

# ORGANISATION AND HOLDING OF ELECTIONS IN POST-WAR UKRAINE. PREREQUISITES AND CHALLENGES



**Needs Assessment Report**

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## **Needs Assessment Report**

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## Introduction

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Ukraine has been facing armed aggression since February 2014. At the same time, the full-scale armed aggression that the Russian Federation launched against Ukraine on 24 February 2022 led to a number of new challenges and threats to the functioning of democratic institutions in Ukraine. In addition to the efforts of the aggressor state to occupy parts of the territory of Ukraine, it obviously intends to deny to the Ukrainian people the right to self-determination, self-identification and statehood. For this purpose, various tools of influence and manipulation have been used.

Under these circumstances, the functioning of democratic institutions must adapt to the wartime challenges and realities. Certain rights and freedoms can and should be limited under martial law. The limits of acceptable restrictions have been defined by the Constitution of Ukraine. However, these restrictions must ensure the preservation of the democratic vector in the country's development. Ultimately, once the war is over, the central and local government authorities will have to fully restore their functions, as well as to ensure the possibility of holding elections.

The need to call, organise and hold elections in the post-war period requires gradual and systematic preparation that should start now. A huge number of internally displaced persons, the occupation of large territories of Ukraine, the powerful propaganda and smear campaign against Ukraine and other severe challenges require both doctrinal and practical consideration. This study is a general attempt to present a systemic analysis of such issues and challenges aggravated by the war. The considerations presented here are based on a systemic study of international electoral law standards, Ukrainian domestic legislation and the current state of affairs in Ukraine.

The problems and their tentative solutions identified by the authors would obviously require an extended and more detailed research. Nevertheless, this study points to the major threats to the democratic development of Ukraine through the lens of challenges as regards calling, organisation and holding elections in the post-war period.

# 1. Prerequisites and grounds for holding elections after the martial law is lifted

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## Calling national elections

The legal regime of martial law prohibits national and local elections as well as national and local referenda. Therefore, during martial law, no elections – whether ordinary, extraordinary or by-elections – can be called, let alone held.

The Law of Ukraine “On the Legal Regime of Martial Law” prescribes the extension of the authority of the President of Ukraine if the constitutional term of his powers expires during martial law; election of the President of Ukraine (which should be considered regular) can be held only after the termination (lifting) of martial law. In case of early termination of the authority of the President of Ukraine, the discharge of the duties of the President is vested with the Speaker of the Verkhovna Rada of Ukraine (Article 112 of the Constitution of Ukraine).

There is a similar rule regarding the extension of powers of the Verkhovna Rada of Ukraine. This legislative provision and Article 81(1) of the Constitution of Ukraine provide for the automatic extension of powers of each People’s Deputy of Ukraine (Member of Parliament) should their powers expire during martial law. However, Article 81 of the Constitution of Ukraine also establishes the grounds for *early* termination of powers of an individual People’s Deputy of Ukraine, which remain in effect under martial law. A mixed electoral system was used for the elections of the current convocation of the Verkhovna Rada of Ukraine, therefore a number of People’s Deputies were elected in single-mandate constituencies, and the mechanism for replacing a vacant mandate – as it is provided for mandates allocated under the proportional representation component of the electoral system – is not applicable to them. Thus, termination of the powers of a People’s Deputy of Ukraine elected in a single-mandate constituency will result in a vacant mandate in the Parliament, which cannot be filled during martial law as by-elections in individual constituencies – established in Article 106 of the Law of Ukraine “On Elections of People’s Deputies of Ukraine” (2011) (still valid as to by-elections based on the final and transitional provisions of the Election Code of Ukraine) – can be held only after the termination (lifting) of martial law.

It is worth noting that it may lead to a potential, albeit unlikely, problem (in case of early termination of powers of a certain number of People’s Deputies without the possibility of filling in the vacant seats) whereby the Verkhovna Rada of Ukraine may lose its powers on the grounds stipulated by Article 82(2) of the Constitution of Ukraine (when it has fewer than 300 elected members).

## Calling local elections at the level of territorial communities

The situation is somewhat more complicated regarding the powers of local self-government bodies of territorial communities during martial law and, consequently, the grounds and the need for extraordinary elections of particular local self-government bodies after the termination (lifting) of martial law. Such grounds are not clearly defined by law.

Pursuant to Article 9 of the Law of Ukraine “On the Legal Regime of Martial Law”, local self-government bodies exercise the powers assigned to them by the Constitution and laws of Ukraine during martial law. Nonetheless, according to this Law, *military administrations of settlements* may be established in territorial communities (settlements). The grounds for their establishment in any community shall be the failure of the community council, its executive authorities and/or community head to fulfil their duties, or violations committed by the village, town or city mayor when exercising the powers entrusted to him/her under martial law.

Under normal circumstances (where no martial law or state of emergency is introduced), the failure of a local council or a village, town or city mayor to exercise their powers may lead to early termination of the powers of the council or the community head, respectively (Articles 78 and 79 of the Law of Ukraine “On Local Self-Government in Ukraine”), whereupon extraordinary elections should be called.

The head of a community may be appointed head of the military administration of a respective settlement. The article is unclear whether in such case he/she stays the village, town or city mayor, i.e., the principal official of a territorial community, and Article 79 of the Law of Ukraine “On Local Self-Government in Ukraine” only provides a *possibility* to terminate their powers in such a case.

According to the Law of Ukraine “On the Legal Regime of Martial Law”, the Verkhovna Rada of Ukraine can adopt a decision entrusting the head of a settlement military administration to exercise the powers of a respective local council, its executive committee, and the community head. Such a decision is taken *at the discretion* of the Parliament, probably following the assessment of a specific situation. Therefore, if the Verkhovna Rada of Ukraine does not make that decision it can be assumed that the local authorities of a respective territorial community continue to function and exercise their powers along with the settlement military administration. However, if the Verkhovna Rada of Ukraine adopts such a decision, the functions of the respective community authorities shall be *suspended* while the military administration exercises these powers, and they continue a latent inactive existence. The functions of these authorities may be restored by a decision of the Verkhovna Rada of Ukraine following the termination of martial law and within 30 days after its termination. If respective legal grounds emerge during this period, such as the local self-government has not resumed *de facto* its functions for some reason, an extraordinary local election shall be called (Article 10 of the above Law).

It is worth noting that these provisions are inconsistent with the provisions of Article 78 of the Law of Ukraine “On Local Self-Government in Ukraine”, which provides for early termination of the local council powers *from the date of the establishment* of a respective military-civilian or military administration.

The most likely grounds for calling an *extraordinary* election may be the inactivity of a local council due to the failure of more than half of its members to participate in a council session (this prerequisite for competence of a council session is established by the Law of Ukraine “On Local Self-Government in Ukraine”). The reasons for it may be permanent absence of councillors (death of a councillor, voluntary renunciation of one’s mandate, departure for long-term residence outside Ukraine, loss of citizenship, as well as, possibly, high treason or collaborationism<sup>1</sup>), which can affect the competence of the council as an authority (Article 45(4) of the Law of Ukraine “On Local Self-Government in Ukraine”), as well as their long absence due to military service, or moving to another region of Ukraine, which only affects the competence of a council session.

The composition of a council that is elected under the proportional representation system can be supplemented by replacing vacant seats. In order to fill in vacant seats in the council of a territorial community with up to 10,000 voters where, in accordance with the Electoral Code, elections are held under a majority representation system, *by-elections* shall be called in respective constituencies (rather than an extraordinary election of the entire council).

There is another reason for early termination of the powers of an authority. The Law of Ukraine “On the Legal Regime of Martial Law” allows establishing a military-civil administration in a settlement (community) after termination of martial law. However, in accordance with Article 3 of the Law of Ukraine “On Military-Civil Administrations”, if a military-civil administration is established in a settlement, the powers of respective village, town or city councils and village, town or city mayors shall be terminated upon the appointment of the head of the military-civil administration. It should be noted that military-civil administrations were established in some communities of the Donetsk and Luhansk regions even before the beginning of the large-scale Russian armed aggression on 24 February 2022; the powers of respective local self-government bodies there were terminated, and they were not elected at the 2020 local elections.

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1. The possibility of losing citizenship, as well as the potential impact of committing crimes of treason or collaborationism on the availability of electoral rights, including passive ones, are discussed below in Clauses 3 and 4.



## Calling elections to district (rayon) and regional (oblast) councils

The authority of district and regional councils during the period of martial law is not clearly defined either.

The grounds for establishment of a regional or district military administration are somewhat broader in comparison to those for the settlement military administrations. The main ground, i.e., managing defence, public safety and public order, is not directly related to the activities of local self-governments at the regional or district levels. This was the ground invoked by the Decree of the President of Ukraine “On the Establishment of Military Administrations” No. 68/2022 dated 24 February 2022.

The other two grounds for the establishment of a regional or district military administration (as indicated in Article 4(4) of the Law of Ukraine “On the Legal Regime of Martial Law”) are the inactivity of a respective regional or district council (failure to convene a session of the council within the time limits established by law) or early termination of powers of the council on the grounds prescribed by the Law of Ukraine “On Local Self-Government in Ukraine”. Considering that military administrations were established by the above Decree of the President of Ukraine; these are currently of only theoretical interest.

Article 10(3) of the Law of Ukraine “On the Legal Regime of Martial Law” stipulates that in the case of the establishment of a regional or district military administration, as well as in the case of a temporary occupation or encirclement of a central regional city (and, as follows from the context of the provision, also a central district city, although this is not directly specified), the regional and district councils *shall not exercise their powers*, which are instead transferred to the respective regional or district military administrations (para. 1 and 3 of Article 10(3)).

The words “shall not exercise their powers” means *suspension* rather than termination of the powers of these local authorities; as in the case of self-governing bodies of a territorial community, such authorities continue to exist ‘latently’, staying inactive until martial law is lifted. If threats to security, law and public order in the region are eliminated, the Verkhovna Rada of Ukraine can resolve to resume the duties of local authorities in the region (i.e., regional and district councils) at the request of the President of Ukraine, but such a resolution can only be made within 30 days upon termination (lifting) of martial law.

Extraordinary elections of a council shall be called should any legal grounds thereto emerge within this 30-days period. Most likely, this may be the reaction to forced inactivity of the regional or district council due to the failure of more than half of the members of the council to be present at the council session resulting from vacant seats or the absence of a significant number of councillors, as described above. Another less likely reason may be the intentional adoption by the council, after restoration of its powers, of a decision that is not compliant with the Constitution and laws of Ukraine. Finally, another ground for early termination of the powers of a regional or district council after termination (lifting) of martial law is the establishment of a military-civil administration in the administrative-territorial unit: pursuant to Article 3 of the Law of Ukraine “On Military-Civil Administrations”, the powers of a regional or district council shall be *terminated* (rather than *suspended*, and therefore cannot be restored) upon entry into force of a relevant act of the President of Ukraine on the establishment of such administration. Although – as stipulated in the same Law – the powers of a military-civil administration shall be terminated upon convening the first session of a newly elected local council, the said Law does not specify the terms for calling extraordinary local elections in communities and administrative-territorial units where the powers of local self-government bodies were terminated due to the establishment of a military-civil administration. 2020 elections showed that holding even ordinary local elections in certain communities may be deemed impossible for security reasons.

