







# Ukraine's Democratic Institutions During the War: A Check-Up







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## Ukraine's Democratic Institutions During the War: A Check-Up

#### **Summary:**

- While there has been some discussion about the nature of Ukrainian democracy after the war, little is being said about democracy during the war. What happens now will, however, influence what happens after the war. A major war is a serious stress test for any democratising country.
- Russia's full-scale invasion of Ukraine did not end Ukrainian democracy. While, democratic rights have been curtailed under martial law, as is justifiable under international law in the context of a massive emergency, Ukraine's democratic institutions continue to function.
- Somewhat paradoxically, some longer-term reforms may now be accelerated, despite the war, with a view towards EU accession. While this is positive, there is a risk of little public discussion of and buy-in for reforms, which could weaken their acceptance later on.
- While this paper only covers selected democratic institutions, the best hope for democracy in Ukraine lies in the groundswell of support for democracy in Ukrainian society. Democracy, as a political system diametrically opposed to Russian autocracy, which has been devastating Ukraine since 2014, is seen as the system of choice for most Ukrainians.

## As far as key democratic institutions are concerned, these are our findings:



• The presidency: President Volodymyr Zelensky has been an inspirational figure. His decision to stay in Kyiv after 24 February, despite the direct threat to his life, was essential to Ukraine's resistance. As a wartime commander-in-chief, his powers are significant and, while there have been no red flags, it will be important that the stability of Ukrainian institutions does not become reliant on one person. There are some concerns in relation to the Presidential Office. It is an institution without constitutional anchor, but it is extremely powerful. This situation deserves review after the war.



• Parliament: Very positively, the Verkhovna Rada (Ukraine's parliament) never stopped functioning, despite the war – even when it raged around Kyiv. Committees and the plenary continue to meet, vote and make decisions. The parliament has, however, stopped publishing its agenda and broadcasts of plenary and committee sessions. This is legitimate, given the

direct security risks of disclosing locations and of Russian psychological influence operations seeking to divide Ukrainian society. That said, publishing the agenda in some form would increase transparency and public involvement. If legislation is published after its adoption by parliament, civil society can only engage or intervene in the small window of time before the president signs a draft into law. While this has worked in the past, it is not an ideal process.



• Elections: According to the electoral calendar, the next parliamentary elections are due in the autumn. Currently, it is impossible to plan for the elections, in view of the ongoing war (the constitution bars the holding of elections under a state of martial law). As such, it is possible that this parliament's term will continue past this autumn. Even if the fighting has ceased by then, there would be significant practical challenges to holding elections, with much of the necessary infrastructure destroyed and many Ukrainian citizens having become internally displaced or refugees abroad. These challenges have triggered discussions about changing the electoral systems to facilitate voting by those who have been displaced, including through e-voting, which raises security. It would be positive to reach a cross-party consensus on key changes to the electoral framework for postwar elections, to avoid the perception of partisanship.



• The Judiciary: The reform of the judiciary has been one of the most difficult areas for change in Ukraine over the years. The war brought a massive new challenge to the judiciary, well beyond what any judicial system is usually designed for – the investigation of alleged wide-spread Russian war crimes. (The International Criminal Court is also investigating these, based on referrals by some 40 states and Ukrainian acceptance of the Court's jurisdiction.) The Ukrainian authorities have continued some judicial reforms, including in relation to prospective accession to the EU. There has also been some progress in anti-corruption efforts, an essential issue to ensure defence efforts are not weakened by graft.



• The Media and Civil Society: Martial law imposed limits on the freedom of the media, mostly related to the sharing of information that might threaten the security of the army and civilians. Since Russia launched its full-fledged war, all television stations have been broadcasting the same programme (the so-called "united news marathon"), at the expense of presenting a plurality of opinions. During this period, the influence of alternative internet media platforms has grown. Ukrainian civil society has been facing the challenges of the full-scale war but continues its work, while volunteers and charitable organisations gather sizable donations for military and humanitarian aid.

#### Introduction

A war is something of a crash-test for democratic institutions. It requires determined, agile and rapid efforts by the executive branch of power and, in particular, by its security services. The Russian war against Ukraine is an extreme case – a massive attack by a global military power seeking to expand its territory. There is no precedent since 1945. The Russian war effort includes conventional military means, as well as cyberwarfare and systematic influence operations. As the war is taking place on Ukrainian territory, it puts a maximum strain on the country's ability to maintain democratic institutions, which are premised on stability, deliberation and transparency.

