

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



**Needs Assessment Report**  
(updated in December 2023)

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(updated in December 2023)

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## Organisation and Holding of Elections in Post-War Ukraine. Prerequisites and Challenges

The needs assessment report is developed within the framework and with support of the Council of Europe Project "Supporting the transparency, inclusiveness and integrity of electoral practice in Ukraine – Phase III", implemented within the framework of the Council of Europe Action Plan for Ukraine 2018-2022. The 2023 update of the needs assessment report is supported within the framework of the Council of Europe Project "Supporting democratic post-war elections in Ukraine", implemented within the framework of the Council of Europe Action Plan for Ukraine "Resilience, Recovery and Reconstruction" 2023-2026.

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Design, cover and layout: Hanna Voina

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# Table of content

<b>Introduction</b>	<b>5</b>
<b>1. Prerequisites and grounds for calling elections after the end of martial law</b>	<b>7</b>
<b>2. Timeframe for calling and holding elections after the martial law is lifted</b>	<b>13</b>
<b>3. Updating and recording voter information</b>	<b>15</b>
<b>4. Ensuring passive suffrage</b>	<b>24</b>
<b>5. Ensuring competitive elections</b>	<b>28</b>
<b>6. Challenges for election administration</b>	<b>33</b>
<b>7. Safety and security</b>	<b>40</b>
<b>Conclusions</b>	<b>46</b>



## 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, the first such precedent after the Second World War, 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 and annex parts of the territory of Ukraine, it obviously intends to deny to the Ukrainian people the right to self-determination, self-identification and statehood.

This war can be considered the first war in Europe to be long fought by *a democratic state governed by the rule of law* on its own territory to defend its existence against foreign aggression. By adhering to the high idea of protecting and preserving democracy and the rule of law as the foundations of its constitutional order even in a defensive war on its territory, Ukraine has thus confirmed its modern role as a defender of these high ideals of European civilisation against the lawless attack of an authoritarian terrorist aggressor.

Any war, and especially the defensive war of a nation that has been subjected to a brutal unprovoked and unexpected aggression, is a special condition of the state and society. War requires the state and society to mobilise all forces and resources to the maximum extent possible, redistribute them to ensure the priority of defence and protection of civilians, ensure maximum efficiency of management, speed of decision-making and its implementation, certain changes as to the priority of the national objectives, in particular, certain changes as to the priority of ensuring the rights of citizens, which, generally speaking, is Ukraine's main goal in accordance with Article 3 of its Constitution, while preserving the democratic nature of power to the maximum extent possible and preventing authoritarian practices in public governance.

War also does not mean that the state should inevitably renounce the rule of law: Ukraine maintains that even in times of war, all measures taken by democratic authorities to repel the aggression must still comply with the requirements of law. At the same time, the needs of defence, and particularly effective command and control, may require a certain narrowing of the scope of some democratic procedures. However, this does not mean a complete abandonment of democratic institutions and cannot lead to arbitrary actions of the government unless prescribed by law.

In such circumstances, the functioning of democratic institutions must be adapted to the requirements and circumstances of war. Certain rights and freedoms can and should be restricted under martial law. Article 64 of the Constitution of Ukraine, in full compliance with Article 15 of the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 4 of the International Covenant on Civil and Political Rights, defines the permissible limits of such restrictions. At the same time, it is necessary to understand that these restrictions should ensure the preservation of the democratic nature of the country's constitutional order. After the end of the war, the issue of full restoration of proper functions of the central and local authorities and free and fair elections will be a key one.

The need to call, organise and hold elections in the post-war period requires gradual and systematic preparation now. The huge number of internally displaced persons, the severe and destructive nature of hostilities and terrorist attacks by the aggressor, the occupation of large areas of Ukraine and related demographic processes, the aggressor's large-scale information and propaganda campaign against Ukraine and other severe challenges require both doctrinal and practical consideration.

This study is a general attempt at a systematic analysis of such problems and challenges that have been exacerbated by the war. The considerations presented here are based on a systematic study of international standards in the field of electoral law, Ukrainian national legislation, prospects for its change, which are the subject of public discourse in Ukraine, and the current state of affairs in Ukraine.

The list of problems and tentative ways of solving them proposed by the authors obviously require further in-depth and detailed research, taking into account the development of the situation in and around Ukraine, the experience of other European states that have faced military conflicts in recent decades. At the same time, this material draws attention to the main problems of restoring full-fledged democratic functions of the Ukrainian state through the prism of challenges to the appointment, organisation and conduct of elections in the post-war period.

# 1. Prerequisites and grounds for calling elections after the end of martial law

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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.

In accordance with Article 83 of the Constitution, should the term of office of the Verkhovna Rada of Ukraine expire during martial law, the powers of the Parliament shall be extended until the first meeting of the first session of the Verkhovna Rada of Ukraine elected after lifting of the martial law. It follows that during martial law, the dissolution (early termination of powers) of the Verkhovna Rada of Ukraine is not allowed.

The Law of Ukraine “On the Legal Regime of Martial Law” similarly prescribes the extension of the authority of the President of Ukraine if the constitutional term of his powers expires during 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).

Therefore, despite a possible expiration of the term of office of the Parliament (Verkhovna Rada) of Ukraine or the President of Ukraine, as established by the Constitution of Ukraine, elections of people's deputies of Ukraine and/or the President of Ukraine shall be held only after the termination (lifting) of the martial law. Such postponed elections should be considered regular elections.

The situation described above is now becoming a reality in Ukraine.

In accordance with Article 77 of the Constitution of Ukraine, regular elections of people's deputies of Ukraine shall be held on the last Sunday of October of the fifth year of the Verkhovna Rada's mandate. The term of office of the current composition (IX convocation) of the Verkhovna Rada of Ukraine began on the opening day of the first session on 29 August 2019; therefore, the fifth year of the Parliament's term of office began on 29 August 2023. Consequently, the next parliamentary elections were to be held on 29 October 2023, and the election process for these elections, in accordance with Article 136 of the Electoral Code of Ukraine, was to begin on 31 August 2023 (60 days before the election day). Holding these elections has already become impossible due to the ongoing war and, accordingly, the martial law regime.

The specificity of the problem of postponement of the regular elections to the Verkhovna Rada of Ukraine is that the regular elections of people's deputies of Ukraine are the only elections established by the Constitution that do not require scheduling a date and are held on a certain date by virtue of the Constitution (early elections are called by the President of Ukraine with the day of their holding determined). The absence of a constitutionally defined entity that calls the election raises the question: who is authorised to determine the day of the *postponed* regular parliamentary elections? Article 157 of the Constitution prohibits the amendment of the Constitution of Ukraine during martial law with a relevant provision; the Law of Ukraine “On the Legal Regime of Martial Law” also makes it impossible to introduce any amendments to the Constitution under these conditions. Thus, a way out of this legally difficult situation will have to be found. One option would be to supplement the Law of Ukraine “On the Legal Regime of Martial Law” with a relevant provision that would authorise the President of Ukraine to determine the appropriate date.

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 the powers of the parliament 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 (July 2019), 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, in the event of early termination of powers of a Member of Parliament of Ukraine elected in a single-member constituency, a vacant mandate arises in the Parliament, which as of autumn 2023 cannot be filled not only because the mid-term elections in certain constituencies provided for in Article 106 of the Law of Ukraine “On Elections of Members of Parliament of Ukraine” of 2011 (still in effect in the part relating to the election of the current convocation of the Verkhovna Rada of Ukraine) cannot be held during martial law. In accordance with part seven of Article 16 of the said Law, during the fifth year of the current convocation of the Verkhovna Rada of Ukraine, mid-term election of a deputy in a separate single-member constituency shall not be called and held. Since the fifth year of the Verkhovna Rada of Ukraine of the 9th convocation began on 29 August 2023, even in the event of termination (lifting) of the martial law, such elections cannot be held.