## Grounds for calling extraordinary local elections

Thus, the Verkhovna Rada of Ukraine may call extraordinary local elections after termination (lifting) of martial law on the following grounds (pic. 1).

However, not all of these grounds are clearly established by law; some of them are appropriate but not statutory. Another drawback of legislative regulation is that individual components and aspects of these grounds are scattered across a number of acts, i.e., the laws of Ukraine “On the Legal Regime of Martial Law”, “On Local Self-Government in Ukraine”, as well as certain provisions of the Law of Ukraine “On Military-Civil Administrations” and the Election Code.



## Grounds for calling extraordinary local elections

- 1 INACTIVITY** of a local council and/or the village, town or city mayor **for the duration of martial law**, that resulted in the establishment of a settlement military administration
- 2 TEMPORARY OCCUPATION** of a territorial community or an administrative-territorial unit as a result of which the relevant local self-government body ceased to exist (lost its powers)
- 3 VACANT position** of the village, town or city mayor (as a result of death, loss of mandate due to departure for long-term residence outside Ukraine, or an act of treason or collaborationism)
- 4 INACTION** of a local council within 30 days **following termination (lifting) of martial law** due to its failure to hold a competent session of a council
- 5 FAILURE** to restore the powers of a local council within 30 days following termination (lifting) of martial law due to the loss of powers by a local council as a result of the decreased number of its members by more than half
- 6 ESTABLISHMENT** of a military-civil administration in a community or an administrative-territorial unit after termination (lifting) of martial law (with postponement of elections for an indefinite period)

Picture 1

Furthermore, in the communities with up to 10,000 voters, *local by-elections* may need to be called and held in certain constituencies in order to fill in vacant seats of council members, instead of an extraordinary election of the entire council. It should be noted that the entity calling such elections in accordance with the Election Code shall be the territorial election commission (challenges related to resuming the functioning of territorial election commissions can be seen in Section 6 below).

The state of the local self-government bodies in regions, districts and territorial communities should be monitored after termination (lifting) of martial law to assess whether extraordinary local elections, or by-elections, need to be held. It would be desirable to carry out such monitoring during the transitional 30-day period after termination (lifting) of martial law. However, the time period required to complete such monitoring may be longer depending on the specific situation.

In this regard, it is recommended to take the following steps:

- at the legislative level, to clarify the grounds and cases for early *termination* of powers of village, town or city mayors, local councils and individual members of local councils in order to ensure legal certainty regarding the need to call the elections and avoid conflicts caused by ambiguous interpretation of current legislation; it is also desirable to set them out systematically in a single law (the Law of Ukraine “On the Legal Regime of Martial Law” may be the most appropriate one), allowing for sufficiently complete and comprehensive regulation of all aspects and terms of the transition period from the legal regime of martial law to peacetime;
- at the level of the Cabinet of Ministers of Ukraine, to develop an algorithm, procedures and deadlines for monitoring the state (existence and capacities) of local self-government bodies to determine whether there are grounds and need for holding extraordinary local elections or by-elections in territorial communities, districts and regions, and to identify the entities authorised to carry out such monitoring.

## 2. Timeframe for calling and holding elections after the martial law is lifted

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The regulations are largely incomplete and inconsistent with regard to the timeframe for calling and holding elections, the need for which arose during or as a result of martial law.

Regarding *calling by-elections of People's Deputies of Ukraine* in individual constituencies (see the section above), there are no special regulations adapted for the period after termination (lifting) of martial law. Pursuant to the still valid Law of Ukraine "On Elections of People's Deputies of Ukraine" (2011), the decision on calling by-elections for a People's Deputy in a single-mandate constituency shall be made by the Central Election Commission within ten days following the early termination of powers of a People's Deputy elected in a particular constituency.

The procedures for early termination of powers of a People's Deputy of Ukraine, depending on the grounds for it, are defined by Article 81 of the Constitution of Ukraine. In particular, in the case of voluntary resignation of a People's Deputy, termination of a People's Deputy's citizenship, or his or her departure for permanent residence outside Ukraine, the Verkhovna Rada of Ukraine adopts a decision on termination of his or her powers. In case of violation of mandate incompatibility requirements, the decision on early termination of People's Deputy's powers shall be made by a court (according to Article 22(4) of the Code of Administrative Procedure, such cases are considered in the first instance by the Supreme Court). If a People's Deputy, elected from among the candidates of a political party, fails to join the parliamentary faction of this political party or leaves such a faction, the decision to terminate the powers of a People's Deputy shall be made by the party's highest governing body (congress). Finally, the powers of a People's Deputy shall be terminated prematurely without a special decision upon occurrence of the following: entering into force of the conviction of a People's Deputy upon a court's verdict; recognition of a Deputy as incapacitated or missing (certified by a court decision); a People's Deputy's death certified by a death certificate.

All the above-mentioned grounds for early termination of powers of a People's Deputy of Ukraine can be valid during martial law. However, under martial law, by-elections of a People's Deputy cannot be held within the ten-day period following the adoption of a relevant decision or the occurrence of a certain fact. In this case, application of Article 20 of the Election Code regulating the effect of martial law on elections seem doubtful, since it does not mention by-elections of People's Deputies, and such elections are regulated by the Law of Ukraine "On Election of People's Deputies of Ukraine". Therefore, considering that the Central Election Commission, that is authorised to call by-elections of People's Deputies, shall only act within its competence, on the basis and in the manner established by the Constitution and laws of Ukraine (Article 3 of the Law of Ukraine "On the Central Election Commission"), clear legislative instructions shall be provided regarding the timeframe for by-elections of People's Deputies of Ukraine in individual single-mandate constituencies where the grounds for calling and holding by-elections arise during martial law or come up immediately after it is lifted.

The Election Code has established a deadline for calling elections where the electoral process was suspended or failed to start due to the introduction of martial law. The deadline is no more than one month upon termination (lifting) of martial law. It does not seem realistic, and it is also inconsistent with the 90-day period established by Article 19 of the Law of Ukraine "On the Legal Regime of Martial Law", although the latter period applies only to local by-elections.

Therefore, the timeframe for by-elections, if the grounds for calling and holding them arise during or become known immediately after lifting martial law, is not regulated by law. It is desirable to fill in this legislative gap by amending the Law of Ukraine "On the Legal Regime of Martial Law". At the same time, the timeframe for calling such elections should be discussed, considering the possibility of extending them up to six months in certain cases (in particular, for reasons of election security; see Section 7 below).

The ambiguity of the timeframe for *calling extraordinary local elections*, that shall be called, according to the Constitution of Ukraine, by the Verkhovna Rada of Ukraine, is caused by the already mentioned conflict of Article 20 of the Election Code (“within a month”) and Article 19 of the Law of Ukraine “On the Legal Regime of Martial Law” (“within ninety days”), where both provisions are related to local elections. Standard methods of resolving conflicts between legal provisions are controversial since the Election Code is a more recent act, but a general one for the appointment of elections, while the Law of Ukraine “On the Legal Regime of Martial Law”, although adopted earlier, is undoubtedly a special act with regard to the subject of its regulation.

This conflict needs to be eliminated by the legislators. We think it is better to give preference to a longer term of three months; moreover, it is worth considering an extension of this term in certain cases or even in general.

The timeframe for calling local elections may need to be extended in the following situations:

- where it is necessary to count the actual residents (voters) in a territorial community or within an administrative-territorial unit (see below);
- where the population of a territorial community has significantly decreased as a result of destructions, evacuation or forced displacement and conditions should be created for the residents to return;
- where there are problems with manning territorial election commissions authorised to organise the preparation and administration of extraordinary elections, as well as to call (if necessary) local by-elections in individual constituencies (see Section 6 below);
- where it is impossible to restore the infrastructure in time (lack of suitable election premises, transportation or communication problems) or to ensure safety and security, including through demining territories (see Section 7 below).

Extending the timeframe for calling extraordinary local elections after martial law is lifted would also require consideration of the possibility to extend the term of office of military or military-civil administrations established in the locations where local self-government did not function.

The *timeframe for calling* extraordinary local elections is closely related to the *timeframe for holding* such elections. According to Article 5 of the Election Code, all local elections (except the regular elections that are held on the day determined by Article 141(3) of the Constitution of Ukraine), including extraordinary elections and by-elections, shall be held twice a year, on the last Sunday of March and the last Sunday of October.

With the deadline established by the Election Code for the start of the electoral process at a local election, i.e., fifty days prior to the voting day, it is clear that in order to hold such election on the last Sunday of March, it should be called at least at the end of January; an election called in February will be held at the end of October, i.e., eight months later. However, the need to resume the activities of the local self-government may require holding such elections more promptly. Therefore, it is worth considering a possibility not to apply the above provisions of the Election Code as regards the voting day for extraordinary local elections and local by-elections if the grounds for calling and holding such elections arise during martial law or immediately after martial law has been lifted.

### 3. Voter records and information update

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Significant demographic changes in Ukraine were caused by the large-scale displacement of the population from the territories affected by the hostilities, occupied or under the threat of occupation, to other regions within the country or even beyond the borders of Ukraine, and by a significant number of victims, in particular among the civilian population, and military mobilisation processes. All these factors have negatively affected the reliability of the information in the State Register of Voters: the Register database as of 24 February 2022 does not reflect the dynamic current developments. Extensive migration of the population will obviously continue for a certain time after termination (lifting) of martial law, and the approximate duration of such processes cannot be estimated now.

The grounds analysed above (see Section 1) make it clear that the elections that may take place after termination (lifting) of martial law will be held in limited areas – within a single-mandate constituency in the case of by-elections of a People’s Deputy, within a territorial community (or even a separate multi-mandate constituency in small communities), district or region – in the case of extraordinary local elections (or by-elections, respectively). In fact, any elections the need for which may arise during or as a result of martial law have residency requirements for a voter entitled to vote at such elections: a citizen’s right to vote at an election depends on whether his or her electoral address is within the territory where the election is held.

Both by-elections of People’s Deputies in individual single-mandate constituencies and extraordinary local elections (or local by-elections) are organised and held within single-mandate constituencies, territorial communities or administrative-territorial units such as districts or regions; election precincts are not supposed to function outside the respective territory.

