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Key Priorities for Reform of Elections, Referendums and Political Finance

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In June 2017, IFES and Civil Network OPORA developed a comprehensive “Legal Reform Priorities for Elections, Referendums and Political Finance” paper. The paper represented consensus among Civil Society Organizations (CSOs) on a core set of principles and reform priorities, and helped to inform and guide CSO efforts in promoting electoral reform. The paper stressed the lack of progress in a number of crucial electoral areas and identified priority actions to address the key flaws in the legal framework and its enforcement related to elections, referendums and political finance. While most of the key issues raised in the paper remain intact, a number of developments have taken place since summer 2017, including the adoption of the draft Election Code No [3112-1](#) in the first reading and striking down the undemocratic 2012 [National Referendum Law](#) by the Constitutional Court of Ukraine. This updated version of the 2017 paper addresses changes that have occurred since June 2017 and identifies the urgent election-related priorities that must be implemented at least one year before the October 2019 Parliamentary Elections, as necessitated by international standards and best practices.

On November 7, 2017, the Verkhovna Rada of Ukraine adopted on the Draft Election Code [3112-1](#) on first reading. It was sponsored by Andrii Parubii, Leonid Yemets (both from the People’s Front) and Olexandr Chernenko (from the Petro Poroshenko Bloc). It harmonizes election procedures for parliamentary, presidential and local elections, and proposes introduction of an open-list proportional system for parliamentary and subnational council elections such as elections to oblast councils and city councils in cities with more than 90,000 voters. This draft is largely based on an earlier Draft Election Code registered in the Parliament in 2010 by former MP Yuriy Kliuchkovskiy.

Since its adoption on first reading, MPs have registered 4,400 amendments to the Draft Code. All of these amendments are being processed by a Working Group established under the Rada Legal Policy and Judiciary Committee, consisting of MPs, electoral experts, civil society activists and other stakeholders. Given that by mid-June 2018, the Working Group has considered less than just 1,000 amendments, it is questionable whether Parliament would be able to adopt the Draft Election Code into law in one year before the next parliamentary elections (by October 2018) as recommended by international standards.

Starting in December 2017, various MPs have registered in Parliament eight draft Parliamentary Election Laws to replace the current parallel system for parliamentary elections such as the first-past-the-post (draft Parliamentary Election Law [7366](#)), a fully closed-list proportional system (draft Parliamentary Election Law [7366-1](#)), an open list proportional system (draft Parliamentary Election Laws [7366-2](#) , [7366-3](#), [7366-4](#)), or exotic electoral systems which are not used elsewhere (draft Parliamentary Election Laws [7366-5](#), [7366-6](#), and [7366-7](#)). None of these draft laws has been considered so far as all the attention is focused on the Draft Election Code.

Reforming Ukraine’s electoral system and replacing the current parallel system with a fully proportional, open-list system for parliamentary elections, as recommended by the Venice Commission and

Parliamentary Assembly of the Council of Europe in 2012 continues to be one of the key priorities for reform in Ukraine. Depending on its key elements (such as threshold, procedure for transferring votes into seats and fielding independent candidates in elections), this reform could have a significant positive impact on stability of the coalition and government, elected representatives' accountability, internal party democracy, abuse of state resources, money in politics and opportunities for "new faces" to appear in a future Parliament. The commitment to introducing a fully open-list proportional system for parliamentary and, where applicable, in local elections, is one of the priorities highlighted in the post-Revolution of Dignity Coalition Agreement signed by a majority of political parties in late 2014.

However, in light of continued inaction and the clear absence of political will on the side of Ukraine's leadership in the area of electoral system reform, it is important to continue to raise and promote other key electoral reform priorities – priorities that could combat some of the prevailing vulnerabilities within the current parallel system. This advocacy can be conducted in parallel to ongoing electoral system reform efforts, but should not be frozen by continued stagnation on systemic change. Reform priorities include strengthening Ukraine's Political Finance Reform Law, adopting a new Law on National Referendums, and amending various areas affecting Ukrainian elections ranging from the abuse of state resources to participation and representation of disenfranchised groups, as outlined below.

Harmonization of election laws

Currently, parliamentary, presidential and local elections are governed by three separate laws, which were adopted at different times and are not harmonized with each other. Harmonization of the election laws has remained one of the key priority (and repeated) recommendations of IFES, the Organization for Security and Cooperation in Europe's Office of Democratic Institutions and Human Rights (OSCE/ODIHR) and the Parliamentary Assembly of the Council of Europe (PACE) for election law reform in Ukraine for many years. However, it has never been effectively addressed by the Rada.

