IFES Comment

IFES Comment on risks related to possibility of calling local elections in fall 2019

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Background

Under the Constitution of Ukraine, regular local elections for all local councilors and mayors should be “held on the last Sunday of October of the fifth year of the term in office of the respective council or mayor” concurrently across the country. The last regular elections for local councilors and mayors were held on October 25, 2015. In order to ensure that elections are held regularly across the country at the same time, the terms for all those in office are calculated from the time of the last regular election (October 25, 2015) irrespective of by-elections or early elections under the current constitutional framework. This ensures that local elections will generally be synchronized.

In order to establish when the next regular elections of local councils should take place, one must first establish the timing of their constitutional terms of office. The current legal framework fails to provide clear guidance as to which date the term in office of a local council begins. Several interpretations are possible, ranging from the date when the local council held its first meeting to the date when at least two thirds of the local councilors local elections took the oath. The local councils elected in 2015 held their first meetings no earlier than November and, in some councils, two thirds of the newly elected councilors were sworn in as late as December. Important to note here is that none of the local councils took office later than December 2015. This means that “the last Sunday of October of the fifth year in office” of any council in question translates in the last Sunday of October 2020; namely, October 25, 2020.

With respect to the date when the mayors elected in October 2015 took office, the current legal framework is more specific: it states that elected mayors assumes their office starting from the date when they took the oath at the plenary meeting of the respective council. In 2015, some mayors were elected based on the two-round system while others won in the first round: some assumed office in November and others in December that year. The end of their “fifth year of their term in office” therefore translates into November or December 2020. Thus, based on the law, regular local elections of mayors should be scheduled for the last Sunday of October 2020 as well.

Therefore, regardless how the term in office for local councils and mayors is calculated, the next regular local elections should take place on October 25, 2020, the last Sunday of the fifth year of their term in office.

Some domestic experts and media, however, have begun publically stating that the next election of local councilors and mayors could be held in the fall of 2019. Given that, under the Constitution, the next regular local elections are to be held in October 2020, this raises the question as to whether it is possible to hold local elections throughout the country earlier. And, if this is possible, what conditions have to be met?
The possibility of holding local elections in fall 2019

While the regular local elections cannot be held until October 25, 2020, the Constitution and the legal framework do not entirely exclude the possibility of holding local elections in Ukraine in 2019. These elections would not be “regular” as laid out in the Constitution, but they can be held nationwide. There are a number of legal possibilities that justify the holding of such pre-term nationwide local elections before October 25, 2020.

The grounds for dissolving local councils and mayors are not in the Constitution; they are listed in the 1997 Law on Local Self-Governance. Article 78 of the Law on Local Self-Governance provides that the powers of any local council can be terminated early by the Verkhovna Rada if the local council in question violates the Constitution or the laws of Ukraine, if the sessions of the council fail to commence, or based on cases envisioned in the Law on Civil-Military Administrations and the Law on State of War. For mayors, the list of grounds for early termination of their powers is broader and includes resignation, loss of citizenship, entry into force of a criminal sentence, corruption, recall by citizens, death, failure to exercise their powers, and violation of the Constitution or laws of Ukraine (Article 79 of the Law on Local Self-Governance).

Given that the grounds for the termination of powers of mayors and councils are listed in the law rather than the Constitution, nothing necessarily prevents the future Rada from changing the Law on Local Self-Governance to expand the current lists of grounds. This expansion could allow the Rada to terminate the powers of local councils and mayors early at the discretion of the Rada on other grounds, scheduling early elections in 2019.

However, the constitutionality of such legal amendments is questionable. The Constitution of Ukraine limits state interference into local self-governance. Nevertheless, it does not necessarily mean that the Constitutional Court would find these amendments to the law unconstitutional in time; namely, before the elections are held. The Constitutional Court can require from one month to half a year to review the compliance of the law with the Constitution.

One important note to stress is that the calling of early local elections will not re-schedule the regular local elections unless the Constitution is changed. This means that even if early local elections are held throughout the country in the fall of 2019, the councilors and mayors elected in these elections would be up for re-election on October 25, 2020. Regular local elections are stipulated by the Constitution and their term in office would likely not exceed one year.

Eliminating the need for the regular local elections in October 2020 would require changes to the Constitution, which is a hard task for the next Rada but not entirely impossible. The first step to change the timing of the 2020 regular local elections would be to initiate an amendment to the Constitution. Such draft constitutional amendments should initially be reviewed by the Constitutional Court. The court would then check whether they violate the procedure for introducing changes to the Constitution or encroach on human rights. The draft would then need to be scheduled on the agenda of the parliament and receive 226 MP votes in the Rada to pass. The vote in the Rada plenary has to be repeated at a subsequent session of the Rada and be re-approved by no less than 300 MP votes. If draft amendments to the Constitution are introduced and preliminarily adopted this fall, their final approval can happen during the winter session of the Rada, i.e. beginning of February 2020.