First and foremost, it should be taken into account that people who have been forced to leave or abandon their place of residence following hostilities or to avoid negative consequences of an armed conflict or temporary occupation are internally displaced persons in accordance with Article 1 of the Law of Ukraine “On Ensuring the Rights and Freedoms of Internally Displaced Persons”. The Election Code of Ukraine in combination with the Law of Ukraine “On the State Register of Voters” allows the internally displaced persons to determine their electoral address, and therefore the place of participation in elections, according to their current place of residence, thereby ensuring their voting rights. Competent local authorities should keep accurate records of internally displaced persons, thus taking into account the respective data while updating the information in the State Register of Voters.

It should also be noted that a significant number of Ukrainian nationals have moved abroad looking for shelter. However, neither by-elections in single-mandate constituencies nor local elections are organised or held outside the territory of Ukraine. Since 2019, for reasons of security and free expression of people’s will, voting at national elections has not been held on the territory of the aggressor state where a significant number – unofficially, more than 1 million of Ukrainian nationals have been forcibly deported to.

All these factors require, in view of the timeframe for holding elections after termination (lifting) of martial law, a prompt update of the State Register of Voters primarily, but not exclusively, regarding the voters’ place of residence and electoral address allowing them to participate in respective elections. Mechanisms for updating voters’ personal data established by the Law of Ukraine “On the State Register of Voters” are insufficient in the context of such large-scale demographic and migration processes. It is also quite possible to have human resource problems at the local authorities maintaining the State Register of Voters, especially in the areas of hostilities or temporarily occupied territories, and it will require special efforts to make sure that the State Register of Voters is updated.

## Preservation of the voter status under occupation

Complex processes and events related to the course of war, including the actions of the occupation regime against the population of the temporarily occupied territories, require clarifying whether certain persons have the Ukrainian voter status giving one the right to vote in elections and referenda.

According to Article 70 of the Constitution of Ukraine, citizens of Ukraine shall have the right to vote in elections and referenda. Article 25 of the Constitution of Ukraine prohibits deprivation of Ukrainian citizenship initiated by the State. However, the Law of Ukraine “On the Citizenship of Ukraine” allows for *renunciation of Ukrainian citizenship* and *loss of Ukrainian citizenship*.

A national of Ukraine who permanently resides abroad can renounce his/her Ukrainian citizenship. Such a renunciation is carried out at the request (petition) of a citizen. This aspect does not pose any particular problem for voter registration, although legislation may need to be improved regarding consular registration of Ukrainian nationals who reside or have been on a long-term stay outside Ukraine, including on the territory of the aggressor state, whether voluntarily or forcibly.

The issue of the loss of Ukrainian citizenship is somewhat different. According to para. 1 of Article 19(1) of the Law of Ukraine “On the Citizenship of Ukraine”, voluntary acquisition of the citizenship of another state by an adult national of Ukraine shall be a ground for losing Ukrainian citizenship. At the same time, voluntary acquisition implies any situation where a citizen of Ukraine, in order to acquire citizenship of another state, had to apply for such acquisition in accordance with the procedure established by the national legislation of the state whose citizenship has been acquired.

On the occupied territories of Ukraine, the occupying authorities have issued passports of the Russian Federation, i.e., documents certifying citizenship of the aggressor state. This process has become especially large-scale in the occupied Crimea and some areas of Luhansk and Donetsk regions that had been under occupation since 2014. Russian passports (and therefore citizenship) are obtained according to the procedures established by the Russian legislation. It can be assumed that in some of these cases Russian passports were obtained under compulsion rather than voluntarily, but in cases of proven voluntary acquisition of citizenship of the aggressor state, there are grounds for the loss of Ukrainian citizenship.

Preserving such persons’ right to vote in the elections of national or local authorities would pose a threat to national security. Therefore, it would be necessary to regulate the procedure for identification of persons who have voluntarily acquired citizenship of the aggressor state and record the loss of Ukrainian citizenship by such persons. This should take place simultaneously with updating information in the State Register of Voters and be respectively reflected therein. It should be noted that this would require significant improvement of a number of provisions of the Law of Ukraine “On the Citizenship of Ukraine”, both regarding the grounds for the loss of citizenship and regarding the renewal of citizenship or re-admission to the citizenship of Ukraine for such persons.

## Restriction of active suffrage for committed crimes against the foundations of national security of Ukraine

Another significant socio-political issue is preserving the right to vote for citizens of Ukraine who have committed crimes against the foundations of Ukraine’s national security, i.e., actions in support of the armed aggression or the occupation or puppet administrations in the temporarily occupied territories. These actions constitute crimes defined by Article 110 (Encroachment upon the Territorial Integrity and Inviolability of Ukraine), Article 110<sup>2</sup> (on the financing of such activities), Article 111 (State Treason), 111<sup>1</sup> (Collaborationism), Article 111<sup>2</sup> (Assistance to the Aggressor State) that prescribe serious penalties. However, according to the Constitution of Ukraine, persons serving sentences for committed crimes, including prison sentences, do not automatically lose their right to vote as a result of the conviction; this position was confirmed by the Constitutional Court of Ukraine in its decision of 1998 in a parliamentary election case. In other words, Ukraine has no restrictive requirement (a general limitation established by law) regarding the right to vote as a consequence of imprisonment. Introduction of such a restrictive requirement in Ukraine is impossible as it would require amending the Constitution of Ukraine, which would contradict Article 157 thereof.



However, besides adopting a restrictive electoral requirement, there are ways of depriving *certain categories* of convicted persons of the right to vote in the form of a criminal sanction for certain types of crimes. It is worth noting that the punishment established by the court in the form of deprivation of political rights was applied for collaborationism by the European states that were subjected to German occupation during the Second World War, in particular, France, the Netherlands, and Belgium. Today, similar sanctions are established in the criminal law of some post-communist states, such as Poland. This experience should be taken into account in Ukraine in future post-war conditions.

Similar issues that arise in relation to passive suffrage of these categories of persons are presented below (see Section 4 below).

## Updating information in the State Register of Voters

If the issues of voters' registration and updating information about them are not addressed through existing mechanisms that are not adapted to the situation, it will cause the risk of significant inaccuracy of voter lists at the elections that will be held after termination (lifting) of martial law. This may result in extensive violations of electoral rights, allow large-scale falsifications during the elections and distortion of the real will of the Ukrainian people, therefore undermining both the legality of the elections and the legitimacy of the bodies formed on the basis of the elections results.

Another challenge is to ensure an accurate voter headcount. It would require the development and approval of a comprehensive post-war action plan to dramatically update the State Register of Voters, rather than simply clarify its certain aspects, and ensure the reliability of the database. It is expedient to develop such a comprehensive action plan in a similar manner to the measures that were carried out in 2005-2006 during the formation of the so-called "general voters lists" based on the Law of Ukraine "On Elections of People's Deputies of Ukraine" as amended in 2005. In addition to facilitating the compilation of reliable lists of voters during the 2006 elections, the resulting database set the ground for filling in the State Register of Voters database in 2009.

Obviously, the procedure for drawing up "general voters lists" implemented in 2005-2006 would need a significant modification and update in current situation. One should take into account the existence of the State Register of Voters as an automated information and communication system, and its entries should serve as the basis for the procedure; the network of agencies maintaining the Register, albeit with possible challenges regarding the restoration of their effectiveness in the areas of military operations or in the temporarily occupied territories; finally, the powers of local executive authorities regarding the development and maintenance of territorial community registers (Article 37<sup>1</sup> of the Law of Ukraine "On Local Self-Government in Ukraine"), the procedures for development, maintenance and administration of which were set up in the Resolution of the Cabinet of Ministers of Ukraine No. 265 of 7 February 2022.

Implementation of a comprehensive action plan to update the State Register of Voters database will require an appropriate legislative framework that would determine specific tasks, stages and timeframe of the action plan, as well as the responsible implementors, while the Cabinet of Ministers of Ukraine can identify specific steps with its by-laws. The appropriate legislative framework is to be eventually implemented by the Central Election Commission as the manager of the State Register of Voters, local self-governments, the State Migration Service of Ukraine, the State Border Guard Service of Ukraine, the Ministry of Foreign Affairs of Ukraine, so it may be developed with the participation of the Central Election Commission, the Ministry for Communities and Territories Development, the Association of Ukrainian Cities, as well as NGOs that have the appropriate expertise.

# 4. Ensuring passive suffrage

The existence and exercise of passive suffrage is subject to constitutional requirements and electoral law, mostly the Election Code. However, the elections held in recent years demonstrated that imperfect legislative provisions caused disputes even in peacetime. Extraordinary elections or by-elections in the post-war period can potentially lead to an increased number of such disputes due to insufficient regulatory clarity caused by different interpretation of respective restrictions with regard to the wartime developments.

## Passive suffrage requirements

The passive suffrage requirements for elections of People’s Deputies of Ukraine are generally defined by Article 76 of the Constitution of Ukraine. These requirements partially coincide with requirements for active suffrage described above; this directly concerns the requirement to have Ukrainian citizenship (challenges related to citizenship are analysed above; see Section 3) and civil legal capacity, full or limited, which is not disputed or presented here.

An important feature of passive suffrage at national elections is the restriction of its subject by the residence requirement in a fairly general form, i.e., the requirement to have been living in Ukraine for the last five years. The purpose of this requirement is to make sure that potential People’s Deputies are sufficiently aware of specific challenges of the state and public life of Ukraine.

Obviously, living in the territory of Ukraine cannot be absolutely uninterrupted. Article 134 of the Election Code lays down the exceptions that are not treated as violations of the requirement of continuous residence in Ukraine. This includes, inter alia, the following cases (pic. 2).

**Exceptions that are not treated as violations of the requirement of continuous residence in Ukraine**

- ≤183 DAYS**  
THE TOTAL period of staying outside Ukraine of up to 183 days during each of the five years
- ≤90 DAYS**  
A ONE-TIME (continuous) private trip abroad lasting up to 90 days
- Going abroad (in this case, the duration is not important):
  - on a **business trip**;
  - for **training**;
  - on **vacation**;
  - for **treatment** prescribed by a competent healthcare institution

Picture 2



A significant number of Ukrainian citizens have left Ukraine to escape from the war after the onset of the large-scale Russian aggression against Ukraine: according to various sources, several million people crossed the borders of Ukraine. Although a significant part of them are children and minors, it can be assumed that half of those having fled from Ukraine are voters. Therefore, it can be assumed, with account of age requirements, that at least two million passive suffrage holders are currently abroad. For many potential election candidates, the continuous period of staying abroad has already exceeded 90 days.

Going abroad for the purpose of escaping the war threat is not listed among the reasons that do not deprive an individual of passive suffrage. However, restricting the right to stand for election on this basis cannot be considered a measure proportionate to the above-mentioned purpose of the established requirement in all cases. Considering the long-term consequences of disqualification due to staying abroad (five years for the election of People's Deputies and ten years for the election of the President of Ukraine), this calls for an appropriate response by the legislator: applicable provisions of the Election Code should provide a clear understanding of the grounds that deprive an individual of one's passive suffrage rights (for example, in case of persons liable for military service going abroad), as well as grounds that do not lead to disqualification of a candidate (in particular, when mothers with children leave for abroad). Unless this is done, one can expect plenty of disagreements when clarifying the reasons for staying abroad (vacation, business trip, training, treatment), for which the period of staying abroad is not limited.