In the laws governing elections in Ukraine, there is no common approach toward regulation of political campaigning, campaign finance, vote counting, electoral operations or the procedures for establishing election commissions. The absence of harmonization across different laws results in confusion among election commissions, election contestants and voters.

Such confusion increases in cases of last-minute changes to election laws, which is a common practice in Ukraine. If all three election laws were harmonized well in advance (at least 12 months) of an electoral contest, political parties, candidates, voters, media, and election commissions would be better prepared for the electoral event and would require less ongoing capacity support ahead of each election.

The Draft Election Code passed in the first reading aims to harmonize all laws governing the elections. If adopted, it will also replace the three election laws governing the national and local elections in Ukraine, the Law on State Register of Voters and the Law on Central Election Commission. This is a welcome step forward which would ensure consistency and uniformity in regulation of elections. It is questionable, however, whether the Election Code would bring any stability to the election-related legal framework, as Ukrainian practice demonstrates that parliamentarians in Ukraine tend to change the rules of the game before each election.

If the Draft Election Code is defeated or not adopted in one year prior to the next parliamentary elections scheduled for October 2019, Parliament should at least introduce changes to the Parliamentary Election Law, Presidential Election Law and Local Election Law to harmonize the procedural provisions in the laws to the highest extent possible.

Proportionate, effective and dissuasive penalties for violations of election laws and effective investigation of offences

The system of penalizing violations of Ukraine's electoral legal requirements remains a significant weakness and vulnerability.

While Ukraine's electoral legislation clearly articulates what is permissible under law and what is not, in many cases there are no penalties in place to ensure enforcement of the respective provisions. For example, distribution of goods and services in relation to election campaigning is formally prohibited by law, but no penalties are in place for individuals who violate this provision. This leads to a sense of impunity and abuse of state resources.

The Criminal Code of Ukraine includes penalties for falsifying sensitive election documents. However, the law does not define "election documents." As a result, domestic observers have identified numerous cases whereby the nominations to the election commissions were falsified, – but, since nominations are not explicitly referred to as election documents, such violations are not subject to sanction.

Moreover, the Criminal Procedure Code does not ensure timely and effective investigation of election-related crimes. When electoral crimes are detected during election campaigns, investigations generally continue long after the elections, making the investigation outcomes less interesting for the media and citizens. The Criminal Procedure Code should be amended to ensure effective and timely investigation of electoral crimes in advance of the election, if practically possible.

Another area of concern is that certain penalties in place are not effective, proportionate, or dissuasive. Administrative fines in most cases are too low to effectively dissuade voters, candidates, and journalists from committing electoral offences. Many violations, such as those relating to election campaigning, only elicit official warnings, which do prevent offenders from committing subsequent offences. Some minor criminal offences can entail lengthy prison terms; but, law enforcement agencies consider them too harsh to be imposed on the guilty and, as a result, courts release offenders on probation or close the criminal case.

Election laws, Code of Administrative Offenses and the Criminal Code should be amended to ensure that any violation results in punishment and those sanctions are effective, proportionate and dissuasive, as called for by international standards. On April 13, 2018, the Cabinet of Ministers submitted Draft Law [8270](#) to the Verkhovna Rada. The legislation is designed to ensure effective, proportionate and dissuasive sanctions for electoral offenses. The Draft Law was prepared by Civil Network OPORA in close cooperation with a variety of stakeholders, including civil society representatives, the National Police, the Prosecutor General's Office, the Ministry of Interior and the Central Election Commission. The Draft Law proposes amendments to the Code of Administrative Offenses, the Criminal Code and laws governing national and local elections to establish criminal sanctions for distribution of goods and services to voters combined with election campaigning on behalf of a political party or candidate; and, for forging, destroying and stealing ballot papers, protocols, candidate nominations for election commissions, commission decisions and records, voter lists and documents produced by or submitted to election commissions. The proposed Draft also administers criminal sanctions for election commissioners' failure to fulfill their duties without a compelling reason; disclosing personal voting results in the precinct, or election location; stealing or destroying a voter's ballot paper; and, restricting access to election commission meetings and election campaign events.

As reported by Civil Network OPORA, Ukraine's law enforcement agencies—who are responsible for investigating election-related administrative and criminal offences – at times lack the knowledge and skills related to collecting evidence, documenting violations, and identifying violations as such. In this respect, further comprehensive elections-specific training for law enforcement officials is needed to effectively enforce a system of sanctions to complement ongoing reform of law enforcement and the judiciary.

Professional electoral administration

Before each major electoral event, IFES and the Central Election Commission (CEC) of Ukraine, organize comprehensive, cascade trainings for election commissioners to increase their level of knowledge and skills to administer an election.