International law accepts that, during time of war, human rights and democratic institutions may be curtailed, but only as necessary and up to a point. The declaration of martial law by Presidential Decree 64/2022, on 24 February 2022, confirmed by the parliament (Law of Ukraine of 24 February 2022 No. 2102) did, indeed, include a list of human rights restrictions. The Ukrainian government duly communicated these restrictions of obligations under the International Covenant on Civil and Political Rights (ICCPR) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) to the United Nations.

Democracy is, in many ways, at the heart of the war. Ever since Ukrainians decided to make their country more democratic, in the Maidan revolution of 2014, and to freely choose its own foreign policy direction, the Russian government has responded with warfare. The full-scale Russian invasion of 24 February 2022 marked only the latest step of in escalation of a war the Kremlin had launched in 2014.

A poll in August 2022 found that <u>95 per cent</u> of Ukrainians believe that it is very important that Ukraine becomes a fully functioning democracy. So far, the three branches of power in Ukraine remain functional, even though the battle to restore the country's territorial sovereignty has been continuing in different forms for almost nine years.

During the conference <u>"Preserving and Developing Ukraine's Democracy: What are the Current and the Future Challenges of Democratic Transformation?"</u>, organised by Democracy Reporting International, the Center of Policy and Legal Reform, and the Reanimation Package of Reforms Coalition, on 21 September 2022 in Kyiv, Ukrainian and international experts and decision-makers took stock of what has changed in Ukraine under martial law.

This paper builds on that conference's outcomes and develops some issues further. It focuses on key democratic institutions, without offering a wider appreciation of developments in Ukrainian society and its attitudes. It is important to note that not all of the changes listed below present threats to Ukrainian democracy, but they need to be monitored, nonetheless.

#### The President



#### Main threats and changes:

- Concentration of power and over-reliance on one person
- Political influence of the Office of the President

President Zelensky has become a symbol of courage and resilience, beginning with his refusal to leave Kyiv after the full-scale Russian invasion, putting his life at risk. His example motivated the representatives of all the other institutions to stay and continue their work.

The democratic system survived and has been sustained during martial law.

The image that Zelensky created became a reassurance for Ukrainian partners that there is a strong political will to sustain the political system in Ukraine and to fight for its survival. Contrary to Russian plans, no vacuum has emerged in Ukraine's governance.



Zelensky has thus become a powerful president, which carries the risk that the stability of the political system becomes over-reliant on one person, rather than on the stability of institutions, even where he has not exceeded his constitutional powers. So far, all of the branches of power have continued their work and ensured the continuance of

checks and balances in line with the constitution.

Beyond the person of the president, with his constitutional role and rights, there is the Office of the President. <u>Historically</u>, this has always been a powerful institution, and this is even more the case today. At the same time, the Constitution of Ukraine does not provide a framework for its role and powers. The <u>Presidential Decree</u> that specifies its competence



defines the institution as a consultative one. In practice, however, the influence of the Office, and especially of its head, is much <u>more significant</u> than as formally defined (the current head of the Office, Andriy Yermak, has been designated as "the most influential person in Ukraine after the President" in a <u>letter</u> to United States Members of Congress sent by the office of Ihor Pasternak, a United States businessman of

Ukrainian origin, in 2021). With the war, the influence of the Office of the President has grown. It is a central executive player in the war effort (its representatives also <u>became members</u> of the negotiation group with Russia in March).

While the role of the Office of the President could be interpreted as merely helping to implement the political role of the President, the reality is that the Office and its head are playing their own weighty role in Ukraine´s power constellation. This should be reviewed once the war is over.

#### **Parliament**



#### Main threats and changes:

- · Parliamentary session agendas are not published
- Limited information about the content of parliamentary sessions and meetings of committees
- The growing political role of the military
- Less intense cooperation with the European Parliament (EP)

The Ukrainian parliament has continued to function during the war, despite the fear of Russian occupation of the capital in the early days of the full-scale Russian invasion. A large majority of parliamentarians have remained present and continued to fulfil their roles and functions. Legislation has been debated and passed, and the committees have continued their work. However, martial law has introduced some significant changes to the workflow of the parliament. Paradoxically, even though the parliament's productivity has increased compared to peacetime, trust in the body has been decreasing under martial law.