According to the official web portal of the Verkhovna Rada of Ukraine, 16 seats of People's Deputies of Ukraine that are contested in single-member constituencies remain vacant for various reasons as of 1 September 2023. Such a number of unfilled mandates (including 26 mandates in single-member constituencies in the occupied territories where elections were not held in 2019) does not pose a threat for the Verkhovna Rada of Ukraine to lose its powers in accordance with Article 82 (2) 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).

The situation with the presidential elections in Ukraine is similar. According to Article 103 of the Constitution of Ukraine, regular presidential elections shall be held on the last Sunday of March in the fifth year of the term of office of the President elected at the last election. As President Zelensky was elected in the 2019 elections, the next election should be held on 31 March 2024, and the relevant election process would start on 2 January 2024. However, it is clear that martial law will not be lifted by this time, and thus the next presidential election will have to be postponed.

Both regular and early presidential elections are called by the Verkhovna Rada of Ukraine. Therefore, in this case, there are no problems with the entity to determine the date of the postponed regular presidential election.

## Calling regular local elections

In accordance with Article 141 of the Constitution of Ukraine, regular local elections shall be held on the last Sunday of October of the fifth year after the previous regular local elections; in accordance with Article 194 of the Electoral Code of Ukraine, regular local elections shall be held simultaneously throughout Ukraine, i.e., in all territorial communities and administrative-territorial units (districts, regions). The scheduling of regular local elections is a power of the Verkhovna Rada of Ukraine under the Constitution of Ukraine.

The last regular local elections before the outbreak of large-scale Russian aggression took place in October 2020; however, due to the Russian occupation of parts of Ukraine in 2014-2015, local elections could not be held in accordance with Ukrainian law in the occupied territories of the Autonomous Republic of Crimea, the city of Sevastopol, and certain districts of Donetsk and Luhansk oblasts. In addition, Donetsk and Luhansk regional councils were not elected (although not all of the territory of the respective regions was occupied; for security reasons and to avoid terrorist threats, local elections could not be held in the territorial communities up to 35 km from the demarcation line in Donetsk and Luhansk oblasts (Central Election Commission Resolution No. 161 of 08.08.2020). The exercise of local government powers in these territories was entrusted to military-civil administrations, i.e., temporary state authorities established in accordance with the Law of Ukraine “On Military-Civil Administrations”.

Thus, according to the Constitution of Ukraine, the next local elections are due in October 2025. The Ukrainian public is cautiously optimistic that martial law will be lifted by then, which will open the possibility (in the absence of other significant obstacles) of holding the next local elections within the constitutionally prescribed timeframe throughout all or at least most of Ukraine.

If these expectations are not met and martial law continues by early autumn 2025, the regular local elections will be postponed until the end of martial law. The date of the postponed regular local elections will be determined by the Verkhovna Rada of Ukraine.

The situation is somewhat more complicated with the powers of local self-government bodies of territorial communities during martial law, and thus it is the same with the grounds and possible need for early elections of certain local self-government bodies after the termination (lifting) of martial law. Although such grounds are not sufficiently clearly established by law, there are certain differences in the position of local self-government bodies at the level of territorial communities and at the level of districts and oblasts in this regard.

### **Grounds for calling local elections at the territorial community level**

Article 9 of the Law of Ukraine “On the Legal Regime of Martial Law” obliges local self-government bodies to exercise the powers vested in them by the Constitution and laws of Ukraine during martial law. At the same time, the requirement to preserve constitutional self-government bodies while ensuring increased efficiency of governance at the local and regional level is achieved, in particular, by imposing certain restrictions on the right of territorial communities to local self-government and, accordingly, the right of citizens who are community residents to participate in local self-government (Article 140 of the Constitution), which is not included in the list of rights prohibited by Article 64 of the Constitution during martial law. Such restrictions are carried out through the establishment of special temporary government authorities – military administrations, as established by Article 4 of the Law of Ukraine “On the Legal Regime of Martial Law”, and a certain redistribution of powers between these authorities and local self-governments.

The grounds for the establishment of a *military administration* of a settlement 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. Elections cannot be called under martial law, therefore, if the above grounds exist, the powers of local self-government bodies are suspended in most cases by a decision of the Verkhovna Rada of Ukraine until the end of martial law (Article 10 of the Law of Ukraine “On the Legal Regime of Martial Law”).

With that decision, the Verkhovna Rada of Ukraine entrusts the head of a settlement military administration with the exercise of powers of the relevant local council, its executive committee, and the head of the community. Such a decision shall be made upon a proposal of the President of Ukraine (apparently, based on an assessment of the specific situation). Therefore, where such a decision is not made, the local self-government bodies of the territorial community continue to function in parallel with the military administration of the settlement, exercising their powers to a somewhat limited extent. In practice, this situation is exceptional.

The activities of local self-government bodies whose powers have been suspended may be resumed 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 Law of Ukraine “On the Legal Regime of Martial 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-civil or military administration.

In addition to the grounds expressly established by the Law of Ukraine “On the Legal Regime of Martial Law”, if the territory of a community is in the zone of active hostilities (close to the front, with massive constant shelling), which is usually accompanied by the evacuation of most residents, or under occupation, the functioning of local self-government bodies of such a community is *de facto suspended*; as a result, military administrations may be established in such communities. In many of these cases, it may not be possible to resume the activities of local governments after the de-occupation of the territorial community and/or the termination of martial law.

The grounds for calling early local elections after the termination of martial law may be the inactivity of the local council due to the inability of more than half of the council members to participate in the council session (this condition for the authority of the council session is established by part twelve of Article 46 of the Law of Ukraine “On Local Self-Government in Ukraine”). The reasons for it may be permanent absence of coun-

cillors (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 elected under the proportional representation system may be supplemented by filling vacant mandates; this is done by a decision of the relevant territorial election commission for local elections, a permanent body (in accordance with Article 33 of the Electoral Code). 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). Such elections are appointed by territorial election commissions.

There is another reason for early termination of the powers of local self-government bodies. 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.

### **Grounds for calling elections to district and regional councils**

Under martial law regional and district military administrations may be established. 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)). However, in practice, regional and, in many cases, district councils continue to function alongside military administrations, exercising somewhat narrower powers.

As in the case of local self-government bodies at the territorial community level, the formula "shall not exercise their powers" means *suspension*, not *termination of powers*; such authorities continue to exist 'latently', staying inactive until martial law is lifted. In case of elimination of threats to security and law and order on the territory of a region, in particular, in case of de-occupation (elimination of immediate military threat) of the regional centre, upon the proposal of the President of Ukraine 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

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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 "Preserving voter status under occupation".

(lifting) of martial law. In particular, the Kherson Regional Council resumed its activities at the end of 2022, after the regional centre was liberated in autumn 2022 after several months of occupation.

If grounds provided for by law arise, an extraordinary election of the relevant council must be called within 30 days after martial law is lifted. 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.

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



## 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

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 Electoral Code.

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 reminded that the entity calling such elections in accordance with the Electoral Code shall be the territorial election commission (challenges related to resuming the functioning of territorial election commissions can be seen in “Challenges for election administration”).

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.

As noted above, *mid-term elections of the Members of Parliament of Ukraine* in certain electoral districts during the fifth year of their mandate (which for the current convocation began on 29 August 2023) are *not scheduled*.

