later than sixty days before the day of holding (Art. 195).

It is clear from the cited provisions that although the moment of commencement of the electoral process is related to the act of ordering elections (if such an act is provided for), it takes place after the adoption of this act. Thus, the ordering of elections takes place outside the period of electoral process, and therefore it is not a stage²¹.

The completion of electoral process occurs with the official announcement of election or re-election results²².

²⁰ Ju.B. Kluczkowski, *Wyborczyj proces: temporalnyj aspekt*, "Публічне право" 2014, no. 4, pp. 5–14.

²¹ *Ibidem*. Otherwise: V. Fedorenko, *Konstytucyjne prawo...*, p. 303.

²² Ju.B. Kluczkowski, *Wyborczyj proces: temporalnyj...*, pp. 5–14.

Ukrainian literature emphasizes that the electoral process is not linearly ordered (when all procedures are arranged in a clear sequence, the end of one procedure marks the beginning of the next). Some stages of the electoral process run in parallel²³.

IV. Subjective aspect of the electoral process

According to Art. 22 (1) of the Election Code, the subjects of electoral process are:

1. voter, who is entitled to vote in a specific election;
2. electoral commission authorized to prepare and conduct specific elections;
3. party (party organization) that has registered candidates for a specific election;
4. candidate registered to participate in the elections in question in accordance with the procedure set forth in the Code;
5. official observer of a candidate or party (party organization) – the subject of a given electoral process or a public organization registered in accordance with the procedure set forth in the Code.

The list is enumerative²⁴.

Subjectivity in the electoral process means “full participation in the legal relations that arise on the occasion of a given election, the possibility of acquiring certain rights (derived from the basic electoral rights), the existence of obligations, as well as legally protected interests in a given electoral process, the ability to act on own initiative in the performance of activities in electoral procedures, as well as to protect own rights and legitimate interests, and bear appropriate (taking into account the electoral-procedural status) responsibility for crimes committed²⁵.”

There is no unity of opinion in the doctrine as to whether the concept of “subjects of electoral process” is the same as the concept of “subjects of elec-

²³ *Ibidem*.

²⁴ O.Ju. Drozd et al., *op.cit.*, p. 28.

²⁵ *Wyborczyj Kodeks Ukrainy, Knyha...*, pp. 173–182.

toral law”²⁶. However, most researchers differentiate them²⁷. Only subjects with “subjective electoral rights,” i.e. active, passive and possibly, sometimes distinguished, nominative electoral rights, i.e. the right to propose candidates during elections, are considered “subjects of electoral law”²⁸.

In addition to the term “subjects of electoral process”, the term “participants in the electoral process” is also used, which includes entities that support the realization of electoral rights of the subjects in electoral process by performing functions and duties provided by law²⁹. These can include state and local government bodies and the mass media. They carry out their general, not only election-related, duties and tasks during elections.

The political party is a subject of electoral law only if it submits candidates in a given election. It then obtains statutorily guaranteed rights in the electoral process that serve to bring about the election of the candidate(s) it submits³⁰. Unlike a political party, which becomes a subject of electoral law when it nominates candidates, the candidate himself becomes one only when he is registered³¹.

An official election observer, despite the fact that he or she may be nominated by a political party or candidate, is an independent subject of the electoral process equipped with his or her own (independent of the subject of their nomination) electoral powers.

Ukrainian election legislation defines three categories of official observers: observers of candidates and parties who are subjects of the electoral process, observers of civic organizations, and official observers of foreign states and international organizations. The status of observers belonging to these different categories is quite different³². In particular, international observers do not have the status of subjects of the electoral law³³. The condition for obtaining the status of an official observer as a subject of the electoral process

²⁶ O.Ju. Drozd et al., *op.cit.*, p. 29.

²⁷ Ju.B. Kluczkowski, *Wyborczyj proces: prawowa pryroda...*, pp. 157–166.

²⁸ Ju.B. Kluczkowski, *Treść i podmioty praw wyborczych w prawie konstytucyjnym*, “Studia Wyborcze” 2014, v. 17, p. 57.