In order to have reliable information about Ukrainian nationals who have left the country, it would be necessary to set up a mandatory register (database) of persons who leave or enter Ukraine during martial law and for a certain period of time after its termination (lifting).

Pursuant to Clause 10 of Article 20 of the Law of Ukraine "On the State Border Service of Ukraine", the State Border Service is currently authorised to develop a database of persons who have crossed the state border of Ukraine exclusively "for the purpose of intelligence, counter-intelligence support for the protection of the state border of Ukraine, operational investigations, counteracting organised crime and combating illegal migration", and the use of such information for other purposes is not prescribed by law. However, the present situation will require registration of Ukrainian nationals who have left and later returned from abroad to Ukraine for many purposes, including election-related ones.

It should be noted that a database entry featuring information on a citizen of Ukraine who is entering or leaving Ukraine with a passport of a foreign country serves as confirmation that the person has voluntarily acquired foreign citizenship and is using that status, which may serve as a ground for losing his or her Ukrainian citizenship (see Section 3 above).

### **Criminal records as grounds for losing passive suffrage**

A conviction for committing an intentional crime as a ground for losing one's passive suffrage rights in the elections of People's Deputies of Ukraine would seem to pose no problems. New Articles 111<sup>1</sup> (Collaborationism) and 111<sup>2</sup> (Assistance to the aggressor state) of the Criminal Code directly establish sanctions in the form of deprivation of the right to hold certain positions or engage in certain activities for a period of ten to fifteen years. Assuming that 'certain positions' also include elected office (as practiced in the doctrine of criminal law and in court case law), and that a People's Deputy of Ukraine is a public official, such a sanction essentially deprives the convicted persons of passive suffrage not only for the period of its validity, but also while the criminal record is in effect before it expires or is cancelled.

However, this limitation of passive suffrage is not applicable prior to the entry of a guilty verdict into force. Given the considerable length of criminal proceedings, even at its judicial stages, it should be noted that such persons will most likely not be deprived of their passive suffrage rights on this ground at the elections following the termination (lifting) of martial law. We believe that the legislators should pay attention to this aspect.

The Constitution of Ukraine does not establish passive suffrage restrictions at local elections. In this regard, Article 193 of the Election Code grants passive suffrage rights to all citizens of Ukraine who have the right to vote in accordance with the Constitution of Ukraine (who have attained the age of 18 and have not been recognised as legally incapable by a court), with an additional disqualification condition for those with a criminal record that has not been cancelled or expired in accordance with the procedure established by law, for committing:

- a severe or an especially severe crime;
- a criminal offence against the electoral rights of citizens;
- a criminal offence of corruption;
- a criminal offence against the foundations of national security of Ukraine as established in Article 111<sup>1</sup> (Collaborationism) of the Criminal Code of Ukraine.

There are more criminal offences against the foundations of national security of Ukraine established by the Criminal Code of Ukraine in the category of crimes; however, some of them are classified as minor crimes, and therefore commission of such crimes does not deprive a person of the passive suffrage at local elections. In the context of a full-scale war and its consequences, this issue should also be considered by the legislators.

Like with passive suffrage restrictions at the elections of People's Deputies (see Section 4), this restriction in its current form is not applicable before a guilty verdict enters into force. Therefore, persons who have committed crimes (among which treason, collaborationism or assistance to the aggressor state) will most likely not be deprived of passive suffrage at the elections to be held after termination (lifting) of martial law. This issue should also be carefully considered by the legislators. Appropriate measures could be introduced in procedural legislation, for example in the form of a court ruling to initiate criminal proceedings. Such measures might have a legitimate purpose aimed at proper functioning and preservation of the democratic regime.

### Residency requirement at local elections

The Election Code does not restrict passive suffrage at local elections by any residency requirement, as it is the case with national elections. Therefore, it is considered that such requirements do not exist. However, Article 5 of the Law of Ukraine "On the Status of Deputies of Local Councils" lays down that *leaving Ukraine for permanent residence abroad* shall be one of the grounds for automatic early termination of powers of a local council member (i.e., termination due to the fact, without taking any decision). It is evident that electing a person permanently residing outside Ukraine as a local councillor would lead to immediate termination of his/her powers; i.e., this reason for the loss of the mandate essentially acts as an additional electoral requirement that limits passive suffrage at the local council elections.

When one goes abroad for permanent residence or stays abroad for this purpose, it is documented by the State Migration Service within Ukraine, or consular offices of Ukraine abroad. Therefore, the Government has at its disposal the information about the persons who have formalised (legalised, from Ukraine's perspective) their permanent residence abroad. However, regulating the grounds for applying such a restriction has become more relevant due to the significant increase in the number of Ukrainian nationals who have left the country due to the war. In order to avoid misunderstandings and disputes on this matter, the Election Code should contain appropriate regulations regarding passive suffrage at local elections, and the State Register of Voters database should reflect respective information on the voters.

## 5. Ensuring competitive elections

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A competitive political environment is a necessary prerequisite to conduct elections in accordance with democratic standards. In fact, elections should not only make it possible to vote, but it is much more important to create conditions where voters can freely form their will and then express it by voting in elections.

There are much deeper and more complex challenges than just enabling political parties and their local branches to nominate candidates for elections. At the very least, a competitive political environment entails the requirement to guarantee free functioning of political parties and their local organisations, freedom of media, as well as equal competitive access to any information, organisational, financial and other resources that political parties and their local branches and candidates need to conduct their election campaigns.

### Resumption of political parties' activities

Under martial law, political activities have changed significantly. Political parties and their local branches have almost fully focused on supporting the primary defence needs of the society and their respective territorial communities. This situation has evolved naturally and reflects the realities and needs during the martial law, although there are no specific legislative provisions on that.

The Law of Ukraine "On Political Parties in Ukraine" does not specifically regulate the activities of political parties under martial law or state of emergency. At the same time, the Constitution of Ukraine allows for restriction of certain political rights, including activities of the parties under martial law (Articles 64, 36 and 37 of the Constitution). However, the Decree of the President of Ukraine "On the Introduction of Martial Law in Ukraine" No. 64/2022 of 24 February 2022 does not impose such restrictions on constitutional rights and freedoms. Therefore, even under martial law, political parties should not formally be subjected to significant restrictions in their activities since there are no legal grounds for such restrictions.

Still, activities of the parties are *de facto* reduced to provision of politically neutral support of the President of Ukraine and the initiatives of the ruling parliamentary majority (primarily, legislative activity of the Parliament). The functioning of the Verkhovna Rada of Ukraine during the introduced martial law shows quite effective cooperation between representatives of various political factions. During the war, the Verkhovna Rada of Ukraine organised its functioning in quite a precise manner: the Parliament convenes for plenary sessions, drafts the agenda, considers draft laws and approves them by finding a political compromise in most cases. Most laws are adopted with the support of all parliamentary factions and groups in the Verkhovna Rada of Ukraine, and the number of votes in a significant number of cases has even reached more than 300<sup>2</sup>. The same level of support for joint political decisions can be observed in the work of the parliamentary committees.

At the local level, the activities of local councils obviously have many peculiarities and complexities, but there is also a noticeable trend toward more politically neutral work of collegial representative bodies.

Thus, political parties, their local branches and their representatives at the Parliament and local representative bodies (local councils) have actually suspended their party work. This is good practice, as national defence should unite politicians, too. Departing from such an *apolitical* operating format will require some time and, obviously, additional efforts from political parties, their local branches, local councillors, and individual party activists.

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2. For the period of martial law, the official website of the Parliament does not display the results of the roll-call vote for each draft law separately, but respective conclusions can be made on the basis of the transcripts of the plenary sessions, that are promptly made public.

Therefore, a certain preparatory period for the full restoration of political parties' activities needs to be determined. Political actors, both at the national and local levels, should be given time to adjust their own programmes and political plans. It is important to provide an opportunity for the parties and their local branches to fully accumulate new political ideas, that should evidently take into account the consequences of the war and the prospects of post-war reconstruction. After all, participation in elections is primarily a competition of political programmes, that should be real and address all the urgent needs of society.

### Prohibition of certain political parties

The war has made it particularly important to counter the activities of political parties whose programme goals or actions are aimed at collaboration with the aggressor, liquidation of the independence of Ukraine, violation of the country's sovereignty and territorial integrity, undermining its security or other forms of illegal activities that are prohibited by the Constitution of Ukraine. The Parliament has introduced appropriate amendments to the legislation to support prompt measures to ban the activities of such political parties. This is quite an important aspect for safeguarding national security and defence, as elaborated further in this study (see Section 7 below). More than fifteen cases have already been initiated by the Ministry of Justice of Ukraine to ban the activities of certain political parties and are pending in the courts. The Ministry of Justice seems to continue scrutinizing the activities of political parties. It is hard to predict the exact number of possible new court proceedings following similar lawsuits to ban other political parties. Respective processes should be completed before elections are called, so that the participation in the election process of any of the political parties or their local branches that may pose a threat to national security and defence does not undermine the legitimacy of the elections, for example, through participation in the establishment of election commissions, nomination of candidates and participation in other election procedures.

### Political parties' capacity to participate in elections

For the effective and competitive participation of political parties in elections, they should be properly prepared in terms of organisation, so that the difficulties of the post-war period do not nullify their capacity to conduct electoral and party activities. Obviously, parties cannot completely restore their activities immediately after the martial law is lifted, but the general conditions for party work should at least guarantee equality before the law and impartiality of the central and local authorities. From this perspective, there are several types of problems that party organizations can face in the post-war period.



#### Structuring the network of political party local branches

Pursuant to the Law of Ukraine "On Political Parties in Ukraine", the establishment and operation of local branches (regional, city, district branches or other structural entities) of a political party is important for its effectiveness. The establishment of separate local branches of political parties is not a right but an obligation of a political party (Article 11(7) of the Law).

The work of party local branches *de facto* enables the full operational capacity of the party's national structures, and regular congresses (conferences, meetings) at various levels ensure the democratic nature of party work. It is worth noting that the administrative and territorial reform carried out in July 2020 significantly complicated the work of political parties. The adoption of several resolutions by the Cabinet of Ministers of Ukraine on the establishment of administrative centres, as well as approval of the territories of territorial communities in July 2020 and the adoption of Resolution of the Verkhovna Rada of Ukraine "On the Formation and Liquidation of Districts" No. 807-IX dated 17 July 2020, actually forced political parties to restructure their local branches. It affected both the community and district branch levels of some political parties, as well as the structure and composition of their governing bodies at the regional level (where district branches were represented in certain governing bodies). During the process of the regular and first local elections held on 25 October 2020, relevant changes in the administrative and territorial set-up of Ukraine considerably affected the participation of most political parties in the election procedures. There were significant difficulties, for example, to identify an appropriate local branch of a political party, where the territories of several former districts had been amalgamated into one new district, for nomination of candidates to the territorial election commissions, as well as candidates for the relevant local elections. Therefore, the Election Code of Ukraine provided a mechanism to ensure the priority right of the higher-level local branches of political par-

ties, primarily at the regional level, to exercise these powers (Articles 203, 204, 219-224 of the Election Code of Ukraine). Such legislative provisions enabled replacement of a party local branch by its higher-level branch, which can put in doubt whether local branches of some political parties meet the requirements of intraparty democracy and participation in respective elections.