The situation with the mid-term elections of a member of parliament in single-mandate constituency No. 206, scheduled for 27 March 2022, was somewhat controversial, with the election process starting on 25 January 2022. Pursuant to Article 19 of the Law of Ukraine “On the Legal Regime of Martial Law” and Article 20 of the Electoral Code, the Central Election Commission suspended the election process due to the introduction of martial law in Ukraine by its Resolution No. 59 of 24.02.2022. However, Article 20 of the Electoral Code requires that such an election be rescheduled no later than one month after the date of termination or lifting of martial law, which contradicts the fact that such elections shall not be held in the fifth year of the Verkhovna Rada's term. In this situation, the latter provision prevails, especially since after the end of martial law, the *postponed regular* elections of people's deputies of Ukraine become an urgent issue.

It should be noted that the deadline for calling elections, the electoral process of which was suspended or did not start due to the introduction of martial law, established by the Electoral Code – no later than one month from the date of termination (cancellation) of martial law – does not seem realistic due to the need for a *transition period* to restore the normal functioning of the national democratic mechanisms.

At the same time, it is quite possible (and has been repeatedly implemented in practice) to fill a mandate that has become vacant as a result of the termination of powers of a deputy elected on a party electoral list; the relevant decisions are made by the Central Election Commission.

The ambiguity of the established 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 conflict of Article 20 of the Electoral 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 Electoral 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. It is advisable 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 “Challenges for election administration”);
- 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 “Safety and security”).

Extending the timeframe for calling extraordinary local elections after termination of martial law (transition period) 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 Electoral 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 Electoral 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 Electoral 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. Updating and recording voter information

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As follows from the reasons analysed above (see “Prerequisites and grounds for calling elections after the end of martial law”), the elections to be held after the termination (lifting) of martial law may take place both throughout Ukraine (postponed regular elections of people's deputies of Ukraine that did not take place in 2023, as good as postponed regular elections of the President of Ukraine which are unlikely to be held in March 2024) and in limited areas – within a territorial community, district, region or even a separate multi-mandate district in small communities – in case of extraordinary or local by-elections. During national elections, all Ukrainian voters have the right to vote. Local elections contain a certain residency requirement for voters to be eligible to vote in such elections: according to part five of Article 7 of the Electoral Code, a citizen of Ukraine's right to vote in a particular election is determined by the fact that his or her electoral address at the time of the election belongs to the relevant territory of a community, district, or region.

The right to vote is a constitutional subjective right of a citizen exercised at his/her own discretion. However, the principle of universal suffrage – one of the fundamental European standards of democratic elections – imposes on the state the obligation to create conditions for each voter to be able to participate in voting at the elections in which he or she is eligible to vote. In Ukraine, one of the main means for fulfilling this obligation of the state is the functioning of the State Voter Register (hereinafter – the Register), an automated information and communication system created to ensure public registration of Ukrainian citizens who are eligible to vote. Pursuant to Article 3 of the Law of Ukraine “On the State Voter Register”, the general nature of the Register ensures that all voters shall be included in it regardless of their place of residence or sojourn in order to implement the principle of universal suffrage.

However, the normal functioning of the State Voter Register during a full-scale war is impossible, primarily for reasons of security and information protection, preventing the aggressor from accessing the Register's database. Therefore, on 24 February 2022, the Central Election Commission as the administrator of the State Voter Register adopted Resolution No. 61, which temporarily suspended the operation of the automated information and communication system “State Voter Register” for the duration of martial law and closed access to the Register's personal data base. So far, no changes have been made to the Register's data during the war.

It is worth noting that the Central Election Commission has recently taken some organisational and regulatory measures to prepare for the process of updating the Register. In particular, the Central Election Commission has put the automated information and communication system of the State Voter Register into test operation. According to the official report of the Central Election Commission's press service, this test operation is of a technological nature and does not involve any processing of voters' personal data.<sup>2</sup> In addition, the Central Election Commission approved the updated procedure for access to the State Voter Register Database by its Resolution No. 74 of 24.11.2023. At the same time, the Commission did not amend Resolution No. 61 of 2022 and did not suggest immediate application of this procedure. As stated in the same press release of the Central Election Commission, its decisions do not lead to the resumption of the State Voter Register functioning during the war.

Large-scale migration processes – the movement of residents from territories in the war zone, under occupation or threat of occupation to safer regions of the country and outside Ukraine (voluntarily, to European and other friendly states, and forcibly, by deportation to the territory of the aggressor state), numerous casualties, including among civilians, as well as military recruitment processes have led to significant changes of the country's demographic situation. All these factors have negatively affected the reliability of the information in the State Voter Register: the Register database as of 24 February 2022 does not reflect the dynamic current developments. Extensive migration of the population will obviously continue for

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2. See: <https://www.cvk.gov.ua/novini/tsvk-zatverdila-poryadok-dostupu-do-bazi-danih-derzhreiestru.html>.



a certain time after termination (lifting) of martial law; it is impossible to assess the potential duration and the final scale of such processes now.

All these factors require prompt updating of the State Register of Voters after the end of martial law, linked to the timing of elections, primarily (but not exclusively) with regard to the voters' place of residence and electoral address, which determines the possibility of a voter to participate in the relevant elections. In addition to ensuring the right to vote, such information is also essential for the proper organisation of elections in statistical terms. The mechanisms for updating voters' personal data established by the Law of Ukraine "On the State Voter Register" are insufficient in the context of such large-scale demographic and migration processes. It is also necessary to take into account quite possible problems concerning staffing of the local authorities of the State Voter Register, preservation of equipment and communication lines, especially in the areas of military operations or temporary occupation, which will require special efforts to organise activities aimed at updating the State Voter Register.

It should also be noted that measures to update the State Voter Register make sense only following at least partial stabilisation and regulation of migration processes, reduction of their intensity, since in a period of dynamic changes no voter registration measures can provide reliable results.

All of these factors will affect the timing and duration of measures to update the State Voter Register, which should be taken into account when deciding on the timing of the relevant post-war elections.

## Problems with updating the State Voter Register

The mechanism for updating the State Voter Register is established in Articles 22 and 23 of the Law of Ukraine "On the State Voter Register" in the form of procedures for periodic (monthly) updating and clarification of personal data in the Register. The first of these procedures involves obtaining relevant data from a number of entities and institutions that have the necessary information, while the second procedure is mainly based on the right of a voter to apply on his/her own initiative to the authorities maintaining the Register regarding his/her inclusion in the Register, changes to his/her personal data or inaccuracies in the personal data of other persons (Articles 19-20<sup>1</sup> of the Law).

The first procedure – periodic updating of personal data on the basis of submissions from the authorised entities and institutions – cannot be effectively used to update the data in the Register after the war, as most registers did not function during martial law. In particular, the registration of persons residing on the territory of a respective community should be carried out by the local self-government authorities of the community (Article 371 of the Law of Ukraine "On Local Self-Government in Ukraine"), the procedure for the establishment, maintenance and administration of which was approved by the Cabinet of Ministers of Ukraine No. 265 of 07.02.2022 (i.e., shortly before the start of the large-scale invasion). However, such records, even if they exist or have been preserved, cannot be useful for post-war updating of the State Voter Register as community registers are focused on registering residents according to their registered (declared) place of residence, i.e., essentially, the owned or leased housing. These registers were closed during wartime and therefore do not reflect the large-scale displacement of people caused by the war. In particular, there is no record of people who have been absent from their registered place of residence for a long time – they have moved to another region of Ukraine or gone abroad, or have been forcibly deported by the occupation authorities.

The procedure for notifying the Register authorities about army servicemen and the scope of relevant information does not meet the needs of the situation, as it is designed for peacetime conditions.

There is incomplete information on deceased citizens, especially in the combat area and in the temporarily occupied territories. A significant number of Ukrainian citizens (both military personnel and civilians) are still missing. There are legal problems with the recognition of civil status acts issued to Ukrainian citizens in the occupied territories.