For this purpose and with IFES technical assistance, the CEC established a Training Center. The Training Center has taken the responsibility for organizing and delivering trainings for election commissioners and other electoral stakeholders. However, notwithstanding this support, the capacity of lower-level election management bodies to administer elections is weakened by the fact that they can be replaced at any time before or after an election (or even on Election Day) by their appointing political party or candidate. It is not uncommon in Ukrainian electoral practice to replace trained commissioners by individuals with limited knowledge of electoral procedures and operations just before an electoral contest.

The Council of Europe's Venice Commission and the OSCE/ODIHR recommended restricting the possibility of replacing election commissioners by their nominating subjects – political parties and candidates. However, many domestic experts are convinced that such a restriction might result in election commissions controlled by one party or candidate and/or their affiliates, especially given reasonable suspicions that the seats on the election commissions are “sold” by one contestant to another.

Certain measures which could contribute to increasing the level of professionalism of the commissioners are possible without restricting the possibility of replacements on the election commissions.

Laws governing elections in Ukraine should be amended to introduce mandatory certification of all election commissioner candidates by the CEC, namely by the CEC Training Center. To ensure the CEC's internal capacity to provide ongoing support to lower-level election management bodies, the status of this Training Center and its power and responsibilities should be articulated in the Law on the Central Election Commission. Ukraine's election laws should make it clear that no person can be appointed to a lower level election commission without certification by the Training Center. Election laws should impose an obligation on political parties and candidates to recruit members of election commissions only from among those certified by the Training Center. In cases when a certified commissioner commits a grave violation of the election law while exercising his/her duties, the CEC should have the right to void their certification, which would be eligible for renewal following a legally established period.

Election management body (EMB) reform

Twelve out of 15 members' terms on the Central Election Commission expired in June 2014. In February 2017, the term another commissioner, Oleksandr Osadchuk, also concluded. The President's slate of 14 candidates for CEC members proposed to Parliament in February 2018, has yet to be considered. Replacement of the CEC commissioners is one of the top and most crucial steps that would bring certainty and independence to CEC operations. To be independent and in line with the Venice Commission's Code of Good Practice in Electoral Matters, the future CEC must include at least one representative of each political party group in the Rada.

As of June 2018, one of the key opposition factions, the Opposition Bloc, remains unrepresented on the President's slate. Given that the President proposed 14 members to replace 13 CEC commissioners, and given that under the Parliament's Rules of Procedure candidates on the President's slate must be approved separately by the Rada, the risk is high that one of the opposition nominees will not receive the required 226 votes and will not be appointed, thus turning the CEC into a body dominated by representatives of the ruling parties, with opposition parties left without representatives on the Commission. For CEC candidate composition to be in line with European standards (with all factions and groups represented on the CEC), at least one nominee from Opposition Bloc must be added to the slate. This should be combined with nominees of the ruling coalition to be removed from the slate or voted down. Also, when the Rada votes on candidates, such a vote must be carefully orchestrated to ensure that the ruling coalition – which holds a

slight majority in the Verkhovna Rada - votes for one nominee of each of the factions and groups in opposition.

In Ukraine, the CEC is a highly centralized body that operates in an old-fashioned manner. It is in charge of providing assistance to lower-level commissions, printing out ballot papers for national elections, supervising operations of lower-level commissions and analyzing campaign finance reports submitted by political parties. Presently, the CEC delegates key powers related to specific regions to individual CEC commissioners who administer elections in designated regions. This approach undermines the collective decision-making nature of the Commission.

The Law on the Central Election Commission provides for establishment of territorial branches of the CEC Secretariat, which are able to assume certain administrative authority. However, such branches have never been established. The Law on the Central Election Commission and other election laws should be amended to specify the branches' mandate and to ensure the CEC is allocated funds needed to create and operate them. These branches can take on a number of functions currently performed by the CEC or its secretariat, such as providing assistance to lower-level commissions, analyzing campaign finance statements and supervising operations of the territorial and district election commissions.

In addition, a number of other CEC internal, structural and operational reforms are needed. The Law on the Central Election Commission, which dates to 2004, should be amended to ensure that all information posted on the CEC website (including all election results at the national and local level) is published in an open data format and is accessible to people with disabilities. Future amendments to the Law should also make it impossible for Commissioners with expired terms to participate in Commission decision-making once their terms in office have expired, provide for staggered terms of future commissioners and mandatory, open and inclusive public consultations on key draft regulations prepared and issued by the Commission. The CEC should also have greater clarity of its mandate and increased funding to introduce voter outreach initiatives. Last but not least, the CEC should conduct more effective protection of information technology data and administrative operations implemented through its electronic system (such as selection of election commissioners and delivery of data to the CEC through the electronic system).