## Lack of a public agenda for parliamentary sessions:

Most importantly, there has been no published agenda for parliamentary plenary sessions since 24 February 2022. This means that citizens and stakeholders cannot track which draft laws have been considered by the MPs until their official publication. Thus, a crucial avenue for public participation is closed.

The only remaining point of public influence is the period between the parliamentary adoption of a legal act and when it is signed into law and force by the president. At this point, stakeholders can try to convince the president to veto the legislation and send it back, which has already occurred. For example, after the parliament passed draft law 8271, on 8 December 2022, on the specifics of military service under martial law or combat conditions, activists appealed to Zelensky in a petition to veto the legislation, pointing to problems with transparency in the adoption of such an important law.

Another notable case of concern was the passing of the <u>bill 2846-IX</u>, on the selection of judges to the Constitutional Court of Ukraine. The Council of Europe's Venice Commission <u>published an opinion</u> on the draft law, recommending essential changes, noting that it had received the document too late, after it had already been considered by the parliament. The president signed the law anyway, so the parliament will now need to amend it to address the recommendations by the Venice Commission. Had the parliament's process of reviewing the draft law been more transparent, the Venice Commission and Ukrainian civil society would have had the opportunity to persuade the parliament to introduce necessary changes before adoption.

Publishing the parliamentary agenda would, therefore, enhance the essential democratic process of lawmaking, especially in a context where EU accession will require many legal reforms. While the basic principle should be a public agenda, in exceptional cases some items or information could be redacted, if security considerations so dictate.



## No online public broadcasts of parliamentary proceedings:

Prior to the full-scale invasion, all parliamentary plenary sessions and committee meetings were streamed online. This practice was suspend-

ed after the attack. In this case, the security concerns might be justified, to prevent Russia from having data on the exact context of the discussion, and information on MPs and the time when they are gathered for the meeting. All such data might be useful for missile strikes or propaganda operations. It will be crucial, however, to reinstate this practice once that danger has passed.



## The growing political representation of the military:

During the war, members of the military have gained an unprecedented level of social trust and support. This started with the beginning of

the Russian war, in 2014, and the trend is likely to be even more noticeable after the end of the war. According to a national poll conducted in August 2022, the Ukrainian Armed Forces had a higher level of trust (95 per cent) than the president, while volunteers and military members scored very high compared to other politicians. Many volunteers and soldiers have also been involved in politics. The involvement of the military in politics can become a problem for democracies, where the army should be under civilian control, and not the other way round.

Positively, despite almost nine years of war, no military-based political party has emerged in Ukraine. Instead, volunteers and military members interested in political careers have joined the ranks of other parties. From the start of the full-scale invasion, the military has remained separate from political debates and has not publicly contradicted the civilian leadership in any significant manner. It remains to be seen whether this remains the case, especially in the case of elections.



#### Slowing down cooperation with the EP:

The integration processes with the European Union have had a positive impact on the democratic practices of the Ukrainian parliament. The requirements of the EU Association Agreement and the recommenda-

tions provided by the European Commission in the context of granting Ukraine EU candidate status have contributed to the passing of a number of laws that strengthen the democratic institutions in Ukraine, such as creating better procedures for the selection of judges for central judicial institutions, the introduction of better media regulations and increasing protection for the rights of national minorities.

The Ukrainian parliament has also been closely cooperating with the EP since 2014. For example, in 2015, on a request from the Ukrainian parliament, the EP issued the so-called Cox Report "On Internal Reform and Capacity-building for the Verkhovna Rada Of Ukraine", which aimed to assist the Ukrainian parliamentarians in enhancing the performance of the legislature. Since Russia's full-fledged invasion last February, the co-operation with the EP has become less intensive. It is essential to continue and intensify this cooperation after the war, especially in view of prospective EU accession. The EP should consider ways to maintain a level of support and co-operation with the Rada, despite the numerous challenges.

