

## Candidate Nomination during 2019 Early Parliamentary Elections in Ukraine: Battle for Intra-Party Democracy

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### Introduction

Political parties shape the 'face' of modern states as the parties are the key actors to recruit political leaders of the country.<sup>2</sup> Today when the world is witnessing a rising trend of intensification of party regulation,<sup>3</sup> candidate nomination remains a "secret garden" of party politics,<sup>4</sup> which makes it almost impossible for law-makers to regulate this process in a way that does not violate the freedom of association. Moreover, the issue of regulation of candidate nomination procedures is rarely discussed in academia. The most comprehensive research on this topic was delivered by the Venice Commission in 2015,<sup>5</sup> which outlined the dichotomy of two principles of party regulation, namely, autonomy and intraparty democracy. While the former guarantees the parties the freedom to operate freely, the latter provides general guidance on how parties should actually operate. Considering that each state has the authority and sovereignty to define the level of interference in the activities of political parties, the issue of the intensity of such interference remains crucial, both for the parties and the state.

2019 became a year of political transformations for Ukraine, as both presidential and parliamentary elections took place. After the victory of the political

newcomer Volodymyr Zelenskyy in March 2019,<sup>6</sup> Ukraine almost immediately entered another election cycle of early parliamentary elections.<sup>7</sup> On July 21, 2019, Ukraine successfully held parliamentary elections that were concluded to be "competitive" and "in accordance with international standards".<sup>8</sup> Among the stages of the election cycle, international observers covered the candidate registration process. In particular, in its final report, the OSCE/ODIHR mission mentioned that 125 decisions of the Central Election Commission (CEC) that related to the candidate registration were challenged in courts.<sup>9</sup> Among these cases, there is the one that changed the role of the election administration in the candidate registration process as the courts provided for interpretation of the CEC powers within this process and drew a red line for the state's intrusion into the internal operations of political parties in Ukraine.

Focusing on the registration of the party list of the Movement of New Forces (hereinafter – MNF), the aim of this paper is to provide an analysis of the implementation of provisions on the candidate nomination during the 2019 early parliamentary elections and to investigate the practice of intra-party democracy during the candidate nomination process in Ukraine. Therefore, the paper considers decisions of the Six Appellate Administrative Court and the Administrative Court of Cassation pertaining to the powers of the election administration in Ukraine and its role in the candidate nomination process.

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<sup>2</sup> Biezen, I.V. (2004). *How Political Parties Shape Democracy: Perspective from Democratic Theory*. ECPR Joint Sessions, 2004, Uppsala, 13-18 April 2004. Available at: <https://ecpr.eu/Filestore/PaperProposal/8ede4f19-6887-4df6-b0ff-851ff2e99ea3.pdf>

<sup>3</sup> Bértoa, F.C. & Biezen, I.V. (2014). Party regulation and party politics in post-communist Europe, *East European Politics*, 30:3, 295-314, DOI: 10.1080/21599165.2014.938738.

<sup>4</sup> Hazan, R. & Rahat, G. (2006). Candidate selection: methods and consequences. In R. S. Katz & W. Crotty (eds.), *Handbook of party politics* (pp. 109-121). London: SAGE Publications Ltd, DOI: 10.4135/9781848608047.n11, p. 110.

<sup>5</sup> European Commission for Democracy Through Law. (2015). Report on the Method of Nomination of Candidates within Political Parties. [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2015\)020-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2015)020-e).

<sup>6</sup> Rohozinska, J. & Shpak, V. (2020). The Rise of an "Outsider" President. *Journal of Democracy*, 30:3, 33-47, <https://www.ned.org/wp-content/uploads/2019/07/Rise-of-an-Outsider-President-Rohozinska-Shpak.pdf>.

<sup>7</sup> During his inauguration speech on May 20, 2019, President of Ukraine Volodymyr Zelenskyy announced the dissolution of the Parliament of Ukraine, *the Verkhovna Rada*, and called for early parliamentary elections.