Political participation of women, IDPs, internal labor migrants and people with disabilities

In Ukraine, overall representation of women in parliament is one of the lowest in the region. While the Political Party Law requires parties to include one-third of women on their party lists, there are no penalties for noncompliance.

Political rights of people with disabilities are not effectively ensured in Ukraine. Premises of precinct election commissions in most cases are not accessible to voters with disabilities. Moreover, people with disabilities have restricted access to election-related information (as accessible formats are not used by the CEC and subordinated election commissions) and blind, or low-vision voters face challenges in selecting their candidates on Election Day. The CEC does not produce tactile ballot guides for technical reasons. More advocacy is needed to ensure political rights of voters with disabilities. The Ministry of Social Policy has prepared Draft Law [5559](#) to ensure voting rights of people with disabilities which is currently pending in the Rada. Parliament should be encouraged to consider recommendations of civil society and others, including IFES, in review and adoption of the law. The Government should also be encouraged to ensure effective enforcement of the adopted law. Moreover, as recommended by IFES and others, the current Ukraine Constitution should be reviewed to ensure full voting rights to persons with intellectual and psychosocial disabilities, as required by the United Nations Convention on the Rights of Persons with Disabilities ratified by the Verkhovna Rada.

While the number of internally displaced persons (IDPs) in Ukraine exceeds 1.6 million (according to UN estimates), IDPs residing in Ukrainian Government-controlled territory cannot effectively exercise their

voting rights. Similar voting challenges are faced by internal labor migrants and other categories of voters residing in areas of Ukraine that differ from their domicile registration. The overall concept of voter (and domicile) registration should be reviewed to ensure that all citizens have the right to vote in all elections conducted within the territory of their factual residence. IFES works closely with the Group of Influence and Civil Network OPORA on legal changes aimed to ensure voting rights of IDPs and other “mobile” citizens. This cooperation resulted in the registration of Draft Law [6240](#) titled, Amendments to Certain Laws of Ukraine Related to Electoral Rights of Internally Displaced Persons and Other “Mobile” Groups of Ukrainian Citizens. The Draft Law was sponsored by 24 Rada members representing the Petro Poroshenko Bloc, the People’s Front, Samopomich, Batkivshchyna, the Radical Party and the Opposition Bloc. If adopted, it would amend the Law on the State Register of Voters, along with other relevant legislation, to guarantee full voting rights for millions of Ukrainians who are displaced by conflict or are voluntarily residing in places that differ from their registered places of residence by enabling them to vote in their actual places of residence.

Adoption of a new National Referendum Law

On April 26, 2018, Ukraine’s Constitutional Court ruled the 2012 National Referendum Law as unconstitutional. The Law was adopted in 2012 without involvement of civil society or the expert community through a process that violated procedures proscribed by the Constitution.

The Constitutional Court decision represents a positive step for Ukraine given that the application of the current flawed referendum law would pose a serious threat to democracy in Ukraine. As noted by national and international civil society representatives and experts, including the Venice Commission, the 2012 National Referendum Law was not consistent with international standards, good practice, or Ukraine’s Constitution.

Abrogation of the National Referendum Law resulted in a legal vacuum in regulation of the referenda in Ukraine, which would be particularly problematic in case of need for changing certain provisions in Ukraine’s Constitution such as those which require approval by the Parliament and President as well as approval by national referendum (in the case of provisions of Chapters I “General Provisions”, III “Elections and Referendums” and XIII “Constitutional Changes” of the Constitution) or adoption of foreign policy decisions, such as joining NATO or the European Union.

In 2015, members of the “For Fair Referendum” coalition prepared a new draft National Referendum Law (formally known Draft Law [2145a](#)) which was introduced in the Rada by MPs from the Petro Poroshenko Bloc, the People’s Front, Samopomich and Batkivshchyna.

The draft National Referendum Law updates preparation and administration of national referenda in line with the Ukrainian Constitution, international standards and good practices. It harmonizes election commission operations, referendum campaigning, media coverage, voting and referendum tabulation. Procedures in the proposed new law are consistent with regulations governing parliamentary and presidential elections.

Given that Draft Law 2145a is the only legislative initiative regulating national referenda currently pending in the Rada, it will be the only bill considered on first reading and no other bills on national referenda can be registered until the bill is adopted or rejected by the Rada. Adopting this draft into law will fill the existing legal vacuum and bring regulation of national referendums in Ukraine in line with international standards, best practices and the Ukrainian Constitution.