#### **Elections**



#### Main threats and changes:

- Timing and manner of the next elections (parliamentary elections should take place this autumn, according to the electoral calendar)
- · Voting of internally displaced persons and refugees abroad
- The scope of the vote in occupied territories

Ukraine has been successfully holding regular competitive, multi-party parliamentary and presidential elections since its independence (with the exception of 2004, which led to the Orange Revolution), and there have been frequent changes of power. The war situation could challenge this in a number of different ways:



#### **Timing:**

According to the International Covenant on Civil and Political Rights, elections should take place "periodically", to renew the legitimacy of the government. According to the regular electoral calendar, Ukraine

should hold the following elections:

- Parliamentary elections, Autumn 2023
- Presidential elections, Spring 2024
- Local elections, Autumn 2025

According to the Constitution, however, elections cannot be held during a state of martial law. Obviously, from a purely practical standpoint, no elections could be held during this war. The parliamentary elections, due in the fall, would be the first to be delayed if the war continues, and a number of options to address the problem are being discussed in policy circles. So far, three timing options are being suggested:

- 1) Holding elections according to the existing calendar, in October 2023. This option is available only if the war in the current form ends in the summer, at the latest, to provide time for election campaigns.
- 2) Organising elections right after the end of the war. Should the war continue for most of 2023, the current parliament will sit longer than its five-year constitutional term. Holding a snap election promptly after the war would ensure democratic renewal, but it would not allow parties and candidates to campaign, and immediate post-war challenges may dictate other priorities. Furthermore, the electoral administration may not be ready (see below).

3) Delay the next elections until all party institutions and electoral bodies have been reinforced. This option would ensure equal opportunities for the parties and give much-needed time for the electoral bodies to organise the process. As with option 2, this will also mean that the current parliament will stay in power for an unspecified period.

Each option has its strengths and weaknesses, and with all of the uncertainty around the war, no decision can be made at this point. It would be useful, however, to come to a cross-party agreement on minimum conditions that would need to be met to hold parliamentary (and other) elections in the future. Such an agreement would manage expectations and give all sides a fair framework for preparation.

It should also be kept in mind that the war could continue in many different forms. De facto, Russia has been waging an undeclared war against Ukraine since 2014, but for many years kinetic military activity was limited to the Donbass frontlines. Ukraine did hold elections in those circumstances. In short, the situation in the future may be more complicated than the binary option of war/no war.



## The electoral system for parliamentary elections:

The electoral system for parliamentary elections has been an issue of vigorous debate ever since Ukraine gained independence in the 1990s.

Immediate post-war elections may pose particular challenges that could influence the electoral system. For example, if there was a desire to hold parliamentary elections as soon possible, when many voters might still be displaced and the electoral infrastructure not in good condition, a nation-wide proportional system might be the easiest to manage. Voters could then cast their votes from anywhere in the country, with no need to relate votes to particular electoral constituencies.



#### **Electoral administration:**

There will be many significant questions for the electoral administration in holding parliamentary elections, related to:

- **Voter registers:** Are they complete, and how much of data has been lost or destroyed in the war? Are all voters accounted for?
- Physical infrastructure: To what degree will the typical electoral premises (schools, universities, other public buildings) be available. How many of these have been destroyed by Russian attacks? What alternatives are available?
- **Human resources:** Would the electoral administration be able to muster the necessary personnel for managing a nationwide election?

## Accessibility for displaced persons and refugees:

The war has forced millions of Ukrainians to flee their homes. According to the <u>International Organization for Migration (IOM)</u>, there were 6.5 million internally displaced persons (IDPs) as of October 2022, while the <u>UNCHR</u> reports that 7.8 million Ukrainians fled to other European countries after the start of the full-scale war.

Providing all of these people with the opportunity to vote will be a significant challenge. How complicated voting for IDPs will be depends on the electoral system (in the case of parliamentary elections). As for those who have moved abroad, the problem of access to polling stations will be pressing. Traditionally, citizens abroad have voted at Ukrainian embassies, but this will not be realistic in those countries with Ukrainian refugee populations in the millions or hundreds of thousands. Other solutions will be needed (for example, postal or electronic voting), in cooperation with host countries.



## Voting rights of people from Crimea and the Donetsk and Luhansk regions:

The Ukrainian government has made it clear that the Ukrainian Armed Forces will do all they can to liberate territories annexed by Russia since 2014, and to restore Ukraine's internationally recognised borders. Reintegration plans for those territories should be weighed carefully, considering that many of the previous inhabitants have fled, those who stayed have been living under occupation, and new inhabitants have been brought in from Russia.