These and other similar obvious and well-known factors make the periodic update procedure unsuitable for post-war updating of the Register's data, forcing us to look for other mechanisms. An alternative method is being actively proposed in expert discussions – updating the information on the basis of requests from voters themselves. In particular, it is proposed that each voter, within a certain period of time after the termination of martial law, should apply to the relevant body maintaining the Register to clarify his or her personal data, especially the current place of residence (stay). This approach, however, should be considered insufficiently

effective, as it means that the government minimises its own initiative in the process of updating the Register, which will be largely left to its own devices. First of all, it should be borne in mind that even if this mechanism is successfully implemented, it will cause a huge burden on the authorities maintaining the Register, each of which in most cases consists of only 3-4 employees. However, there are reasonable doubts that in the real life and security conditions after the war, voters will have to solve the problems of their families' livelihoods and will hardly actively apply to the Register authorities with notifications of their up-to-date personal data. In addition, disputes may arise over the accuracy of the information provided by voters, which requires the establishment of procedures for their verification, especially in the context of problems related to the actual place of voting, acquisition of citizenship of the aggressor state and collaboration activities of some persons; the latter issues are discussed below.

First of all, special attention should be given to the category of citizens who were forced to leave or abandon their place of residence as a result of the armed conflict or temporary occupation or in order to avoid their negative consequences and changed their place of residence within the territory of Ukraine. Such citizens are internally displaced persons in accordance with Article 1 of the Law of Ukraine "On Ensuring the Rights and Freedoms of Internally Displaced Persons". Their return to their previous place of residence immediately after the termination of martial law will in many cases be difficult and sometimes impossible for a long time due to the significant destruction of housing and infrastructure. The Electoral Code in conjunction with the Law of Ukraine "On the State Voter Register" allow internally displaced persons to determine their electoral address, and thus their place of participation in all elections, both national and local ones, at their actual place of residence upon application to the entities maintaining the State Voter Register *on their own initiative*, thereby ensuring their voting rights. However, such a mechanism is designed for the normal functioning of the Register authorities and a relatively small number of applications. At present, there are only statistical estimates of the number of internally displaced persons by region and settlement. The individual registration of internally displaced persons is only partially carried out by the social security agencies to provide assistance to those who apply for it; therefore, there is no full registration of internally displaced persons.

The problem of accounting for residents of settlements under occupation will be complicated due to both significant changes in the composition of the population and the problems of determining the existence of voting rights mentioned above. Particular attention will be required to update the data on Ukrainian voters in the territories occupied since 2014-2015 (Crimea, Sevastopol, certain districts of Donetsk and Luhansk oblasts). Only a small number of voters (estimated to be less than 10%) have changed their electoral address from these territories to other regions of Ukraine during this time. It is extremely difficult to keep track of such citizens or even to establish the facts of their departure. However, the information in the State Voter Register database on voters from the occupied territories has not been updated since 2014.

These problems show that there will be significant risks of inaccuracy and incompleteness of voter lists during the elections to be held after the termination (lifting) of martial law if we rely mainly on the initiative of voters to update the Register personal data, which can lead in fact to subjective results, and on the mechanisms of periodic updating and clarification of the Register's data established by the Law of Ukraine "On the State Voter Register". This may result in non-compliance with the constitutional principles and international standards of democratic, free and fair elections, significant violations of people's voting rights, creation of conditions for large-scale election fraud, distortion of the real will of the Ukrainian people, and thus undermine both the legitimacy and democratic nature of the elections in general and the legitimacy of the representative bodies formed as a result of the elections.

### **Problems with registration of Ukrainian citizens outside the state**

It is worth noting that a significant number of Ukrainian citizens have gone abroad to friendly countries in search of safety. By various estimates, 5-6 million Ukrainian citizens have taken refuge in European countries, and some 500,000 citizens are outside Europe. About a third of them are children and adolescents, therefore the number of Ukrainian voters in these countries is approximately 4 million (up to 15% of all voters as of 2021). During national elections, Ukrainian citizens residing or staying abroad have the right to vote, which the state must ensure.

It should be borne in mind that since 2019, voting in domestic elections has not been held on the territory of the aggressor state for reasons of security and freedom of expression, where a significant number of Ukraini-

an citizens (according to various sources, between 1 and 2 million) have been forcibly deported. It is extremely difficult or even impossible to keep records of such people or even to establish the facts of their departure.

During the national elections, citizens of Ukraine who meet the criteria of Article 70 of the Constitution have the right to vote even if they reside or stay outside Ukraine. Ensuring the possibility to vote in such elections requires personal registration of such citizens, which is carried out, within the system of the State Voter Register, by the Register maintenance authority under the Ministry of Foreign Affairs of Ukraine (part twelve of Article 14 of the Law of Ukraine “On the State Voter Register”) with the assistance of Ukrainian diplomatic missions abroad.

The main source of information about the Ukrainian citizens residing abroad is the consular register (part nine of Article 22 of the Law of Ukraine “On the State Voter Register”), which is maintained by Ukrainian consular offices abroad. However, registration and de-registration is carried out on an application basis at the initiative of a citizen of Ukraine. For various reasons, a significant number of Ukrainian citizens outside Ukraine are not registered with the consular authorities. Another way to obtain information about Ukrainian voters outside the country is where such persons apply for their inclusion in the State Voter Register (Article 19(3) of the Law of Ukraine “On the State Voter Register”). Thus, the possibilities to obtain information on personal data of voters on the initiative of the Ukrainian authorities are very limited. Assistance in this regard could be provided by the states that have accepted Ukrainian citizens and provide them with comprehensive social assistance, and therefore have relevant information about them. It is clear that such information can be provided to the Ukrainian side only with the goodwill of the respective states, which implies the conclusion of relevant inter-state or intergovernmental agreements between Ukraine and these countries. It should be noted that the assistance of friendly states in ensuring the holding of post-war national elections in Ukraine may be necessary not only in terms of registration of Ukrainian voters, but also to organise their voting at such elections.

### Measures to update voter data

The difficult situation with ensuring real voter registration cannot be resolved by relying solely on the initiative and activity of voters themselves. Its solution requires the development and approval of a comprehensive programme of actions by the authorities in the post-war period aimed at radically updating, rather than just clarifying certain items, and ensuring the reliability of the data in the State Voter Register database. Such a comprehensive programme should be developed by analogy with the measures introduced in 2005-2006 to form the so-called “general voter lists” on the basis of the Law of Ukraine “On Elections of People's Deputies of Ukraine” as amended in 2005. The resulting database not only made it possible to compile reliable voter lists for the 2006 elections, but also became the basis for the initial filling of the database of the State Voter Register in 2009.

Of course, the procedure for compiling “general voter lists” implemented in 2005-2006 would require significant modification and modernisation in the current conditions. It should be based on the existence of the State Voter Register as an automated information and communication system, whose data should serve as the basis for the procedure, in particular using the network of entities maintaining the Register, albeit with possible problems in restoring their capacity in the areas of military operations or temporary occupation. At the same time, such a procedure will require the involvement of a number of other bodies, in particular, executive authorities of local self-governments authorised to form and maintain the register of each territorial community (Article 37<sup>1</sup> of the Law of Ukraine “On Local Self-Government in Ukraine”). The procedure should make it possible to contact, if necessary, each voter whose information needs to be clarified.