Political finance reform

While the adoption of the 2015 Political Finance Reform Law marked Ukraine’s significant step forward to regulate the role of money in Ukrainian politics, certain provisions of that Law could benefit from further improvements.

The 2015 Political Finance Reform Law requires political parties to submit their quarterly reports in paper and electronic formats. Reporting in a paper format makes it difficult for the National Agency for the Prevention of Corruption (NAPC) to analyze the reports and to identify donations from prohibited sources, illegal expenses or concealed party assets. NAPC needs to establish an electronic party and candidate declaration system which will integrate party and candidate financial reporting, enable political parties and candidates in the national and local elections to complete the reports online, contribute to more effective political finance oversight, and provide comprehensive information on political finance to public authorities, civil society watchdogs, journalists and citizens. Establishing such a system should be preceded by changes to the Political Finance Reform Law, which will provide for key functioning principles.

In 2015, the Venice Commission and the OSCE/ODIHR recommended that sanctions for failure to comply with political finance rules should be effective, proportionate and dissuasive. Nonetheless, Ukraine's current system of penalizing political finance violations remains, by-and-large, ineffective. Parties' or candidates' failure to submit timely financial reports to the NAPC or election commissions is punishable by a small fine of up to UAH 6,800, while repeated failure to file the reports entail the same fines. This is an important reason why only two-thirds of more than 350 registered political parties file their quarterly reports to the NAPC. The system of penalizing political finance violations should be strengthened to make sure that it dissuades parties and candidates from committing repeated violations.

The rules governing donations, expenses and reporting by political parties, MPs, and presidential candidates have been harmonized by the 2015 Political Finance Reform Law. However, this law has not brought campaign finance rules applicable to local elections in compliance with the rules governing campaign finance in parliamentary and presidential elections. As has been highlighted by the Council of Europe's Venice Commission and the Group of States Against Corruption (GRECO), the OSCE/ODIHR and IFES, the 2015 Local Election Law should be amended to regulate campaign finance in local elections as it does for national elections.

The 2015 Political Finance Reform Law requires all political parties that receive annual public funding or participated in national or local elections to undergo an independent annual external audit. Such audits are expensive for many new or small political parties with low incomes. The auditing requirement should be reviewed to make sure that only those political parties whose income exceeds certain legally established levels, who participated in the regular or pre-term presidential and parliamentary elections or received public funding, are subject to mandatory independent auditing. The auditing requirement should not apply to parties that nominated candidates in rolling local elections.

GRECO and others have also recommended to clearly delineate the powers of the NAPC and other agencies (such as the Accounting Chamber, the CEC and the Fiscal Service) involved in political finance regulation to avoid duplication of efforts and to increase the overall effectiveness of political finance monitoring. This recommendation has yet to be addressed in the current legal framework.

One of the reasons for the strong dependence of political parties on wealthy donors is absence of instruments aimed to limit campaign spending by parties and candidates in elections. The OSCE/ODIHR and the Venice Commission have recommended introduction of campaign spending limits for all elections. Many civil society organizations, including the IFES-supported Reanimation Package of Reforms Election Group, also advocate for restrictions on television, radio and outdoor political advertising, as advertising-related expenses constitute a lion's share of electoral contestants' budgets. The need to restrict campaign expenses, which could include introduction of spending limits and/or restrictions on political advertising, should be carefully considered.

Last but not least, political finance reform can only be effective if implemented by an independent, unbiased, transparent and accountable regulating agency. The 2014 Law on Prevention of Corruption should be amended to ensure that the regulating agency, the NAPC, is fully compliant with these requirements and is able to effectively regulate the role of money in Ukrainian politics.

Conclusion

While reform and harmonization of Ukraine's current electoral systems for parliamentary and local elections remain a reform priority, political inaction on this front must not hold other reform priorities hostage. Many legislative changes are still possible under Ukraine's current parallel system that would significantly strengthen the country's electoral processes, including:

- harmonization of election laws;
- mandatory certification of election commissioners;
- introduction of timely, proportionate, effective and dissuasive penalties for electoral violations;
- replacement of CEC commissioners with expired terms;
- implementation of structural and operational reforms of the CEC;
- ensuring electoral rights of underrepresented and disenfranchised groups (IDPs, internal economic migrants, women and people with disabilities);
- adopting the new National Referendum Law;
- establishment of an electronic declaration system for political party and campaign financial reports;
- considering restrictions on campaign spending and advertising; and,
- harmonization of political finance provisions for local elections.

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