Such challenges for political party activities, caused by changes in the administrative and territorial set-up, remain relevant for some political parties to this day. Under the circumstances, new war-related challenges (primarily, the occupation of some parts of Ukraine's territory) will significantly limit the functioning of the statutory bodies of local party branches, and, in some cases, the parties' governing bodies at the national level. Improper structuring of party local branches undermines in fact the possibility of participation in national elections for such parties, and in some cases it prevents them from participating in local elections at all.



## Human resources

To participate in elections, political parties should be able to actively involve their members in party work. It is not just about people who can become candidates from political parties and their local branches at respective elections, but also about party activists who actually organise its participation in the elections, primarily taking care of election campaigning and other organisational activities. The important role of the leaders and members of the statutory bodies of political parties, both at the national and local levels, should also be underlined, as the possibility of organisation and conduct of elections in general largely depends on the ability of party leaders and managers to work well – to assemble a quorum of collegial bodies, to hold meetings and make decisions, to prepare and submit the required documents to election commissions and other authorities, etc.

Today there is no clear and precise nation-wide statistics on the internal displacement of Ukrainian nationals and the number of people who left the country for permanent residence. Accordingly, no systematic and reliable data is available regarding the whereabouts of political party members on the territory of Ukraine, and most importantly, their readiness for party work.

It is also extremely important to know which party activists have been called to arms, including members and managers of party statutory bodies and their local branches. Obviously, there is no clear and systematic statistics on the enrolment of political party members to the Armed Forces of Ukraine and other military formations, as it is unlikely that the government records such information, and most political parties would not have the capacity to do this independently. It is important to emphasise that nationals of Ukraine liable for military service are usually conscripted before the end of a special period, that, in accordance with the Law of Ukraine "On Mobilisation and Mobilisation Training", covers the duration of martial law and, partially, of the reconstruction period after termination of hostilities. Therefore, party members conscripted under the martial law may be *de facto* prevented from participation in party activities for quite a long period of time.

Furthermore, one should not forget the legal restrictions for military personnel regarding their participation in political activities and party work in general. In particular, the Law of Ukraine "On the Armed Forces of Ukraine" stipulates that military personnel must suspend their membership in political parties for the period of military service (Article 17(1) of the Law). Similar restrictions have been established for members of territorial defence units: Article 11(11) of the Law of Ukraine "On the Fundamentals of National Resistance" prohibits the activities of political parties, including campaigning and/or use of any items depicting the symbols of political parties, in the national resistance system. Respective bans are also found in the Law of Ukraine "On Political Parties in Ukraine" stipulating that military personnel and citizens of Ukraine who are enrolled in voluntary formations of territorial communities cannot be members of political parties (paragraph 11 of Article 6 (3) of the Law of Ukraine "On Political Parties in Ukraine"). If compliance with the relevant legislation is monitored, which is unlikely during the war, any data thereon would hardly be publicly available. Therefore, the requirement of political neutrality and impartiality towards military personnel should also be taken into account as an essential factor when considering the possibility of calling, organising and holding democratic elections.

These and some other factors allow us to assert that the readiness of political parties to involve their members in active party work in the post-war period will require much time. Moreover, it will be extremely important to legislatively regulate the ways of dealing with obstacles to the participation in party activities of the persons who have concluded their military service and were demobilised.



## Organisational and financial capacities

A political party and/or its local branches obviously require significant resources as well as appropriate logistical support to participate in elections. It includes official costs directly incurred through participation in the election process (payment of cash deposit and financing pre-election campaigning) as well as indirect expenses (rent and maintenance of premises, salaries of party office employees, etc.). Under martial law, most parties have refocused their activities to meet the humanitarian needs of the population through participation in various public initiatives, including charitable and volunteer ones. In the post-war period, financial capacities of most political parties will clearly not be sufficient for full participation in elections.

Ukraine introduced state financing for statutory activities of political parties in 2015. The relevant provisions of the Law of Ukraine “On Political Parties in Ukraine” were significantly amended to adjust the subjects (the actual list of parties) entitled to receive such state financing. Ultimately, only political parties that participated in the distribution of mandates in the last regular or special elections of People’s Deputies of Ukraine were entitled to state financing of their statutory activities. Therefore, it is just about the parliamentary parties. However, financing of the statutory activities of these parties may be terminated. The National Agency for Prevention of Corruption sent a proposal to the Verkhovna Rada of Ukraine to amend the laws of Ukraine “On Political Parties in Ukraine”, “On the State Budget of Ukraine for 2022” to suspend state funding of political parties for the entire duration of martial law and streamline the annual amount of state funding of political parties by applying the subsistence minimum indicator for able-bodied persons instead of the current minimum wage indicator<sup>3</sup>. Adoption of such amendments will not only limit financial capacities of political parties under the introduced martial law but will also significantly reduce the amount of possible funding for them in the future. We will not discuss whether the proposed measure is expedient but will just note that its implementation will obviously require the political parties to find other additional sources for financing their activities. This will take some time.



## Safe work of political parties

In wartime, the activities of political parties and their local branches are also threatened by the military aggression. This primarily concerns the territories where active hostilities are taking place, the temporarily occupied territories, as well as the areas where there is a threat of hostilities or occupation. Freedom of political activities, freedom of speech, the ability to freely assemble and hold public events and other components important for a full-fledged party life are obviously limited. Numerous facts and examples of persecution (intimidation, kidnapping, torture, murder) of Ukrainian public and political figures by the armed forces of the Russian Federation in the temporarily occupied territories certainly exert at least psychological pressure on politically active citizens of Ukraine. Under such pressure, political activities cannot be completely free and democratic.

This factor obviously does not have a direct legal definition and is unlikely to be openly regulated by law, but it must be taken into account when assessing the democratic environment, i.e., the minimum necessary conditions for calling, organising and holding elections.

## Competitive access to media and other communication channels

Media and other communication channels focus on ensuring the primary needs of national security and defence in wartime. Obviously, under such circumstances, access to information (communication) channels is different for various political parties and their local branches. There are both objective restrictions related to the topics of the shows, broadcasts and information materials, and completely subjective ones, such as the impossibility of direct access to communication channels due to their special working mode in wartime.

It needs to be stressed on that ensuring competitive access to media is extremely important for the organisation and conduct of democratic elections. It should be taken into account, however, that the Election Code of Ukraine applies the media concept meaning that is traditional for the Ukrainian legislation. According to

3. Address of the Chairman of the National Agency for Prevention of Corruption to the Speaker of the Verkhovna Rada of Ukraine, dated 6 June 2022. No. 50-22/13533-22 (<https://bit.ly/3z37LN5>).



the provisions of the Law of Ukraine “On Information”, media are the means intended for public dissemination of printed or audiovisual information (Article 22(2) of the Law). An update of such a narrow approach is long overdue and relevant not only for Ukraine. Recommendation CM/Rec(2011)7 of the Committee of Ministers of the Council of Europe suggests that member states of the Council of Europe implement a new, broader notion of media in their national legislation. Such a notion should cover all actors involved in the production and dissemination, among a potentially large number of people, of the content (e.g. information, analysis, commentary, opinions, educational materials, materials related to culture, art and entertainment in textual, audio, visual, audiovisual or other formats), as well as software designed to facilitate interactive mass communication (e.g. social media) or other content-based large-scale interactive formats (e.g. online games), that are, in all these cases, subject to editorial control or content supervision<sup>4</sup>. The implementation of this new media notion in Ukraine requires both systemic changes in the legislation and review of some administrative and management processes. Obviously, this is rather a complicated and lengthy process. However, this approach is quite important for gradual application, given the large-scale and extremely wide use of electronic tools for information dissemination.

This approach requires a comprehensive review of the acts regulating election campaigning and some special information laws. In the conditions of war and constant threats to the national security, including information threats, it is extremely important to ensure proper regulation of respective issues.

Another important aspect is the media functioning, with account of the “United News” (#UArazom) joint information telethon. The decision to launch this telethon was made at a meeting of the National Security and Defence Council of Ukraine on 18 March 2022. In fact, it was decided that under martial law the implementation of a unified information policy was a priority issue for national security that would be ensured by uniting all national TV channels with predominantly information and/or analytical programming on a single information platform of strategic communication, 24-hour information marathon “United News” (#UArazom)<sup>5</sup>. Such a decision is reasonable and acceptable during the war. In the post-war period, however, bringing back media competition is a priority and a prerequisite for the creation of proper conditions for the free competition of political ideas and development programmes proposed by the existing and possibly new political parties and their local branches. This process is rather complicated but essential for holding free elections.

Therefore, the restoration of proper conditions for equal access to information resources requires some additional time after the end of the war. According to international standards, elections cannot be recognised as free unless there is a proper environment for the voters to form their will freely.

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4. Recommendation CM/Rec(2011)7 on a new notion of media (<https://bit.ly/3yldHtH>).

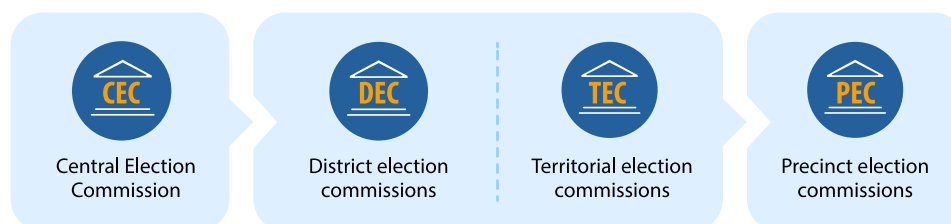
5. Clause 1 of the Decree of the President of Ukraine “On the Decision of the National Security and Defence Council of Ukraine dated 18 March 2022 ‘On the Implementation of a Unified Information Policy under Martial Law’” No. 152/2022 dated 19 March 2022 (<https://bit.ly/3RBWdYy>).

## 6. Challenges for election administration

Proper organisation and conduct of elections require smooth and coordinated work of a number of central authorities and local self-governments. In times of war, the activities of the authorities, various units and officials that are involved, in one way or another, in the organisation of the elections have undergone significant restrictions and modifications. Moreover, the full launch of the system of election commissions, which are the major entities administering the election process, will be fraught with difficulties. Main challenges in this area are described below.