To implement a comprehensive action programme to update and modernise the database of the State Voter Register, an appropriate legislative framework is needed that would define the objectives of the programme, its stages and deadlines, as well as the implementers. Specific steps can be established by the Cabinet of Ministers of Ukraine at the by-law level. Development of an appropriate regulatory framework with consideration of its potential implementers (the Central Election Commission as the manager of the State Voter Register, local self-government bodies, the State Migration Service of Ukraine, the State Border Guard Service of Ukraine, the Ministry of Foreign Affairs of Ukraine, the Ministry of Communities, Territories and Infrastructure Development of Ukraine) can be carried out with the involvement of the Association of Ukrainian Cities, other associations of local self-government bodies, as well as NGOs experts with relevant expertise.

Based on the experience of 2005-2006, the implementation of such a procedure would take 2-3 months, provided that the relevant regulatory framework is developed in a timely manner and preparatory organisational

measures are taken. Such measures should be a part of the transition period after the termination (lifting) of martial law, and their duration should be taken into account when determining the criteria for the end of the transition period.

## Preserving 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.

In accordance with Article 70 of the Constitution of Ukraine, *citizens of Ukraine* who are at least 18 years old and have not been declared incapacitated by a court 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 Citizenship of Ukraine” in its current version<sup>3</sup> provides a possibility 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. These processes were especially widespread in Crimea and certain districts of Donetsk and Luhansk regions occupied since 2014; in 2023, these processes were also carried out in the occupied parts of Zaporizhzhia and Kherson oblasts. 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, obtaining passports of Russia happens under duress and is not voluntary, but in cases of voluntary acquisition of the citizenship of the aggressor state, and even more so in the case of a person's enlistment in the military forces of the aggressor state, it becomes the ground 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 and procedure 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

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3. At the time of the publication of this study, the President of Ukraine submitted to the Verkhovna Rada of Ukraine a draft law “On Certain Issues in the Field of Migration Regarding the Grounds and Procedure for Acquiring and Terminating Ukrainian Citizenship”, which proposes, inter alia, a new version of the Law of Ukraine “On Citizenship of Ukraine”. The provisions of this draft law have not been analysed at the time of preparation of this update.

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) of the Criminal Code of Ukraine that prescribe serious penalties. However, according to the Constitution of Ukraine, citizens 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, apart from the establishment of a restrictive electoral qualification, it is also possible to deprive *certain categories* of convicted persons of the right to vote in the form of a criminal sanction for certain types of crimes. In this situation, it is advisable to take into account the experience of various European countries. The European Court of Human Rights (hereinafter – the Court, or the ECHR) found in its 2005 judgment in *Hirst v. the United Kingdom* that the electoral qualification that automatically deprives convicts of the right to vote was a violation of Article 3 of Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Nevertheless, the Court stated that the said article “does not preclude restrictions on electoral rights that may be imposed on an individual who, for example, has seriously abused a public position or whose behaviour has threatened to violate the rule of law or democratic principles”. A similar position was subsequently reiterated in the 2010 judgment in *Frodl v. Austria*. In its 2012 judgment in *Scoppola v. Italy*, the Court clarified that States “may decide whether to leave it to the courts to determine the proportionality of a measure depriving prisoners of their right to vote or to introduce appropriate provisions in their legislation” (i.e., to establish the conditions for the application of such an individual sanction). 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 considered with regard to the future post-war reality in Ukraine.

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

## Problems of ensuring conditions for voting outside Ukraine during post-war elections

Another guarantee of the right to vote provided by the government, along with voter registration, is the creation of organisational conditions under which a voter can cast his/her vote if one wishes to exercise one's right to vote. Such conditions, provided by the government, should give the voter free and easy access to a properly equipped voting place at the relevant polling station, where one has guaranteed conditions for free personal (without any external influence) expression of will, while observing the anonymity of the vote cast, which corresponds to the universally recognised principle of secret ballot enshrined in Article 71 of the Constitution of Ukraine, Article 21 of the Universal Declaration of Human Rights, Article 25 of the International Covenant on Civil and Political Rights, as well as the Code of Good Practice in Electoral Matters, the reference document of the Council of Europe. The possible use of alternative voting procedures, such as early or remote (postal or electronic) voting, should not allow for violation of such requirements as free expression of one's will, personal, one-time and secret voting, and it should not shift the burden of ensuring that the government complies with these requirements to the voter.

The standard mechanism adopted in Ukraine and enshrined in the Electoral Code for voting in a specially equipped room on the election day in the presence of official observers ensures that these fundamental requirements are met, without which elections cannot be recognised as free and fair. To this end, a network of polling stations has been established in Ukraine, and each voter is informed about the polling station at which he or she can vote. The voter service procedures established in the Electoral Code and a rational calculation of the time required allowed us to estimate that one polling station can provide adequate voting conditions for 2,000-2,500 voters on the election day.

The biggest problems in ensuring the conditions for exercising the right to vote are related to voting by Ukrainian citizens who will be abroad at the election time. As already noted, the number of such voters is estimated at about 4 million, which is significantly higher than the number of voters officially included in the voter lists in the out-of-country electoral constituency during the latest parliamentary elections in 2019 (450,000 persons of whom only about 15 per cent (32,800 persons) took part in the voting according to the official data of the Central Election Commission).

It is impossible to estimate today the dynamics of the return to Ukraine of people who have found refuge abroad after the end of the war, and the relevant indicators should be provided when the State Voter Register is updated. However, it is quite reasonable to assume that the Ukrainian citizens residing abroad will be much more interested to vote in the post-war elections than in the last elections held in peacetime. Thus, the task of the Ukrainian government will be to provide conditions for several million voters of this category to vote.

Traditionally, Ukrainian citizens have voted in out-of-country elections at polling stations located in the premises of Ukrainian diplomatic missions. This ensured compliance with the relevant requirements of the Ukrainian legislation, including security requirements, by using Ukrainian government's own means in view of the extraterritoriality of the diplomatic premises. At the latest elections in 2019, 102 polling stations were set up abroad; this is the maximum number of polling stations that could be established using the premises of Ukrainian diplomatic missions. Obviously, in the current circumstances, this number of polling stations will not be able to make voting possible for the real number of Ukrainian voters. It is necessary to look for additional possibilities to ensure their voting. Among these possibilities, we will briefly describe the following.

► *Setting up additional polling stations abroad outside the premises of Ukrainian diplomatic missions*

The most obvious way to increase the access of out-of-country voters to polling stations is to increase their number and bring them closer to the places of residence of a significant number of Ukrainian citizens in the respective countries. This means setting up several hundred additional polling stations with voting facilities outside the premises of Ukraine's diplomatic missions, i.e., on the sovereign territory of foreign countries. To do it, a simple permission from the authorities of a respective country is not enough, it is also necessary to address the security issues for voters and election commissions, protection of order during voting, preservation and protection of election documents, which can only be ensured in cooperation with the law enforcement forces of the host state. The latter is particularly relevant in the current situation, given the repeated cases of hooligan provocations carried out by Russian nationals and their supporters in European countries. This implies the existence of relevant interstate (intergovernmental) agreements between Ukraine and the relevant states, which should be prepared and concluded in advance. Under any circumstances, the degree of election security at such polling stations will depend on the goodwill of the host states, and not on Ukraine's actions.

Another problem with the establishment of a significant number of additional polling stations abroad is the staffing of the respective precinct election commissions. In accordance with the requirements of the Electoral Code of Ukraine, a precinct election commission shall have an average of 12-15 commission members who are voters of Ukraine and reside or are staying in the territory of the respective state. This means that in the case of approximately 300 polling stations abroad, about 4,000 people need to be involved in the precinct election commissions, who need to be properly prepared to perform the duties of commission members through training, as well as properly motivated to perform these rather onerous duties. Such activities should be started in advance.

Despite the problems described above, with appropriate preparation and consent of the host states, this method of providing voting opportunities seems to be the most feasible in most countries where a significant number of Ukrainian voters are present.