²⁹ O.V. Sowhyria, N.H. Shuklina, *op.cit.*, p. 218.

³⁰ Ju.B. Kluczkowski, *Wyborczyj proces: prawowa pryroda...*, p. 166.

³¹ *Wyborczyj Kodeks Ukrainy, Knyha...*, p. 178.

³² Ju.B. Kluczkowski, *Wyborczyj proces: prawowa pryroda...*, pp. 157–166.

³³ *Wyborczyj Kodeks Ukrainy, Knyha...*, p. 179.

is his registration by the competent election commission (Art. 60, 112, 167, 239 of the Code).

V. Procedural aspect of the electoral process

The normatively established order of performance in the electoral process of a specific action by an authorized entity is called an election procedure. All election procedures constitute the procedural aspect of the electoral process³⁴. More precisely, the procedural aspect of the electoral process consists in the fact that the actions of subjects involved in the electoral process take place in accordance with normatively determined procedures, which collectively constitute the legal model (legal algorithm) of these actions³⁵.

The electoral process is carried out in practice primarily as a system of successive organizational and electoral stages³⁶.

The structure of electoral process of different bodies differs (see Art. 79, 137, 196 of the Code) but it is possible to distinguish the basic stages of organizing and holding elections common to all elected bodies. There is no consensus in Ukrainian Doctrine on such a list of the main electoral process stages. The most common view is that no enumeration of the electoral process stages can be definitive and will be subject to change. Different authors provide different catalogs of electoral process stages. Ju.B. Kluczkowskyj points to the following as the most frequently mentioned: formation of the territorial basis for elections (districts and precincts); formation of election administration bodies (district and regional election commissions); compilation and verification of voter registers; nomination (advancement and registration) of candidates; election campaign; voting; counting of votes and determination of election results³⁷. O.V. Sowhyria and N.H. Shuklina authors of one of the constitutional law textbooks, on the other hand, list the following stages: nomination of candidates; appointment of electoral commissions (except

³⁴ Ju.B. Kluczkowskyj, *Wyborczyj proces: proceduralnyj aspekt*, "Публічне право" 2014, no. 3, pp. 9–20.

³⁵ *Ibidem*.

³⁶ *Ibidem*.

³⁷ *Ibidem*.

for the Central Election Commission); registration of candidates; conducting the election campaign; establishment of voting precincts; compilation of voter registers; voting; counting of votes; and determination of election results. The optional election process stages are re-voting; counting the votes in the re-vote; determining the re-vote results³⁸.

VI. Principles of the electoral process

The Electoral Code of Ukraine, in Art. 21, enumerates seven basic principles of the electoral process: 1) guaranteeing the fulfillment of citizens' electoral rights as set forth in the Constitution of Ukraine and the Election Code; 2) observance of the basic principles of electoral law as set forth in the Constitution of Ukraine and the Election Code; 3) legality and prohibition of unlawful interference by anyone in the electoral process; 4) political pluralism and multipartyism; 5) openness and openness of the electoral process, all its procedures taking into account the limitations, established by law, due information of voters and other entities about the electoral process; 6) freedom of electoral campaigning, equal access of all candidates and the entities putting them forward in the respective elections to the mass media regardless of the form of their ownership, with the exception of mass media the founders of which are parties (party organizations); 7) impartiality of the executive authorities, autonomous authorities of the Republic of Crimea, bodies of local self-government, enterprises, institutions and organizations, their heads, other official persons and functionaries in relation to candidates and parties.

VII. Conclusions

Ukraine is currently facing a dilemma with regards to holding the upcoming parliamentary and presidential elections. On the one hand, holding them under conditions of ongoing war would not only be organizationally difficult but also questionable from the point of view of maintaining democratic standards. On the other hand, the question of whether the development of

³⁸ See: O.V. Sowhyria, N.H Shuklina, *op.cit.*, p. 219.

democratic institutions in Ukraine can continue without holding elections under the constraints of war and martial law must be answered. There are many indications that with the enactment of the Election Code, the process of normative formation of the electoral process in Ukraine has not yet ended. The war could not fail to affect the political changes taking place in the country. The described regulations provide the basis for holding free and fair elections, but this also depends on many other factors, the analysis of which exceeds the scope of this paper.