### Competence of election commissions and possibility for their full operation

According to the Election Code of Ukraine, election commissions act as independent bodies that administer election processes; they ensure implementation of the basic principles of electoral law, the fundamental grounds of the electoral process, exercise of electoral rights by Ukrainian citizens, preparation and holding elections. The system of election commissions includes the Central Election Commission, district election commissions, territorial election commissions, and precinct election commissions (pic. 3).



Picture 3

As for the status and activities of the **Central Election Commission** under the imposed martial law, there is no special regulation of its functions during this period. The Law of Ukraine “On the Central Election Commission” does not mention any peculiarities as regards functioning of this body under martial law. In this situation, general restrictions provided by the legislation in accordance with the legal regime of martial law should apply. The Regulations of the Central Election Commission have been amended, enabling it to exercise its powers even under martial law. They stipulate that meetings of the Commission can be held with the use of technical means via video conferencing, with an optional simultaneous broadcast on the CEC official website<sup>6</sup> in case of introduction of martial law or state of emergency in Ukraine or in some of its areas, declaration of an emergency or quarantine in accordance with the procedure defined by law, or the occurrence of other circumstances that objectively prevent convening a meeting of the CEC under the usual procedure or threaten the life and health of the Commission members, employees of the Commission Secretariat and the Service of the Administrator of the State Register of Voters. The Central Election Commission holds its meetings regularly.

It is worth looking at the organisation of the functions of the Administrator of the State Register of Voters, as well as the relevant management bodies and regional entities administering the Register. Ensuring security of the Register and preventing any illegal use of information in its database is, obviously, the priority. The Central Election Commission responded in a timely manner to the war challenges and, in order to protect the integrity of the State Register of Voters database, it temporarily suspended the automated information and com-

6. Resolution of the Central Election Commission “On Approval of the Regulations of the Central Election Commission” (as amended by Resolutions of the Central Election Commission) No. 72 dated 26 April 2005 (<https://bit.ly/3ARsy86>).



munication system of the State Register of Voters for the duration of martial law in Ukraine. The maintenance of the Register by competent authorities has also been suspended for the duration of martial law. In addition to the challenges caused by the war, there were difficulties in organising the operation of the State Register of Voters caused by the administrative and territorial reform implemented in July 2020. The implementation of the Resolution of the Verkhovna Rada of Ukraine “On the Formation and Liquidation of Districts” No. 807-IX of 17 July 2020 on reorganisation and creation of state district administrations still cause many practical challenges and problems. The effects of the war only complicate and aggravate these problems, and the urgent need to solve them will certainly arise simultaneously with the need to restore and update the current version of the State Register of Voters in the post-war period, as noted above.

According to the Election Code of Ukraine, *territorial election commissions* are permanent bodies, and members of a territorial election commission shall exercise their powers until a new composition of the respective territorial election commission is formed in the manner prescribed by this Code (Article 33(8) of the Code). Therefore, even under martial law, territorial election commissions should continue their work. Taking this into account, there are several critically important aspects to be mentioned.

Firstly, the current composition of territorial election commissions requires constant monitoring during the war, since the existence of a competent territorial commission *de facto* allows it to hold meetings and exercise its powers. Under martial law, apparently, such powers are very narrow. However, at least the prompt exercise of its right to replace deputies whose powers have been early terminated is extremely important in the communities where local councils continue to exercise their authority as military administrations have not been established there.

Certain members of territorial election commissions cannot exercise their powers for objective reasons, e.g., they have moved to another settlement within Ukraine, they are serving in the Armed Forces of Ukraine or doing active volunteer work, etc. The situation is particularly challenging in the temporarily occupied territories, as well as in the areas where active hostilities are taking place, and it is extremely difficult to predict the ability of territorial election commissions to exercise their powers there.

Secondly, the above-mentioned war-related challenges make the need to introduce changes to the composition of territorial election commissions particularly dramatic. There are several difficulties, including the presence/absence in the community (where the election commission members actually reside and work) of enough qualified candidates to be put on the territorial election commissions, and the ability of the election commissions members to quickly and efficiently exercise their powers is especially important in wartime; readiness of the local branches of political parties to submit their nominations to replace members of the territorial election commissions in a timely manner, and this is true not only about the selection and submission of candidates, but also about the fulfilment of statutory requirements for the adoption of relevant decisions, their execution and submission by authorised persons at a local party branch.

Thirdly, a pressing issue is that persons nominated by local branches of the political parties whose activities have been prohibited by a court, can still be members of territorial election commissions. In accordance with the requirements of the Election Code of Ukraine and international standards, election commissions are independent bodies responsible for the administration of election processes, and their members should lose legal ties with the entity nominating them. Furthermore, any maintenance of legal ties should be perceived as a violation of the requirement of objectivity and impartiality. Therefore, the question of whether representatives of any nominating entity should remain in the composition of territorial election commissions should be decided, bearing this approach in mind. However, the Central Election Commission is already receiving resignation requests from certain members of territorial election commissions who were nominated by local branches of the political parties, the ban on whose activities is being considered in court.

In fact, an even more difficult problem is the possibility to nominate new candidates to territorial election commissions by local branches of the political parties the ban on whose activities is being considered in court but no court decision has entered into force yet. The Central Election Commission justifies its position, when considering relevant materials, by referring to the Decision of the National Security and Defence Council of Ukraine “On the Suspension of the Activities of Certain Political Parties” of 18 March 2022. However, this approach is legally vulnerable and requires legislative regulation.

In accordance with the Election Code of Ukraine, *district* and *precinct election commissions* are formed and operate temporarily only for the time that is necessary to organise and hold particular elections. Therefore,

their operations is not a pressing issue now, but the above problems as regards territorial election commissions will be also relevant for district and precinct election commissions.

Thus, under the introduced martial law, the election management entities administering the election processes in Ukraine adjusted their work to the challenges of the war. At the same time, large-scale problems related to the formation of the commissions and supporting the functions of lower-level election commissions require a detailed analysis and corresponding legislative changes. Otherwise, organising and holding elections in the post-war period will be extremely difficult, if possible at all.

## Required changes for the territorial organisation of elections

A significant number of internally displaced persons raise concerns the capability of the system of permanent election precincts to meet all the needs of the election process and to allow all the voters to vote properly. Respective issues have already been considered above (see Section 3), but it is also important to see how the changes in the data of the State Register of Voters may affect the system of election precincts and boundaries of territorial constituencies.

In accordance with the Election Code of Ukraine, the process of voting and vote counting shall be organised and held at the election precincts, formed by the Central Election Commission or a district election commission in accordance with this Code, and existing on a permanent or temporary basis. Election precincts existing on a permanent basis are formed and liquidated by the Central Election Commission in accordance with the procedure established by the latter. According to the Code, election precincts are formed for 20 to 2,500 voters. There are three types of election precincts: small – for up to 500 voters, medium-sized – for 500 to 1,500 voters, and large ones for more than 1,500 voters (Article 28(1), (2) and (4) of the Election Code of Ukraine).

According to the official data, there are millions of people who have been internally displaced during martial law in Ukraine<sup>7</sup>. At the same time, internal displacement is spread across all regions of Ukraine, although most IDPs move to the regions close to the areas where hostilities are taking place (Zaporizhzhia and Dnipropetrovsk regions) and to the western regions of Ukraine. In some localities, the number of officially registered internally displaced persons constitutes a very large share of the local population, if compared to the figures before 24 February 2022. The number of Ukrainian citizens who have left their homes and moved to other regions without registering the official status of internally displaced persons is most likely quite significant, although it will be almost impossible to obtain official statistics on this.

Therefore, one can assume that the number of voters who would prefer to exercise their electoral rights at the place of their temporary stay may be quite significant. It should also be taken into account that according to the amendments to the Law of Ukraine “On the State Register of Voters” introduced on 16 July 2020, the entity maintaining the State Register of Voters may, at the request of a voter, establish a different election address of the voter other than one’s place of residence (Article 8(3) of the Law). Furthermore, the voter’s request to change the election address can, in this case, be submitted in electronic form and does not require any additional justification<sup>8</sup>. Therefore, voters will be able to change their voting address without any obstacles already in the process of the respective elections (only within the first five days), even though it is difficult to predict the number of such cases. As a result, it will be extremely difficult to predict whether one can comply with the above Article 28(4) of the Election Code of Ukraine as regards the maximum number of voters at a regular election precinct. On the other hand, the number of voters will significantly decrease in the territories that the internally displaced persons have left behind.

Under such circumstances, the Central Election Commission will have to amend the list of the existing election precincts that operate on a permanent basis, and the description of their boundaries; in particular, it will probably be necessary to form new election precincts, liquidate the existing ones, as well as temporarily close some special election precincts. It is also noteworthy that formation of a new election precinct on a permanent basis shall take place before the process of the relevant elections starts, and the submissions shall be sent to the Central Election Commission at least ten days prior to the start of the electoral process at a

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7. More than 2 million people have registered as internally displaced since the introduction of martial law (<https://bit.ly/3cfxtVP>).

8. See the Procedure for consideration of a voter’s request to change the election address in accordance with Article 8(3) of the Law of Ukraine “On the State Register of Voters” approved by Resolution of the Central Election Commission No. 88 of 18 May 2020.

respective election<sup>9</sup>. These aspects of the functioning of the election precinct system need to be considered and resolved, particularly at the legislative level, as they directly create a number of significant organisational difficulties for elections in general.

The Election Code of Ukraine also stipulates that the number of voters should be taken into account when forming territorial constituencies for local elections. In particular, to elect village, town or city councils in territorial communities with up to 10,000 voters, the territory of a community shall be divided into multi-mandate constituencies. Such constituencies shall include approximately the same number of voters in relation to the council seats that are contested in the constituencies. The number of voters in a multi-mandate constituency formed within the territory of a village, town or city community, if possible, cannot exceed more than 15 percent from the approximate average number of voters in the constituency, per one council seat. In addition, such constituencies shall be formed by the relevant territorial election commission not later than on the second day of the election process (Article 199(2)-(4) of the Election Code of Ukraine).

As regards other types of elections, a significant increase or decrease in the number of voters will have smaller impact on their territorial organisation but may lead to large disparities in the number of votes regarding the weight of representative mandates at respective elections; and this would be a significant factor leading to the violation of the principle of equal electoral rights. This will also cause significant difficulties for administration of respective elections, as the operations of district and territorial election commissions can be hindered, and in some cases, perhaps, even completely blocked.

Therefore, the territorial organisation of elections will directly depend on the updates of the information in the State Register of Voters and will require a detailed analysis of both the need to ensure the equal “weight” of the votes and the difficulties related to administering the elections.

## Financial and technical support for election preparation and administration

Organising and holding elections require significant material resources. It is not just about direct costs from the national or relevant local budget, but also about a number of additional indirect costs that are essential in order to organise the operations of election commissions, voting, vote counting and tabulation. At least, several main areas where such problems may occur should be highlighted.