► *Voting during several days (early voting)*

The institution of early voting is known to Ukrainian electoral law as it was used in the first decade of Ukraine's independence. Its use stopped due to its inherent fundamental flaws which allowed violations and abuses that reduced public confidence in the election results.

Voting over several, even two days cannot be conducted by one full-strength commission due to the excessive workload of the commission members, which inevitably leads to mistakes and violations and creates conflicts. This problem can be solved either by forming two alternating commissions, which would double the number of people involved in the commission, or by administering early voting by only a part of the com-

mission, which significantly reduces the credibility of the commission's activities as it does not ensure internal mutual control, which can be provided by including representatives of the stakeholders (candidates, political parties) in the commission. Multi-day voting also creates a security problem for election documents, in particular the ballot boxes with filled ballots, during the inevitable night breaks between the voting days, which may also undermine confidence in the results.

A significant drawback of the multi-day voting procedure is its inconsistency with the campaigning that should end the day before the election day to allow the so-called “day of silence”. In any case, holding the voting while campaigning is still permitted is not consistent with the universally recognised requirement of free formation and free expression of the voter's will.

#### ► *Introduction of postal voting*

Postal voting is quite widespread in European countries, and this method of voting is considered to be a means of increasing voter participation in elections. At the same time, postal voting is inevitably an early vote, which entails most of the organisational problems described above. In addition, it is generally recognised that postal voting poses much higher threats to the requirements of free (without external pressure), secret and personal casting of votes by voters. The problematic nature of this voting method is related to the following features.

Firstly, in postal voting, the voter fills in the ballot paper in a publicly uncontrolled environment, which does not guarantee that he or she does so personally and of his or her own free will, without pressure or coercion from others. Any accompanying statements that are supposed to certify that the voter has expressed one's will freely and secretly may also be written under pressure and coercion. The introduction of such voting procedure means that the state renounces its obligation to create conditions for the voter to express one's will freely and secretly and shifts this responsibility to the voter. In any case, such voting increases the likelihood of “family voting”, which is recognised by the Venice Commission as a significant violation of democratic electoral standards, including gender equality.

Secondly, in postal voting, between the moment the envelope with the completed ballot paper is sent by post (the moment the voter casts his/her vote) and the moment the envelope is received by the relevant election commission, the ballot paper is under the control of postal workers, i.e., the persons who have no legal connection to the election process, and in the case of postal voting abroad, citizens of another state. The high postal standards in most (though not all) European countries do not guarantee protection against targeted abuse and cannot be controlled by Ukraine.

Thirdly, the identity of a voter who voted by post is seen by the relevant election commission only after receiving a completed ballot paper, which opens the possibility of violating the secrecy of the vote and reduces confidence in the election results.

The introduction of such a voting method is possible, provided that proper standards of the postal service are ensured, in particular, secrecy of correspondence and reasonable timeframes for mailing services, and there is high confidence in the activities of election commissions. Failure to comply with these requirements or lack of compliance guarantees threatens to undermine confidence in the election results and the legitimacy of the elected representatives and officials.

#### ► *Electronic remote voting*

This method of voting is similar in its characteristics to postal voting, although it is carried out by fundamentally different technical means. The Council of Europe has repeatedly drawn attention to the standards, compliance with which makes it possible to introduce this method. In particular, the Committee of Ministers of the Council of Europe in its Recommendation CM/Rec (2017)5 emphasises that “public trust in the authorities responsible for election administration is a prerequisite for the introduction of e-voting” and that “only secure, reliable, efficient, technically robust, open to independent verification and easily accessible to voters e-voting systems can build public trust”. In Ukraine's current circumstances, these requirements should be supplemented by security and protection of the system from sabotage, targeted hacker attacks and manipulative influences. It can be argued that today the required public trust in electronic remote voting is absent in the Ukrainian society.

In summary, it is worth noting that the scale of organisational problems in arranging out-of-country voting for Ukrainian voters is a direct consequence of the number of Ukrainian citizens seeking safe living conditions during the war. Therefore, one of the tasks of Ukraine after the end of hostilities and the termination (lifting) of martial law should be to encourage Ukrainian citizens to return to Ukraine and to create the most favourable conditions for their integration into post-war reconstruction, including democratic processes in the country.



# 4. Ensuring passive suffrage

The existence and exercise of passive suffrage is subject to constitutional requirements and electoral law, mostly the Electoral 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 “Updating and recording voter information”) 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 Electoral 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).



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. As already mentioned, by various estimates, about 5-6 million citizens have found refuge outside Ukraine, of whom two-thirds are voters. Therefore, it can be assumed, with account of age requirements, that about 4 million passive suffrage holders are currently abroad. For many potential election candidates, the continuous period of staying abroad has already significantly 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, in most cases, a measure proportionate to the above-mentioned purpose of the established requirement in all cases. Given the long-lasting consequences of disqualification due to staying abroad (5 years for parliamentary elections and 10 years for presidential elections), certain legislative changes are needed: applicable provisions of the Electoral 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), and to simplify the conditions for consular registration (both permanent and temporary) of Ukrainian citizens residing or staying abroad for a long time.

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 "Updating and recording voter information").

Another aspect that the legislators should take into account is that the vast majority of adults who left Ukraine with their children in search of safety amid the war are women. If the constitutional residency requirement for national elections is not relaxed for this category of people, it will result in a significant deformation of the gender composition of the holders of passive suffrage, which will have signs of discrimination, contrary to the generally accepted standards of understanding the principle of gender equality.

### **Conviction as ground for loss of 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. It should be borne in mind that the European Court of Human Rights in its 2012 judgment in *Scoppola v. Italy* recognised the legitimate purpose of depriving a person prohibited from holding public office of his/her electoral rights as aimed at the proper functioning and preservation of the democratic regime.

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. It appears 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 Electoral 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 "Ensuring passive suffrage"), 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 formally deprived of passive suffrage at the elections to be held after termination (lifting) of martial law. Law enforcement agencies and the Ukrainian criminal justice system, due to their overload largely caused by the need to investigate and prosecute war crimes and other war-related crimes, may not be able to address the issue of collaborationism in a timely and appropriate manner. Among other problems, they may lack the resources and evidence necessary to prosecute all persons for all types of collaborative acts that pose a threat to democracy.

Appropriate preventive measures to suspend the right of such persons to participate in elections until a final court verdict (e.g., in the form of a court order to secure criminal proceedings) could be established in procedural legislation, possibly temporarily, as part of transitional justice. Similarly to the opinion of the European Court of Human Rights in *Scoppola v. Italy*, cited above, such measures would have a legitimate aim to sustain proper functioning and preservation of the democratic regime.

Another way to meet the urgent public need to prevent the persons tainted by collaboration and other forms of cooperation with the aggressor or the occupying regime from participating in post-war elections may be *lustration*, another transitional justice tool aimed at identification of those who pose a significant threat to democracy, banning them from holding positions (including elected office) in government. This tool is familiar to many countries whose peoples have won freedom from authoritarian regimes, including those in Central and Eastern Europe struggling with their post-communist legacies, and its applicability in post-war Ukraine is recognised by Western analysts. Lustration is usually aimed at identifying individuals who have committed human rights violations or engaged in other compromising activities under a previous hostile regime or recent enemy occupation. Because of their past actions and connections, such individuals may continue to pose a significant threat to democracy. The purpose of lustration is often to temporarily ban these persons from holding positions in government and thus protect the country's democratic process.

The Ukrainian experience of lustration after 2014 and its analysis by the Venice Commission and the European Court of Human Rights yielded many critical but useful lessons that can be successfully taken into account during the post-war transition period in Ukraine.<sup>4</sup>

These issues also deserve careful consideration by the legislators.