Deciding on the modalities for voting in these areas will be a complex process, and should be discussed in due course, on the basis of international and European human rights obligations.



#### Introducing e-voting, e-counting:

There have been a number of <u>statements</u> from senior governmental representatives that the introduction of electronic voting could be a possibility for the next elections. E-voting could, indeed, solve some

specific problems created by Russia's war: It would make it easier to vote from anywhere (within Ukraine or from abroad) in general, and it would even allow voters to cast their votes for specific electoral districts. Thus, even if voters cannot be present in a particular electoral district (where they have their usual residence and are registered), their votes could be assigned to and counted for those districts. This would also ease or remove the burden of setting up physical election infrastructure, namely a large number of polling stations. Ukraine has a high level of digitalisation, which could help the introduction of electronic voting.

E-voting carries with it a number of risks, however. In many established democracies, the practice has not been introduced, due to concerns over electoral integrity. Electronic voting is a challenge for the secrecy of the vote, as it is not possible to ascertain that a person who votes electronically from anywhere is doing so alone. It is possible that family members or other people might try to influence their decision.

Some countries, notably Estonia, use e-voting extensively and are satisfied with it, but its introduction in most cases has been the result of a long process to ensure the integrity of the system. Ukraine may not have the time and willingness to focus on this issue, given the many other urgent difficulties it will need to address.

Moreover, Russia's systematic cyberwar against Ukraine creates the additional risk of Russian interference in this sensitive political process. For the time being, the established paper vote, easy to understand and decentralised in its implementation, may be the safest option. Of course, any election is an opportunity to start experimenting with and testing new voting technologies in a limited manner.

Using some modern technologies might prove useful during the next elections. Some MPs believe that using electronic vote-counting machines would enhance the quality of the voting and counting. The International Foundation for Electoral Studies (IFES) has noted that Ukraine is not yet ready for the introduction of systematic electronic voting, but that increasing the level of digitalisation of counting and registering votes would enhance the quality of the electoral process. Thus, the introduction of some electronic practices during the next elections might be advisable, but only to a limited extent.

The Central Election Commission of Ukraine has already prepared <u>proposals</u> for conducting the elections after the war that consider most of the issues mentioned above. The challenge will be to continue deliberations and to agree on solutions acceptable to all stakeholders, while reducing the risks of interference and error.

#### **Political Parties**



#### Main threats and changes:

- The banning of political parties
- Ensuring equal conditions for all political parties to register and campaign

Ukraine has a multi-party political system that provides for diversity among the parties and requires a level playing field for contestants. The major change in the framework for the functioning of political parties in Ukraine was bill 2243-IX, introduced on 3 May 2022, which provided a new process for banning pro-Russian political parties engaging in hostile activities. Those political parties were then banned by court decisions. The representatives of the main pro-Russian political party, the Opposition Platform – "For Life" (OPFL), were on United States sanctions lists, and one of its members had called openly for the use the weapons of mass destruction against Ukraine. The cofounder of the party, Victor Medvedchuk, a confidant of Vladimir Putin, was handed over to Russia in the biggest prisoner swap of the war, in which more than 200 Ukrainian and other soldiers returned to Ukraine. Moreover, a similar ban on the Communist Party and its symbols was imposed in Ukraine in 2015, and then confirmed by a court decision in 2022.

There is a concern about the functioning of political parties related to the provisions for political campaigning in Ukraine. For example, the <u>bill "On Media"</u>, which was passed based on the recommendations of the European Commission in granting Ukraine candidate status for the EU, <u>omitted</u> the provisions concerning media regulation during the elections. This issue will have to be resolved to ensure conditions allowing political parties to compete on a level playing field during the next elections.

#### The Judicial System



#### Main threats and changes:

- The necessity to find mechanisms to adjudicate war crimes and crimes against humanity
- The issue of the ratification of the Rome Statute
- The continuation of the judicial reforms
- Fighting corruption

Reforms to Ukraine's judicial system have always been challenging. Much has already been done, but even more changes still have to be implemented in order for Ukraine's judiciary to function properly and ensure the rule of law.