<sup>8</sup> OSCE/ODIHR Election Observation Mission Final Report. Early Parliamentary Elections in Ukraine 21 July 2019, accessed on February 1, 2020: <https://www.osce.org/odihr/elections/ukraine/439634?download=true>; Statement of the NDI Election Observation Mission to Ukraine's July 21, 2019 Snap Parliamentary Elections, accessed on February 1, 2020: [https://www.ndi.org/sites/default/files/NDI%20Ukraine%20-%20July%2021%202019%20Parliamentary%20Election%20Observation%20Statement%20-%20ENG%20v\\_0.pdf](https://www.ndi.org/sites/default/files/NDI%20Ukraine%20-%20July%2021%202019%20Parliamentary%20Election%20Observation%20Statement%20-%20ENG%20v_0.pdf); ENEMO International Election Observation Mission Early Parliamentary Elections – Ukraine 2019 STATEMENT OF PRELIMINARY FINDINGS AND CONCLUSIONS July 23rd 2019, accessed on February 1, 2020: <http://enemo.eu/uploads/filemanager/PreliminaryStatementParliamentaryElectionsUkraine2019.pdf>.

<sup>9</sup> OSCE/ODIHR Election Observation Mission Final Report. Early Parliamentary Elections in Ukraine 21 July 2019, p. 14, accessed on February 1, 2020: <https://www.osce.org/odihr/elections/ukraine/439634?download=true>.

## Party Regulation and Intra-Party Democracy in Ukraine

Party regulation in Ukraine stands on the following legislative acts: Constitution of Ukraine, Law on Political Parties, and several laws on the election of the president, members of the parliament, and local councillors. As the constitution was adopted only five years after the proclamation of independence, the activities of political parties were initially regulated by the Law on Associations of Citizens as of 1992, which did not provide any special status for political parties. Only in 1996, *the Verkhovna Rada* adopted the constitution containing provisions on the freedom of association and general rules on the functioning of political parties. The constitution, however, did not define the role and place of political parties within the Ukrainian polity.<sup>10</sup> Such scarce party regulation fostered an environment where political parties became strongly tied to private donors that usually belonged to different financial-industrial groups.<sup>11</sup>

The turning point in the party regulation became the year 1997 when *the Verkhovna Rada* introduced a proportional electoral system,<sup>12</sup> enabling political contestants to seek for political parties that would nominate them as candidates. Nonetheless, there was still no particular law on political parties regulating this institution.

In 2001, the Ukrainian parliament finally adopted the Law on Political Parties, which covers in more detail the activities and tasks of the parties as well as the core principles of their functioning.<sup>13</sup> Among the novelties of the law was a provision that defined party statutes as one of the sources of party law.<sup>14</sup> According to the law, statutes shall contain a list of the governing bodies of a political party as well as the description of their powers and terms in the office.<sup>15</sup>

Thus, party regulation in Ukraine remains discretionary,<sup>16</sup> providing rather an extensive amount of freedom for the parties to define their internal organization and decision-making. This regulation creates a situation in which political parties are operating freely without any state interference, except for the provisions on the financial audit.<sup>17</sup>

At the same time, the law empowers certain state agencies to execute state control over the operations of political parties.<sup>18</sup> In particular, the law includes that the Ministry of Justice shall oversee the implementation of the provisions of parties' statutes unless other state bodies shall execute such control under the laws of Ukraine. The ambiguity of this provision was already discussed in the Opinion on the Ukrainian Legislation on Political Parties, delivered by the Venice Commission.<sup>19</sup> The commission mentioned that "*the controlling powers of the Ministry of Justice over the parties with regard to the observance of the Constitution and other laws, including the power to obtain documents and other information from the parties, should be determined in a detailed and accurate manner*".<sup>20</sup> Moreover, the "*control over a party's statute or charter should be primarily internal, i.e., should be exercised by the members of the party*".<sup>21</sup> The case, which emerged during the 2019 early parliamentary elections, brought back the issue of legal clarity of the state bodies' powers as well as the more general question on the interference into the parties' candidate nomination processes.

## Candidate Nomination: 2019 Early Parliamentary Elections

The candidate nomination process answers the question "who decides?"<sup>22</sup>, or in other words, it defines the range of actors taking part in the selection of

<sup>10</sup> Pesotska, K. (2019). Constitutionalization of Political Parties: Experiences of Germany and Ukraine. *NaUKMA Research Papers. Law*, 4, 59-65, DOI: 10.18523/2617-2607.2019.4.59-65.