### Elections financing

Expenses for organisation of national elections and holding them shall be covered by the public budget funds allocated specifically for the organisation of respective type of elections, while the expenses for the organisation of local elections must be covered by the public budget and the local budget respectively (depending on the type of elections – by the local budget or the funds received as a targeted subvention from the State Budget of Ukraine) (Articles 90, 147 and 209 of the Election Code of Ukraine). Funds should be secured in a respective budget, and that requires a fairly accurate calculation of financial needs, which, in the context of post-war reconstruction, may be bigger than usual. Such a calculation cannot be fully carried out unless there is an understanding of the number of elections to be scheduled. In addition, appropriate funds should be allocated in the State Budget of Ukraine for the relevant year, at the time of its adoption, or the Parliament will have to introduce changes to the national budget.



### Premises for elections

The Election Code of Ukraine says that voting shall take place in specially designated and equipped premises. Such premises are subject to several requirements, both in terms of their area (voting premises shall have the area of at least 50 square metres for a small election precinct, at least 75 square metres for a medium-sized election precinct, and at least 90 square metres for a large election precinct), and in terms of their equipment standards. Election commissions should also be provided with premises to carry out their work, which is not directly related to voting. In particular, election commissions should be able to hold their meetings, produce

9. See the Procedure for the establishment of election precincts on a permanent basis, their temporary closure, liquidation and the introduction of changes in the information on the formed election precincts, approved by Resolution of the Central Election Commission No. 116 of 25 June 2020.

and properly store election documentation, use computers and other equipment, including automated information analysis systems, etc. A significant number of communities will face various obstacles when implementing these legislative requirements in the post-war period. The situation will be especially difficult in the areas where active hostilities took place or those hit by missiles or artillery fire.

## **Equipment**

The Election Code of Ukraine stipulates that local executive authorities and local self-governments, or other bodies (officials) that exercise their powers according to the law, as well as their officials shall provide election commissions – in accordance with the standards approved by the Central Election Commission – with transport vehicles, means of communication, equipment, implements and office appliances, that shall be returned after termination of activities of the election commissions (para. 3 of Article 61(1) of the Election Code of Ukraine).

The law requires that each voting premise be equipped with a sufficient number of booths for secret voting (there shall be at least two booths for small election precincts, at least four for medium-sized election precincts, and at least six for large election precincts), and each election precinct shall be provided with the necessary number of ballot boxes, stationary (large) and mobile (small) ones. The legislation establishes requirements for the number of such boxes and the procedure for their manufacturing and storage. The question of whether a community has preserved already available ballot boxes or there is a need to manufacture new ones should obviously be further clarified for each election precinct. The lack of the required number of voting booths or ballot boxes, or the use of boxes that do not meet the established standards can significantly undermine the constitutional requirement to ensure the secrecy of voting.

## **Transportation support**

The issue of transportation support for election commissions is not laid down by the election legislation. However, the practice of organising and holding elections reveals the extensive need for this type of support, at least when transporting ballot results reports drawn at an election precinct, as well as other documents, to a district or territorial election commission. The availability of vehicles and safety of movement in the area are equally important.

## **Communication channels**

Special attention should be paid to the availability of communication channels and whether they can be used effectively. Several aspects are important. First, it is vital to ensure the restoration of the permanent communication channels that were used for the functioning of the State Register of Voters and communication between the Central Election Commission and lower-level election commissions, including the functioning of the automated information analysis system. Not only should such communication be restored where it was lost, for example due to damaged networks, but electronic communication channels should be additionally checked for safety of use and prevention of external interference. Secondly, telephone and mobile communications should be restored in respective areas. After all, several provisions of the Election Code of Ukraine require the subjects of the election process to indicate their contact phone numbers to be used for communication with them. For example, an election commission must notify the persons concerned about the place, day and time of the election commission meeting to hear a complaint, by way of sending a registered telegram, fax, e-mail, telephone, telephonogram, or SMS (Article 70(3) of the Election Code of Ukraine).

The major financial and technical requirements for the elections specified above are the basic prerequisites for the organisation and conduct of full-fledged elections. Therefore, one of the main criteria to decide whether elections can be called in a certain territory should be an assessment of the local capacities to meet these requirements established by the Election Code of Ukraine.



## 7. Providing safety and security

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Elections as a democratic institution are only possible where a secure environment can be guaranteed so there is no threat to the safety of any participant. Ensuring safety and security of future elections in the post-war period requires an analysis of a number of factors that will affect the security of all election participants at all stages of the election process, and in some cases beyond it. We must focus on the following three main areas of concern.



### National security

Calling, organising and holding elections are undoubtedly a matter of national security. Interference in elections at any stage can lead not only to the distortion of the will of voters, but also to the undermining of the very institution of elections and encroachment on state sovereignty, which is especially relevant in the post-war period. Therefore, it is vital to continuously monitor potential threats to the national security, starting from the very possibility of calling and holding elections.

**Restrictions on calling elections.** In wartime, it is essential for the Government to consider various challenges and threats to the activities of public authorities, and a reasonable balance between military and civilian administrations shall be established. In the post-war period, this approach will be no less relevant. International peacebuilding standards quite often prescribe the introduction of a transitional public administration to develop the prerequisites and proper environment for fully democratic governance. Therefore, before elections are called and held, a certain period of time, and rather a long one, is needed both for the nation (or a part thereof such as a community or a number of communities, in case of local elections) to get prepared organisationally for the elections, and for a proper free democratic environment to be created for holding elections in full compliance with the basic principles of electoral law.

Ukrainian legislation has established a somewhat different approach and terms for calling elections after termination (lifting) of martial law. We have already discussed the conflict of provisions in the Election Code of Ukraine (Article 20) and the Law of Ukraine “On the Legal Regime of Martial Law” (Article 19) in this area.

Another issue of concern is the lack of legislative criteria for an unbiased assessment of the capacity to prepare and hold elections in a certain territory after the hostilities end and the martial law is lifted. After all, all the problems specified herein require not only an analytical overview and ascertainment, but, in some cases, the implementation of a number of complex measures that will take rather a long time. With this approach, quite a dangerous effect can be caused by a quick and almost automatic launch (provided by paragraph 6 of Article 20(1) of the Election Code of Ukraine) of the electoral process for the elections that can be legally held without a separate decision on their calling, and the start of the relevant electoral process is announced by the Central Election Commission within a month upon termination or lifting of the martial law or state of emergency.

Since the beginning of the armed aggression of the Russian Federation against Ukraine, the Verkhovna Rada of Ukraine and the Central Election Commission have already faced this problem. When appointing regular local elections in 2020, the Parliament decided (Resolution of the Verkhovna Rada of Ukraine No. 795-IX dated 15 July 2020) against calling or holding the elections of People's Deputies of the Verkhovna Rada of the Autonomous Republic of Crimea, members of local councils and the mayors of villages, towns and cities in the temporarily occupied Autonomous Republic of Crimea, in the city of Sevastopol, and in certain districts, cities, towns and villages of Donetsk and Luhansk regions. The Resolution lays down the conditions for calling such elections, including:

- termination of the temporary occupation and armed aggression of the Russian Federation against Ukraine, namely the withdrawal of all illegal armed formations led, controlled and financed by the Russian Federation, the Russian occupying forces, and their military equipment from the territory of Ukraine;
- restoration of full control over the state border of Ukraine by Ukraine;
- disarmament of all illegal armed formations and mercenaries operating in the temporarily occupied territories of Ukraine;
- restoration of the constitutional system and legal order in the temporarily occupied territories of Ukraine;
- ensuring safety of Ukrainian nationals living in the respective territories of the Autonomous Republic of Crimea, Donetsk and Luhansk regions and the city of Sevastopol following the full completion of disarmament, demilitarisation and reintegration procedures in the territories in accordance with the standards of the United Nations and the Organisation for Security and Co-operation in Europe.

The Central Election Commission addressed another aspect of this problem with the adoption of the Resolution "On the Impossibility of Holding the First Elections of Members of Certain Village, Town and City Councils of Donetsk and Luhansk Oblasts and the Respective Mayors of Villages, Towns and Cities on 25 October 2020" No. 161 dated 8 August 2020. This document in fact defined and applied the criteria for the impossibility to hold elections.

Without analysing the format and context of the adoption of the above acts, it should be pointed out that both resolutions are by-laws. At the same time, there is no proper regulation of such issues in the law. Considering the scale of the current war in Ukraine, the challenges and complexity of the future post-war reconstruction, as well as the international standards for disarmament, demilitarisation and reintegration, it is essential to define legislatively the general prerequisites for organisation and conduct of democratic elections, which shall therefore lay down the grounds for calling the elections.

**Restriction of active and passive suffrage.** For elections as a form of direct democracy, not only the result is important – the formation of representative authorities, but also the process of exercising political rights, i.e., the right to elect and being elected. However, these political rights are not absolute. They can be limited proportionally to the challenges and threats faced by the society. Participation, whether direct or indirect, in an armed aggression against one's own people is certainly a fact that can affect the scope and manner of exercising one's political rights. As previously noted, (see Sections 3 and 4 above), it is vital to develop appropriate legislative mechanisms for possible restriction of electoral rights in the post-war period. This directly impacts the fundamental principles of national security and defence of the State.

**Prohibition of activities of certain political parties.** In order to counter the activities of political parties whose programme goals or actions are aimed at cooperation with the aggressor, the Verkhovna Rada of Ukraine adopted amendments to the Law of Ukraine "On Political Parties in Ukraine" in May 2022. These amendments introduced detailed provisions regarding the grounds and mechanisms for prohibition of the activities of political parties in Ukraine. The procedures for court hearing of cases on the prohibition of political parties as

requested by the Ministry of Justice of Ukraine were also amended. Without going into details about the new legal provisions, we should focus on several election related aspects of the implementation of the respective mechanisms.

First, mechanisms still need to be developed for a quick detection and prompt response by the Ministry of Justice of Ukraine – the central executive agency that implements the national policy in the field of state registration (legalisation) of citizens' associations and other non-governmental organisations, to the actions of the leaders of political parties or their local branches which may justify prohibition of the party. This is particularly important when analysing election programmes and the content of election campaign materials, which is what the Central Election Commission does at national elections, and territorial election commissions at local elections.

Second, although there may be detailed grounds for prohibition of political party activities and reduced terms for court proceedings, including appeals, these mechanisms are unlikely to be applied expeditiously because of the quick pace of the election process. This is especially relevant in situations where, for example, the grounds for prohibition of a political party have been identified at the beginning of the election process, but it is unlikely that a final court decision would enter into force before the voting day at a respective election round.

Third, the way how a court decision on prohibition of a political party shall be implemented during the election process needs to be regulated by law, particularly, as regards its impact on different election stages. For instance, the status of candidates nominated by such a party and/or its local branch remains uncertain. Another unresolved situation is where a party nominates a non-partisan candidate in a single-mandate constituency.