The war has brought whole new challenges, particularly the investigation and prosecution of Russian war crimes. No legal system is prepared for the sudden, widespread commitment of atrocities. Ukraine is still not a party to the Rome Statute, which established the International Criminal Court (ICC), but it has accepted the Court's jurisdiction for war crimes in the context of Russia´s full-fledged invasion. Forty-one states have already referred the case of war crimes in Ukraine to the ICC. In March 2022, the ICC Prosecutor, Karim A.A. Khan, started investigating cases of war crimes and crimes against humanity committed by Russia in Ukraine and, on 13 March, issued arrest warrants for Vladimir Putin and Maria Lvova-Belova, Russia´s Commissioner for Children's Rights. They are alleged to be responsible for the war crime of the unlawful deportation and transfer of a population (children).

Some positive changes to the judiciary have been made during the war, including the passing of the bill on improving the procedures for selecting judges for the Constitutional Court of Ukraine, following a recommendation by the European Commission. The Council of Europe's Venice Commission opinion on this reform commented that: "Overall, the Venice Commission finds that the draft amendments go a long way toward implementing the recommendations of the Venice Commission's previous opinions. At the same time, there is still room for improvement."

Finally, the fight against corruption remains a major concern. Citizens and partner countries expect strong efforts in this field for the further democratic development of Ukraine, and especially in times of war, when the state's resources must be efficiently used to defend and liberate the population. Furthermore, post-war reconstruction will involve sizeable funds, which will also need to be managed transparently. Ukraine needs, therefore, to demonstrate that its institutions are ready to follow best practices of accountability and transparency. In this regard, some positive changes have been made. For example, the head of the Special Anti-Corruption Prosecutor's Office (SAP) was finally appointed in July 2022. Since the appointment, a number of cases have been directed and investigated by the SAP.

#### **Media and Civil Society**



#### Main threats and changes:

- Martial law limitations on the media
- The united news marathon, limiting competition among information television channels
- Challenges and opportunities for civil society



#### The media:

During the war, martial law has imposed tangible restrictions on the freedom of the media, primarily to ensure the security of both citizens and the army. For example, the Ministry of Defence has urged citizens

and media not to publish video recordings of the places of impact of Russian missiles or the movement of troops and military equipment. The law regulating these and other limitations was passed in March 2022, and stated that their violation can lead to criminal responsibility. Another major change in the Ukrainian media sphere was the launch of the "United News Marathon" (all channels show the same programme), broadcasted by the major media groups. This united the efforts of the national information television channels to broadcast the news on a single information platform of strategic communication "United News #UATogether". The decision was made by the National Council of Security and Defence (NCSD), in order to implement a joint informational policy, which was described as a "priority issue for the national defence". The government switched off television channels that refused to go along.

At the same time, the influence of internet platforms on the dissemination of news in Ukraine has increased. Platforms such as Telegram, Twitter, TikTok, Facebook, and Instagram offer access to other information, but are less transparent in terms of the sources and quality of information. The owners of many prominent Telegram channels, with hundreds of thousands of subscribers, remain unknown and cannot be held responsible for violations of rules.

Therefore, the pluralism of information on television has been reduced, while alternative sources of information have become more important, but many of these are less reliable.



#### **Civil society:**

After 2014, civil society in Ukraine enjoyed a substantial level of social trust. The onset of the full-scale war has created new challenges, however, while at the same time increasing the importance of civic

action. Foremost, the support and influence of volunteer and charitable organisations

focusing on military and humanitarian aid has grown substantially, with the leading organisations being CF "Come Back Alive", UNITED 24, PA "Sprava Hromad", CF "Serhiy Prytula", CF "Poroshenko Foundation", and CO Caritas. The trust in these initiatives has been demonstrated by the level of donations received – since February 2022, Ukrainians and foreigners have donated almost \$1 billion to the three largest funds and the National Bank of Ukraine.

The functioning of civil society organisations has been impacted by the war, however, and two-thirds of these organisations have reported substantial difficulties since February 2022. The main problems included financial deficits, maintenance of their offices (mostly connected to the electricity supply), and the physical security of their teams. Nevertheless, most of these organisations have managed to address these issues and continue their work.

Should Ukrainian civil society successfully withstand the challenges of war, its role in post-war Ukraine is likely to increase, as the prospective Ukrainian integration into the EU and post-war recovery and reconstruction will require public oversight of the reform process, which has traditionally been an important role of Ukrainian civil society.

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