<sup>11</sup> Whitmore, S. (2014). GSDRC Helpdesk Research Report 1146. Political party development in Ukraine. Birmingham, UK: GSDRC, University of Birmingham.

<sup>12</sup> Meleshevich, A. (2010). Political Parties in Ukraine: Learning Democratic Accountability? In Kaw Lawson et al (eds.), *Political Parties and Democracy: Post-Soviet and Asian Political Parties* (pp. 85-111). Westport (USA): Greenwood/Praeger, 2010.

<sup>13</sup> Kovryzhenko, D. (2010). Regulation of Political Parties in Ukraine: Current State and Direction of Reforms. Ukraine. Retrieved from: <https://parlament.org.ua/upload/docs/Party%20Report%20Ukraine.pdf>.

<sup>14</sup> Law of Ukraine On Political Parties, Article 3, (2001).

<sup>15</sup> Law of Ukraine On Political Parties, Article 8, (2001).

<sup>16</sup> Bogasheva, N.V. (2012). Relations between the state and political parties in Ukraine. Kyiv: Logos.

<sup>17</sup> Law of Ukraine On Political Parties, Article 17, (2001).

<sup>18</sup> Law of Ukraine On Political Parties, Article 18, (2001).

<sup>19</sup> Opinion on the Ukrainian Legislation on Political Parties, adopted by the Venice Commission at its 51st Plenary Session (Venice, 5-6 July 2002).

<sup>20</sup> Opinion on the Ukrainian Legislation on Political Parties, adopted by the Venice Commission at its 51st Plenary Session (Venice, 5-6 July 2002), p. 7.

<sup>21</sup> Opinion on the Ukrainian Legislation on Political Parties, adopted by the Venice Commission at its 51st Plenary Session (Venice, 5-6 July 2002), p. 7.

<sup>22</sup> Norris, P. (2006). Recruitment. In R. S. Katz & W. Crotty Handbook of Party Politics (pp. 89-108). London: SAGE Publications Ltd, DOI: 10.4135/9781848608047.n1, p. 92

candidates for elections. This process is a touchstone for intra-party democracy as it demonstrates the level of inclusion and decentralization<sup>23</sup> of the internal decision-making procedures of a political party. Thus, from an organizational perspective, party congresses or conventions are the bodies to nominate candidates for elections<sup>24</sup> as these bodies gather the biggest amount of party members, which is an indicator for the inclusiveness of internal decision-making.

The Law of Ukraine on Elections of People's Deputies (hereinafter – Law On Parliamentary Elections) also defines the party congress as the body that shall form and approve the party list for the nation-wide constituency as well as nominate candidates in single-member constituencies in accordance with the procedures set by the party statute.<sup>25</sup> This provision indicates that only the highest party body – the party congress – is entitled to nominate candidates for elections and approve the party list. It should be noted that these two procedures, nomination and approval, should be distinguished as within the current legal framework; they have quite different legal consequences. The nomination process covers the selection or the so-called 'filtering' of candidates, while the approval of the party list refers to the final confirmation of the decision to include a party member as a party candidate for elections. At the same time, the Law on Parliamentary Elections does not provide for the methods to nominate candidates nor control mechanisms for this process, which is again an indication of the discretionary party regulation.

According to the Article 53 of the Law on Parliamentary Elections, the Central Election Commission (hereinafter – the CEC) registers the candidates for parliamentary elections if a political party provides the decision on candidate nomination, adopted in accordance with the provisions of the party statute. Hence, there are two cumulative requirements for the registration of candidates for parliamentary elections: (1) submission of the party decision on candidate nomination and (2) adoption of this decision

in accordance with the procedures laid out in the party statute. At the same time, the Law on Parliamentary Elections explicitly does not define such powers of the CEC as the control over the compliance of the candidate nomination with the party statute, which causes legal loopholes and impedes the proper implementation of the law.

During the 2019 early parliamentary elections, the CEC denied the registration of 487 candidates, 298 of which were nominated by political parties.<sup>26</sup> Most of the denials were caused by the violation of the technical requirements on the submission of the registration package. For instance, the commission denied on the ground of the absence of candidates' biographies or other missing information in the registration form. Among others, the CEC adopted a unique decision in the denial of the MNF's party list, in which the commission executed state control over the internal operations of the party and assessed the compliance of the candidate nomination with the MNF party statute.