Negative implications of possible fall 2019 local elections

While holding early elections in fall 2019 might be politically conducive for the President and his party given their current strength in public opinion polls, such elections would not be desirable for a number of reasons.
First, they would be the third nationwide elections in 2019 and put significant organizational and financial burden on political parties, candidates and state institutions, including the CEC. There is also a chance of voter fatigue due to the number of electoral events.

Second, and more importantly, if elections are held early, they are likely to be held under the deeply flawed 2015 Local Election Law, which establishes the so-called St. Petersburg proportional system with unpredictable political outcomes for most elected councils. Many procedures laid down in the Local Election Law are deeply flawed. The keys weaknesses include lack of effective regulation of campaign finance, lack of clear delineation between election campaigning and media coverage of elections, vote counting and vote tabulation procedures that are prone to fraud, absence of instruments to ensure a better level of accessibility of elections to voters with disabilities and a deficient 30 percent gender quota, which does not have sufficient sanctions for non-compliance. The 2015 Local Election Law effectively excludes IDPs and millions of economic migrants from elections as, in contrast to the presidential and parliamentary elections, it does not allow voters to change the place of voting without changing the voter’s address. While changing the Local Election Law before early elections is not an impossible task per se, these changes, in case of adoption, would enter legal force just in a few months before the elections – changes to electoral legislation this close to an electoral event is not best practice. The OSCE/ODIHR and the Venice Commission do not recommend any significant changes to the key elements of the election laws (such as electoral system, election districting, system of electoral administration and operations, etc.) later than a year before the elections.

Third, early elections in 2019 would create the risk of concentrating most political power at all levels in the hands of a single party or limited number of parties that would create the coalition in the future Verkhovna Rada. Such concentration, as has been proven by recent Ukrainian history in 2014, can be dangerous.

Fourth, decentralization reform and the merging of local communities is in full progress across Ukraine and is fundamentally changing the local self-governance structure at the local level. At times, new local self-government entities have been established across the borders of existing territorial-administrative units, most commonly by splitting a rayon between two or more amalgamated communities. Several communities are lined up for scheduling first elections. Holding local elections ahead of time may not only potentially bring the decentralization processes to a halt but also risk creating instances of dual self-governing bodies with unclear division of tasks.

Finally, amending the Constitution to count the term in office from the date when the local council or mayor assumed office regardless of whether the elections were early or “regular” would mean that the terms of offices of all the councilors and mayors would be desynchronized. If the powers of a mayor are terminated under a Constitution that has been amended in this way, the next mayor will be elected for a five-year term, not for an abridged term. The same will apply to local councils. Desynchronized terms mean that elections to some councils, as well as mayoral elections, would be held almost every Sunday. Such isolated electoral events are difficult to monitor. Under the current Constitution, the mayors and councils elected in early elections can only exercise their powers until the end of the 5-year term remaining from the previous “regular” elections held throughout the country.

Conclusions

Currently, the legal grounds for holding local elections throughout Ukraine in fall 2019 are absent from the legal framework. However, the incoming MPs may introduce such provisions by amending the Law on Local Self-Governance to grant the Rada the discretion to terminate the powers of all local councils and mayors simultaneously. The compliance of such legal changes with the Constitution is, however, questionable, and they may be challenged in the Constitutional Court.
requirement to conduct local elections in October of 2020 can only be lifted following an amendment to the Constitution of Ukraine.

Elections in the fall of 2019 and any amendments to the Constitution aimed to cancel the regular 2020 local elections would be an unwelcome development with negative effects. Such amendments would desynchronize the terms in office of local councils and mayors, put significant organizational and financial burden on electoral stakeholders, might cause voter fatigue and potentially exclude the possibility of implementing a comprehensive local election law reform anytime soon. Other risks include possible concentration of too much power in hands of the ruling party or coalition and, importantly, a potential halt to decentralization reform in Ukraine.

The next local election cycle should be held in terms prescribed by the current Constitution on October 25, 2020. These local elections must be preceded by a comprehensive revision of the flawed 2015 Local Election Law. The amendments to this law should replace the “St. Petersburg” electoral system for local elections and improve election procedures governing campaign finance, election campaigning, vote counting and vote tabulation, and more. Such amendments should be introduced well in advance of the 2020 local elections and drafted in a open and inclusive process, involving all key electoral stakeholders. An incoming government should do its utmost to finalize decentralization reform well in advance of the 2020 local elections.

Finally, local election law reform should not overshadow other urgent reforms pending in the Rada for years, such as effective sanctions for election-related violations, enfranchisement of IDPs and economic migrants in all elections, and better accessibility of elections for voters with disabilities.

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