Literature

- Drozd O.Ju. et al., *Vyborchyi kodeks Ukrainy. Naukowo-praktycznyj komentar*, Kyjiw 2020.
- Fedorenko W.Ł., *Konstytucyjne prawo Ukrainy: pidrucznyk*, Kyjiw 2016.
- Kluczkowski Ju.B., *Pryncypy wyborczoho prawa: doktrynalne rozuminnia, stan ta perspektywy zakonodawczoji realizaciji w Ukraini*, Kyjiw 2018.
- Kluczkowski Ju.B., *Wyborczyj proces: prawowa pryroda i subiektnyj aspekt*, "Prawo Ukrainy" 2014, no. 7.
- Kluczkowski Ju.B., *Wyborczyj proces: procedurnyj aspekt*, "Публічне право" 2014, no. 3.
- Kluczkowski Ju.B., *Wyborczyj proces: temporalnyj aspekt*, "Публічне право" 2014, no. 4.
- Kluczkowski Ju.B., *Treść i podmioty praw wyborczych w prawie konstytucyjnym*, "Studia Wyborcze" 2014, vol. 17.
- Organy stojące na straży uczciwości procesu wyborczego w kontekście zapobiegania przestępczości, jej przyczynom i uwarunkowaniom na tle prawnoporównawczym*, eds. M. Maksymiuk, G. Pastuszko, Warszawa 2022.
- Posibnyk dla dowhoterminowych sposterihacziv za pozacerhowymy wyboramy narodnych deputativ Ukrainy 2014 roku*, ed. O. Siwczenko, Kyjiw 2014.
- Prawo wyborcze do parlamentu w wybranych państwach europejskich*, eds. S. Grabowska, K. Składowski, Kraków 2006.
- Pyrzyńska A., *Zmiany w sądownictwie a uczciwość procesu wyborczego*, <https://www.batory.org.pl/wp-content/uploads/2022/10/Zmiany-w-sadownictwie-a-uczciwosc-procesu-wyborczego.pdf>.
- Sadowski A., *Společna kontrola wyborów w polskim prawie wyborczym [in:] Aktualne wyzwania prawa wyborczego*, eds. M. Zubik, M. Podkowik, Warszawa 2021.
- Skotnicki K., *Problematyka zarządzania powszechnych wyborów w Konstytucji RP z dnia 2 kwietnia 1997 r. [in:] Sześć lat Konstytucji Rzeczypospolitej Polskiej. Doświadczenia i inspiracje* eds. L. Garlicki, A. Szmyt, Warszawa 2003.

- Skotnicki K., *Zasada powszechności w prawie wyborczym. Zagadnienia teorii i praktyki*, Łódź 2000.
- Sokala A., Michalak B., *Wybory* [in:] Sokala A., Michalak B., Uziębło P., *Leksykon prawa wyborczego i referendalnego oraz systemów wyborczych*, Warszawa 2013.
- Sokala A., Szmyt A., *Polski model administracji wyborczej sukcesem demokratycznej transformacji*, "Przeгляд Wyborczy" 2013, no. 8–9.
- Sowhyria O.W., Szuklina N. H., *Konstytucyjne prawo Ukrainy*, Kyjiw 2019.
- Świątkowska J., *Działania prowadzone w cyberprzestrzeni jako metoda ingerencji w demokratyczny proces wyborczy* [in:] *Walka informacyjna: uwarunkowania, incydenty, wyzwania*, ed. H. Batorowska, Kraków 2017.
- Wyborczyj Kodeks Ukrainy, Knyha persza. «Zahalna czastyna»* (w redakciji stanom na 1 żowtnia 2021 roku), ed. Yu.B. Kluczkowskocho, Kyjiw 2021.
- Zieliński J., *Prawo i proces wyborczy w opiniach Komisji Weneckiej* [in:] *Aktualne wyzwania prawa wyborczego*, eds. M. Zubik, M. Podkowiak, Warszawa 2021.