Fourth, the prohibition of a political party does not directly affect members of the election commissions who were nominated by that party or its local branch for a respective election commission. This might, at the very least, complicate the formation of election commissions as the election commission members whose powers have been terminated have to be replaced.

Fifth, the law does not cover the connection between unlawful activities of a political party in general, which are the grounds for prohibition of the party, and activities of its individual members, including those who hold top positions in the party or its bodies. For example, on the one hand, failure to prove close relations between a party position and that of its individual member cannot lead to the ban of that party, but, on the other hand, it does not restrict this person from running in elections, e.g., as a self-nominated candidate.

Therefore, clear legal provisions are needed with regard to the consequences of a court decision to ban a political party, at least in terms of its enforcement during the election process.





## Physical safety

Obviously, elections cannot be organised and held during the war. Complete physical safety for all participants of the election process should be a prerequisite for calling elections. There are several conditions: *cessation of hostilities; demining of territories; stopping the illegal circulation of weapons and ammunition; proper conditions of the premises and buildings to be used for the organisation of elections and voting; elimination of threats to the life and health of the election participants from former combatants siding with the aggressor state, etc.*

Without adequate security guarantees, even calling elections is at risk. Moreover, it would be impossible to prepare and carry out the main election procedures. Democratic elections cannot be organised and held in a situation where people have to take care of their survival and meeting only their basic needs (safety, health care, food, hygiene, etc.).

The physical threats indicated here also directly affect the principle of free elections. The free election principle means the absence of any unlawful influence on the voters, or a threat thereof, both at the stage of forming a will and when establishing the voting results. The following aspects of the free election principle can be considered.

**Freedom to participate in elections:** no one can be forced to participate in elections and the electoral process. This applies to all participants of the election process, including voters who may not come to vote, candidates who may not run for office, and members of election commissions who may stop working as election commissioners.

**Free formation of voters' will and free voting:** no one can illegally influence the formation of voters' will, either directly or indirectly. In the post-war period, it is critical to secure an environment where voters feel as safe and comfortable as possible. Numerous examples of war crimes against the civilian population committed by the occupiers should not exert pressure on the voters. This is important so that, for example, the threat of shelling, explosion of ammunition or gun violence do not force a voter to act rashly, in a biased way or to succumb to manipulation.

**Guaranteeing genuine expression of the will:** the election results should be properly established and directly reflect the will of the voters. It is important to prevent any situation where the expression of the will is undermined due to non-recognition of election results or their incorrect tabulation. It also concerns protection and security of election documents. Following the armed aggression of the Russian Federation against Ukraine back in 2014, the election legislation has been amended to allow both the police and the Security Service of Ukraine to guard the ballots and election documents during transportation. The Election Code of Ukraine still contains such provisions (Articles 242, 253, 255, and others).



Therefore, ensuring physical safety would mean creating the conditions where not only the process of voting, vote counting and establishing the election results will be safe and secure, but also, just as importantly, where all election procedures and candidates' activities such as campaigning will take place in a safe environment where all the participants of the election process will be able to focus on the elections.

From a practical perspective, the key aspect here is the time, the period after which elections will be scheduled once the martial law is lifted. It is also important to elaborate a system of measures to be taken, *inter alia*, to guarantee safe elections in the post-war period.



### Information security

In our modern globalised world where the use of digital technologies is extremely widespread, regulating the use of various information resources and communication channels is becoming increasingly critical. In the hybrid war against Ukraine, the manipulative informational influence and propaganda are some of the key tools used by the aggressor state, and they will remain so in the nearest future. It is crucial to develop the tools for countering informational influence and ensuring the safe use of modern technologies.

To confront hostile information, a system of measures should take into account that the dissemination of information has long gone beyond the traditional media framework, and even the electronic media. Today, the influence of electronic resources on the course of the election process and election results is growing very quickly and broadly. Even many traditional printed media are switching to digital format. This gives rise to several practical concerns. For example, media websites would not only feature journalist reports, news and stories, but also advertising, in particular, banners. The ownership structure and procedures for the administration of such resources are becoming too complex to easily exercise respective government control and public oversight. Advertisement content can change very quickly and vary depending on a number of factors such as time and format of placement, the end user's viewing history, targeted advertising, etc., which enables both the use of targeted advertising and different forms of hidden or indirect political advertising. Therefore, media legislation should take into account the widespread nature of electronic media and not only focus on professional content, i.e., the main information product, but also cover the neighbouring areas of activity of media resources.

New communication channels operating via social media and mobile messenger applications such as Telegram, Viber, WhatsApp, Signal, and others play a central role, too. They were widely used before 24 February 2022 and became dramatically useful at the time of the full-fledged war. Social media and the mobile messengers have become the major source of information for most Ukrainians, and even the only one for some of the people. Some of these communication channels have an audience of several million subscribers. There are no common tools for responding to possible violations regarding the use of such channels during the

election process, primarily in campaigning, which can significantly undermine the possibility of holding free elections. Furthermore, the threat of manipulation and other illegal influence on the voters, particularly by the aggressor state, is becoming extremely real.

Thus, it is vital to develop and promptly implement effective tools for countering hostile propaganda, various forms of voter manipulation such as fake news, disinformation, abuse of modern digital or digitalised communication tools, and so on. It would be impossible to call, organise and conduct free and democratic elections in accordance with international standards unless proper legislative solutions are found to address the challenges outlined above.

## Conclusions

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The legal regime of martial law prohibits national and local elections and referenda. However, after the martial law is lifted, organising and holding elections will become a major issue, especially as regards local elections. The requirement to call and hold local elections in the communities where military administrations have been formed remains controversial because of the inconsistency of various laws regarding the termination or suspension of the powers of the heads of communities and local councils while military administrations exercise their powers.

There are certain difficulties with the legislative establishment of an exhaustive list of grounds for calling extraordinary local elections, including in extraordinary situations where local self-government officials collaborate with the aggressor state. Furthermore, there is a conflict of legal provisions regarding the timeframe for calling extraordinary elections after martial law is lifted, which is not only unresolved at the legislative level, but does not account for the complexities of post-war reconstruction and peculiarities of the organisation of elections, such as significant reduction of population in certain communities.

Large-scale demographic changes in Ukraine are caused by massive displacement of population from the territories where hostilities are taking place, from the occupied territories or those under threat of occupation, to other areas in Ukraine or abroad, a significant number of victims, in particular among the civilian population, as well as military conscription. All these developments have seriously affected the reliability of the information of the State Register of Voters: the Register database of 24 February 2022 does not reflect the current dynamic situation. This problem should be solved by several complex measures, that, of course, require respective legal regulation.

Complex processes and developments related to the war, including the actions of the occupation regime against the population of the temporarily occupied territories, such as issuing passports to people in the occupied territories, require checking whether certain persons have the status of voters in Ukraine, giving one the right to vote in elections and referenda, and, therefore, whether they can exercise their active and passive suffrage.

Limitation of the active and passive suffrage rights of the persons who have committed crimes against the foundations of national security of Ukraine requires a legislative solution. The existing mechanisms in criminal proceedings will obviously be insufficient to ensure prompt response to the related challenges. There is also pressing need to adjust the residency requirements (residence in the territory of Ukraine for a certain period of time), as election disqualification of persons who stay abroad in wartime would create a disproportionate restriction of the electoral rights. A similar approach should be taken regarding inadmissibility of disqualification due to forced departure for permanent residence abroad in wartime.

The activities of political parties both at the national and local levels have been significantly complicated and cannot be fully restored immediately after the martial law is lifted. There are several areas where parties and their local branches face difficulties. Security challenges are primarily caused by the impossibility for political parties to function on the occupied territories and territories where active hostilities are taking place. Organisational challenges are related to the complexities of structuring party local branches, as not all political parties have adapted their structures to the new administrative territorial set-up introduced in 2020, and it is completely unrealistic to do it in wartime. The war has also led to significant problems with human resources: party office staff and activists are hardly able to engage in party work, even in the areas where hostilities are not taking place, and many of them are serving in the army or staying outside Ukraine. Financial difficulties are also critical as financing the activities of political parties is certainly not a high priority in wartime. It will obviously undermine the capacities of respective party structures.

The information work of the media and other communication channels is focused on meeting the primary needs of national security and defence in wartime. Obviously, access to information and communication channels is different in this situation for different political parties and their local branches. Considerable time will be needed to restore proper conditions for equal access to information resources, or at least to create equal opportunities for it. By international standards, elections cannot be considered free if there is no proper environment for the voters to form their will freely.

Several types of problems should be addressed to guarantee smooth election administration. First of all, the composition of territorial election commissions that operate on a permanent basis should be inspected to see whether new district and precinct commissions, that are set up only temporarily for particular elections, can be formed. Notwithstanding enrolment to the military service, massive internal displacement of people many of whom have left the country, political parties should have a sufficient number of professionals to be able to nominate election candidates. Secondly, there may be a critical need to establish new election precincts and, therefore, to change constituency boundaries, especially at local elections, due to a significant change in the number of voters in some territories. Thirdly, it will be extremely difficult to provide financial and technical support for election organisation, especially in the areas affected by active hostilities and/or hit by missiles or artillery fire. The problems will not only concern the need to find premises for the operation of election commissions and voting, but also to provide adequate financing of all related costs, for example, transportation of election documents.

Providing a safe environment for elections and the electoral process will require thorough consideration and legislative solutions for at least three main issues of concern. The first one is related to the national security, where legislative solution is needed for a proportional restriction of the active and passive suffrage for persons whose participation in elections will threaten national security and defence. The second issue is physical safety, where proper conditions, i.e., cessation of hostilities and demining, must be established not only to make safe the processes of voting, vote counting and establishing election results, but also, just as importantly, to make sure that all election procedures and candidates' activities such as campaigning will take place in a safe environment. The third issue of concern is information security, as it is vital to develop and promptly implement effective tools for countering propaganda, various forms of voter manipulation (fake news, disinformation, etc.), abuse of modern digital or digitalised communication tools, and so on.

It would be impossible to call, organise and conduct free and democratic elections in accordance with international standards unless proper legislative solutions are found to address the challenges outlined above and respective practical preparatory steps are taken.

The full-scale armed aggression of the Russian Federation against Ukraine led to a number of new challenges and threats to the functioning of democratic institutions in Ukraine. Therefore, the issue of calling, organising and holding of elections in the post-war period requires gradual and systematic preparation already at this stage. A huge number of internally displaced persons, large scale occupation of Ukrainian territories, powerful propaganda and smear campaign against Ukraine and other severe challenges require a comprehensive analysis. This study is an attempt to present such a comprehensive analysis of respective issues and challenges aggravated by the war. The considerations presented herein are based on international electoral law standards, Ukrainian domestic legislation and the current situation in Ukraine.

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