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4. See, for example, K. Sikkink's article "Russia's Voluntary Collaborators" in *Foreign Affairs*: <https://www.foreignaffairs.com/ukraine/russias-willing-collaborators>; Ukrainian translation: <https://www.pravda.com.ua/columns/2023/08/4/7414230/>.

## Residency requirement at local elections

The Electoral Code does not directly 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, not all citizens of Ukraine who permanently reside abroad legalise this fact. Therefore, it should be borne in mind that the relevance of regulating the grounds for applying such a restriction is growing due to a significant increase in the number of Ukrainian citizens who have travelled abroad under martial law, and the significant duration of their residence outside Ukraine. In order to avoid misunderstandings and disputes on this matter, the Electoral Code should contain appropriate regulations regarding passive suffrage at local elections, and the State Voter Register database should reflect respective information on the voters.

## 5. Ensuring competitive elections

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A proper 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. 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.

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 more in detail (see "Safety and security"). Eighteen political parties have already been banned. The Ministry of Justice will continue scrutinizing the activities of other 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 Electoral Code of Ukraine provided a mechanism to ensure the priority right of the higher-level local branches of political parties, primarily at the regional level, to exercise these powers (Articles 203, 204, 219-224 of the Electoral 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 transition 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 participa-

tion 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. Preparations for the elections will undoubtedly require political parties to find other additional sources of funding for 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 Electoral Code of Ukraine applies the media concept meaning that is traditional for the Ukrainian legislation. According to 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.<sup>5</sup> In December 2022, Ukraine adopted the Law “On Media” that implemented a significant part of the relevant international standards at the national level. However, no corresponding changes were made to the Electoral Code of Ukraine. In view of this, the implementation of this new concept in Ukraine still requires not only additional systemic changes to the legislation, but also a review of a number of administrative and management processes. Obviously, this is a rather complicated and lengthy process. However, such an approach is quite important for its gradual implementation, given the large-scale and extremely widespread use of electronic information dissemination tools.

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

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



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>6</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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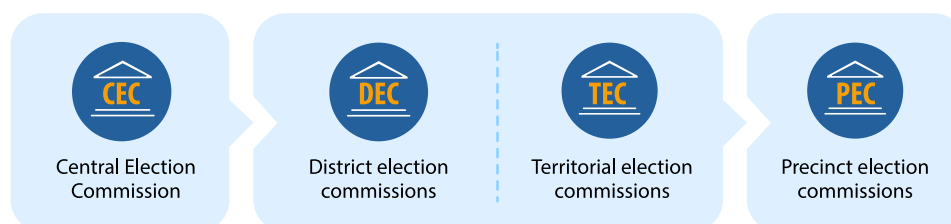
6. Clause 1 of the Decree of the President of Ukraine "On the Decision of the National Security and Defence Council of Ukraine dated 18 March 2022 'On the Implementation of a Unified Information Policy under Martial Law' No. 152/2022 dated 19 March 2022 (<https://bit.ly/3RBWdYy>).

## 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 Electoral 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>7</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 Voter Register. The Central Election Commission holds its meetings regularly.

It is worth looking at the organisation of the functions of the Administrator of the State Voter Register, 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 Voter Register database, it temporarily suspended the automated information and communication system of the State Voter Register for the duration of martial law in Ukraine. The relevant

7. 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>).

authorities have also stopped maintaining the Register at this time. Preparations for the process of updating the Register are currently underway, but the resumption of full-fledged work with the Register is not yet possible (see “Updating and recording voter information”). In addition to the challenges caused by the war, there were difficulties in organising the operation of the State Voter Register 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 Voter Register in the post-war period, as noted above.

According to the Electoral 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 and updating during the war,<sup>8</sup> 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 it is very important to exercise them. In particular, 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 Electoral 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. Moreover, the continuation of such communication should be perceived as a violation of the requirement of objectivity and impartiality. At the same time, one should take into account possible threats to the functioning of election commissions in the previous composition. One of the possible options for a correct solution of this problem may be a complete renewal of the composition of the respective territorial election commissions, though it would require legislative clarification of the relevant procedures.

In accordance with the Electoral 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 are not a pressing issue now, but the above problems as regards territorial election commissions will be also relevant for district and precinct election commissions.

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8. The Central Election Commission regularly carries out relevant work. In particular, it makes relatively frequent decisions on changes to the composition of territorial election commissions that prepare and conduct local elections.

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 raises acute concerns about 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 “Updating and recording voter information”), but it is also important to see how the changes in the data of the State Voter Register may affect the system of election precincts and boundaries of territorial constituencies.

In accordance with the Electoral 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 Electoral Code of Ukraine).

According to the official data, there are millions of people who have been internally displaced during martial law in Ukraine.<sup>9</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 Voter Register” introduced on 16 July 2020, the entity maintaining the State Voter Register 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>10</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 Electoral 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 respective election.<sup>11</sup> These aspects of the functioning of the election precinct system need to be considered

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

10. 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 Voter Register” approved by Resolution of the Central Election Commission No. 88 of 18 May 2020.

11. 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 resolved, particularly at the legislative level, as they directly create a number of significant organisational difficulties for elections in general.

The Electoral 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 Electoral 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.

By all means, migration processes outside Ukraine will also have a significant impact on the organisation of out-of-country voting (see “Updating and recording voter information”). Traditional approaches to the system of establishment and functioning of out-of-country polling stations will not be sufficient to ensure the right to vote for Ukrainian citizens staying abroad.

Therefore, the territorial organisation of elections will directly depend on the updates of the information in the State Voter Register 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.

## Digitalisation and use of the latest technologies

The use of modern technologies for election administration is a requirement of the times and an important tool for ensuring the efficiency and transparency of the electoral process. At the same time, the introduction of new technologies and tools in the electoral process should be carried out with a clear commitment to the principles of electoral law and a high level of trust in both the process of organising elections and their results.

The Electoral Code already makes it possible to use innovative technologies in the electoral process. In particular, the Central Election Commission may decide to introduce innovative technologies, hardware and software during the organisation and conduct of elections in the form of an experiment or pilot project regarding voting at polling stations using hardware and software means (machine voting), counting votes using electronic vote tabulation hardware, and drawing up protocols on vote counting. Such experiments or pilot projects may only be conducted simultaneously with the elections at these polling stations, in compliance with all traditional requirements for the respective elections and voting procedures. At the same time, the results of such experiments or pilot projects may not be used to establish the voting results or election results, or to appeal decisions, actions or inaction of election process participants.

Thus, Ukrainian legislation provides for the gradual use of modern digital tools while taking into account possible risks and threats.

It is worth noting that Ukraine already has some experience of digitalisation in the field of elections. In particular, the establishment of the electronic State Voter Register in 2007 with the support of the OSCE was a large-scale and ambitious project. Despite all the difficulties, the Central Election Commission successfully organised the functioning of the Register, which is still considered one of the most complete databases of Ukrainian citizens. The parliament often obliges the Central Election Commission to provide temporary access to the Register to other authorities when adopting new legislative changes. This experience is a good basis for piloting a system of electronic interaction with other public authorities.

It is worth noting that the implementation of that project took several years and required serious complex organisational actions by a number of public authorities. It is also worth noting that the project was accompanied by proper legal regulation, both at the level of a special law adopted by the parliament and

proper regulation at the level of bylaws. This experience can be a good basis for introducing new technologies and tools in the administration of the electoral process. It is also worth considering that the Central Election Commission will have to play a key role in the implementation of the relevant process. Currently, this is difficult to implement as the CEC Secretariat lacks relevant specialists, and inadequate financial and technical support does not allow for rapid development of this area.