On May 20, 2019, the president announced early parliamentary elections, and on May 23, the official election process started. On June 20, the CEC received the registration documents for the MNF party list along with the protocol on the candidate nomination. Having analysed the documents, the commission found that, according to the MNF party statute, the party council is entitled to call for a party congress and bring the issue of the candidate nomination before the congress. Thus, on May 8, 2019, the MNF party council made a decision to convene an extraordinary party congress and consider the party list for the parliamentary elections. Considering that the electoral process started on May 23, 2019, the CEC decided that it was impossible for the political council to set a date for the party congress as early as on May 8, 2019. Therefore, the CEC found this protocol invalid as the nomination process *“did not comply with the provisions of the party statute”* and denied the registration of the MNF party list.

During June 25-29, 2019, the MNF challenged the CEC decision in both the court of the first instance and the court of appeals.<sup>27</sup> The MNF based its position on the fact of a purely technical mistake that was made during the drafting of the protocol. The courts of both instances supported the position of the

<sup>23</sup> Scarrow, S. (2005). Political parties and democracy in theoretical and practical perspectives. Implementing intra-party democracy. National Democratic Institute for International Affairs (NDI). Retrieved from: [http://www.ndi.org/files/1951\\_polpart\\_scarrow\\_1101\\_05.pdf](http://www.ndi.org/files/1951_polpart_scarrow_1101_05.pdf).

<sup>24</sup> von dem Berge, B., Poguntke, T., Obert, P. et al. (2013). Measuring Intra-Party Democracy: A Guide for the Content Analysis of Party Statutes with Examples from Hungary, Slovakia and Romania. Berlin: Springer, p. 12.

<sup>25</sup> Law of Ukraine On Elections of People's Deputies, Article 53, (2011).

<sup>26</sup> Calculations made by the author.

<sup>27</sup> Decision of the Sixth Appellate Administrative Court in case No. 855/168/19 dated of June 25, 2019; Decision of the Cassation Administrative Court in case No. 855/168/19 dated of June 29, 2019.

party, confirming that the protocol on the candidate nomination “*contained [the] wrong date*”. In particular, the courts referred to article 60 of the Law on Parliamentary Elections, which states that any technical mistakes in the registration documents shall not be a ground for the denial of the candidate registration. In addition, the courts found that the article 54 of the law does not provide the CEC “*with the powers to verify internal actions aimed at organizing and holding of the party congress, but merely regulates the registration procedure and the documents that should be submitted...*” for the registration of the candidates. The courts ruled that the Ukrainian law does not entitle the commission “*to audit any internal party activities, which should be considered as an intrusion into the operations of a political party*”. As a result of both court proceedings, the CEC registered the MNF party list and admitted the party for the participation in the early parliamentary elections.

### **One small step for a political party, one giant leap for political parties**

The 2019 early parliamentary elections challenged the traditional approach to regulating the intra-party procedures in Ukraine and revealed a range of loopholes in the state's oversight over the candidate nomination process. The case of the MNF demonstrates that there is a lack of legal certainty in the regulation of the election administration's powers in Ukraine, which deserves consideration and further improvement by the parliament. In particular, the courts concluded that the sole role of the CEC in the candidate registration process is to accept the documents and admit political parties for elections. This ruling undermines the position of the commission as the central body responsible for the election process. Moreover, Ukrainian laws do not contain any explicit provisions on the powers of the commission to verify how parties follow their codified candidate nomination procedures. Hence, there is a conflict of the legal norms as the current version of the Law on Parliamentary Elections contains a 'dead' provision, which requires holding the candidate nomination process in accordance with the party statute but does not provide for control mechanisms over the implementation of this provision.

The candidate nomination definitely falls within the responsibility of political parties. However, the state shall remain responsible for verifying whether candidates nominated to meet the minimum criteria for elections, for example, age, citizenship, living

census, etc. At the same time, the level of interference of the state into the intra-party decision-making, and candidate nomination *per se*, is still unsolved. Shall the state have the powers to control the nomination of candidates? If so, which state bodies shall have such authority? If no, are there any other ways to regulate the internal processes of political parties to ensure their democratic nature? These questions leave us with more grounds for further research than definite answers.