A completely different set of problems is related to the introduction of electronic voting in an uncontrolled environment, e.g., internet voting. The challenges and legal prerequisites for the implementation of new technologies are more extensive and threatening here (see “Problems of ensuring conditions for voting outside Ukraine during post-war elections”).

The problems with the introduction of e-voting in Ukraine are generally quite widespread and have much in common with those in other Central and Eastern European countries. However, Ukraine has peculiarities caused by the ongoing war and the state of economic development, which significantly complicate the progress in this direction. In addition, the threat to national security and sovereignty is paramount.

Active hostilities and aggression by Russia continue on all possible fronts. The digital component is also a serious “battlefield”. Websites, servers and other technological assets of public authorities are subject to constant and very aggressive attacks by the aggressor state. Therefore, even piloting new voting formats (modalities) would be dangerous amid the war. It is hardly advisable to introduce such complexities and innovations in the first post-war election campaigns. The challenges of post-war reconstruction will hinder the proper preparation of society through technological and educational activities. Careless use of such a serious tool as internet voting could jeopardise the sovereignty of the state and its institutions.

From a technological point of view, it is certainly worth considering that the level of digitalisation of society is relatively high, but it does not fully meet the requirements for implementing such a large-scale project as remote voting, e.g., via the internet. Despite the widespread use of smartphones in Ukraine, the level of digital literacy and compliance with safe internet practices is still relatively low. It is worth noting that the number of people who use computers (desktops and laptops) is even lower. In addition, the use of unlicensed (pirated) software remains a serious problem.

Another important aspect is ensuring proper protection of information and personal data. The existing Ukrainian experience of digitalisation in other areas provides many examples where regulation of this aspect requires additional attention. For example, the functioning of the Unified State Web Portal of Electronic Services in terms of personal data protection is regulated at the subordinate level and through separate procedures, rather than through proper regulation by law. Another important aspect is that the current version of the Law of Ukraine “On Personal Data Protection” does not provide for effective state control over personal data protection. Ukraine is currently on the way to harmonising its national legislation with the relevant EU legal standards.<sup>12</sup> Relevant draft laws have been registered in the Verkhovna Rada of Ukraine, but have not yet been adopted.

Given these and a number of other aspects, the digitalisation of election administration in Ukraine can be a gradual process. It is crucial to build on the existing experience of using the latest technologies both in the field of elections and in related areas. Any changes should be subject to proper regulation in compliance with the requirements of the Constitution of Ukraine and the relevant international standards. Obviously, the risks and threats posed by active hostilities and the war in general make rapid digitalisation impossible. A different approach could have a very serious impact not only on ensuring compliance with the principles of electoral law, but also on elections as a democratic institution in general.

## Logistical support for the preparation and conduct of elections

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.

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12. In particular, this refers to Regulation (EU) 2016/679 of the European Parliament and of the Council of 27.04.2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (<https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32016R0679>).



## 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 Electoral 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.

In particular, funding for seemingly routine electoral procedures (equipment of premises for election commissions and voting rooms, provision of high-quality internet connection for the functioning of the information and analytical systems, transportation of ballots and election documentation, etc.) can be much higher in certain areas in the post-war period. The costs can be reliably calculated only with a good understanding of the number of elections that will be called, as well as the challenges for each of the territories where such elections will be held. In addition, the relevant funds should be provided for in the State Budget of Ukraine for the respective year at the time of its adoption, or the parliament will have to amend the state budget.



## Premises for elections

The Electoral 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 and properly store election documentation, use computers and other equipment, including automated information analysis systems, etc. Implementation of such legal requirements in the post-war period in a significant number of communities will face a number of obstacles. First of all, it is important to take into account the potential number of voters who will participate in the elections in each territory. After all, the number of internally displaced persons in some regions is extremely high, and it may be quite difficult to provide the necessary number of voting facilities. The situation will be particularly difficult in areas where active hostilities have taken place or which have been subjected to rocket or artillery fire. A separate set of problems will be related to the provision of voting premises in out-of-country polling stations, where the number of voters will certainly change.



## Equipment

The Electoral 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 Electoral Code of Ukraine).

The law requires that each voting premise should 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 booths for medium-sized election precincts, and at least six booths 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. In areas where active hostilities have taken place and infrastructure has been severely damaged, it will be difficult to provide proper transportation. In this case, it is important not only to ensure the actual availability of vehicles, but also to ensure safe movement in the respective territories. If the system of polling stations abroad is significantly expanded, the organisation of out-of-country voting will require finding additional possibilities to transport election documents to and from diplomatic missions.



## 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 Voter Register 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 Electoral 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, by telephone, telephonogram, or SMS (Article 70(3) of the Electoral Code of Ukraine). Again, the organisation of out-of-country voting will raise the issue of access to secure communication channels and will require fairly close cooperation with national authorities in each country where voting for Ukrainian citizens will be arranged.

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 Electoral Code of Ukraine.



## 7. 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 Electoral 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 Electoral 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. Relevant laws are being drafted at the parliament, but their official consideration has not yet begun.

The need to develop criteria for assessing the situation and the preconditions for calling, organising and holding elections in the post-war period is a critical prerequisite for ensuring Ukraine's democratic development. A comprehensive analysis of the relevant challenges and threats should form the basis for an appropriate national policy.

The work on the criteria should include several components and levels. In particular, different sets (blocks) of criteria should be considered depending on the type of elections (criteria for national and local elections should take into account the specifics of such elections and their constitutional nature); for different territories of Ukraine (depending on the scale of hostilities and duration of the war, for example, for the occupied territories); depending on the available tools and mechanisms to verify the criteria for the possibility/impossibility of holding elections, etc.

The criteria for holding elections/referendums should be based on a thorough analysis of the situation and specific facts. The decision-making procedure cannot be based on abstract (unjustified) administrative positions or political decisions. Accordingly, the decisions that the authorised entities make should be preceded by procedures to identify, analyse and, if need be, establish the relevant facts.

The criteria for the possibility/impossibility of calling, organising and holding elections should be established at the legislative level. At the same time, the relevant amendments to the Electoral Code of Ukraine and other legislative acts should be drafted with broad involvement of non-parliamentary experts and a level of transparency and openness proportionate to the situation.

**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 "Updating and recording voter information" and "Ensuring passive suffrage"), 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. The Verkhovna Rada of Ukraine is currently discussing additional regulatory restrictions on the rights of members of political parties whose activities have been banned by a court. The respective draft law was analysed by the Venice Commission

experts and a number of proposals for the relevant legislative regulation were provided.<sup>13</sup> Work on the draft law is ongoing.



### Ensuring physical security

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.

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13. See Ukraine – Joint opinion of the Venice Commission and ODIHR on the draft law amending certain legislative acts of Ukraine which restrict the participation in state power of persons associated with political parties whose activities are prohibited by law, approved by the Council for Democratic Elections at its 78th meeting (5 October 2023) and adopted by the Venice Commission at its 136th Plenary Session (Venice, 6-7 October 2023) CDL-AD(2023)025-e ([https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2023\)025-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2023)025-e)).

**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 Electoral 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 Voter Register: 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, as well as 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, dis-information, etc.), abuse of modern digital or digitalised communication tools, and so on.

The need to develop criteria for assessing the situation and the preconditions for calling, organising and holding elections in the post-war period is a critical prerequisite for ensuring Ukraine's democratic development. A comprehensive analysis of the relevant challenges and threats should form the basis for an appropriate public policy. Such criteria should be established at the legislative level. At the same time, the relevant amendments to the Electoral Code of Ukraine and other legislative acts should be drafted with broad involvement of the non-parliamentary experts and a level of transparency and openness proportionate to the situation.

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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