

UKRAINE POLICY ALERT

Ukrainian authorities' legitimacy when elections are impossible

Part I: Why elections in Ukraine are impossible while the full-scale war continues?

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The new normal that Ukraine has been forced into after Russia's full-scale invasion on the 24th of February 2022 raises questions for the Ukrainian government, politicians, experts, and society about whether democratic elections are possible in Ukraine while the active phase of the war is ongoing. This also raises questions about the legitimacy of Ukrainian elected authorities when elections are not likely for years to come. In Part I of this series of Ukraine Policy Alerts, the author delves into the legal perspective to explain why conducting elections in Ukraine remains impossible amid the ongoing full-scale war.

PART I: Why elections in Ukraine are impossible while the full-scale war continues?

Russia's full-scale invasion of Ukraine in February 2022 has caused the political system to face the challenges of so-called "militant democracy" - the need for the authorities to take measures to preserve the democratic regime in Ukraine and create opportunities for democracy to defend itself. This situation has affected the institution of democratic elections as one of the main factors of the government's legitimacy.

Since it became clear that the Ukrainian parliamentary elections scheduled for 29th of October 2023 would be postponed indefinitely, and it also became obvious that the planned presidential elections on 31st of March 2024 would also be postponed, Ukraine has found itself in new legal and political circumstances and there is no clarity regarding what comes next. This issue becomes even more evident when discussing the local elections in Ukraine, which are scheduled for 26 October 2025. However, it is highly likely these may also be postponed or held only on Ukraine's sovereign territory if the situation on the battlefield remains unchanged.

This discussion surrounding the issue of elections and legitimacy has two main aspects - legal and political. While the former is determined by Ukrainian legislation, international law, and democratic standards, the latter is less transparent and predictable. The political aspect depends on the domestic political situation in Ukraine, changes in the situation at the battlefield, and the expectations of Ukrainian society and the international community, especially the Western partners of Ukraine. The interaction of these different elements in the face of uncertainty will shape the current situation with the political legitimacy of the government in Ukraine when elections are impossible.

Is it possible not to hold elections during the war?

The issue of holding elections during wartime is primarily a matter of legislation, not political debate. For this purpose, we need to consider the [Constitution of Ukraine](#), as well as special laws - the Law on the Legal Regime of Martial Law and the Electoral Code of Ukraine. Ukrainian law prohibits the holding of elections during martial law.

Article 64 of the Constitution states that the right to "participation in the state affairs (including the participation in elections), in all-Ukrainian and local referendums," as defined in Article 38, is not absolute and may be restricted in its exercise under martial law, as well as the freedoms necessary to exercise such right. These freedoms are of expression (Article 34), association (Article 36), and peaceful assembly (Article 39).

Furthermore, Article 20 of the [Electoral Code of Ukraine](#) states that " In the event of martial law or state of emergency being imposed in Ukraine or in its separate territories, the election process of national elections and/or local elections held in these territories or their parts shall be terminated from the date of entry into force of the respective decree of the President of Ukraine." It also states that "The decision on calling elections, the electoral process of which was suspended or did not begin due to the imposition of martial law or state of emergency, shall be adopted by the subject of their appointment not later than one month from the date of termination or abolition of martial law or state of emergency." This provision is debatable, as it will be a priori impossible to hold the first post-war elections within a month after the end of martial law. Ukraine should consider introducing a transitional period of at least six months from the end of the martial law regime to the start of the election process, which could extend for a year.

The constitutional provision was put into effect by President Volodymyr Zelenskyy's [Decree No. 64](#), "On the Introduction of Martial Law in Ukraine" of 24th of February 2022, which states that "in connection with the introduction of martial law in Ukraine, the constitutional rights and freedoms of a person and citizen provided for in Articles 30-34, 38, 39, 41-44, 53 of the Constitution of Ukraine may be temporarily restricted for the period of martial law." Initially, authorities introduced it for 30 days, but later, the parliament extended the martial law for three months. The Ukrainian parliament, the Verkhovna Rada, has voted for this nine times, each time with the support of at least 300 MPs.

As the Law on the Legal Regime of Martial Law does not specify any restrictions on the possibility of prolonging the presidential decree, martial law will likely continue to be in force throughout Ukraine until the active phase of the war is over. In the future, the legal regime of martial law may remain in place only in certain territories of Ukraine, potentially opening the possibility of holding national and local elections on the sovereign territory of Ukraine controlled by the Ukrainian authorities.

Indeed, this was the situation for almost eight years, between the beginning of the Russian-Ukrainian war in 2014 and the full-scale invasion in 2022, when Ukraine held five election campaigns - early presidential and parliamentary elections in 2014, regular presidential and early parliamentary elections in 2019, and regular local elections in 2020. However, about 7% of Ukraine's sovereign territory was occupied at that time, and the legal regime of martial law operated only in part of the occupied territory of Donetsk and Luhansk regions. There were no large-scale hostilities, while today, about 20% of the territory is under Russian occupation or under condition of active warfare, almost 30% of Ukrainian territory is mined, and another 20% is within the immediate reach of artillery installations. Missiles and drones are launched across the country, posing unprecedented and unjustified security threats to the population. Moreover, there is the context of daily active hostilities along the entire 1,500-kilometre length of the active frontline.

A similar legal logic for assessing the possibility of holding elections in wartime is used in international democratic practice. For example, Article 21 of the [Universal Declaration of Human Rights](#), the preamble to the Convention for the Protection of Human Rights and Fundamental Freedoms, Article 25 of the [International Covenant on Civil and Political Rights](#), and the practice of the European Court of Human Rights and the Venice Commission. The Venice Commission emphasizes that the elections require a peaceful political atmosphere, the full implementation and comprehensive observance of all freedoms and human rights, as well as the full guarantee of public order and security, which is the reason for the existence of constitutional and legal restrictions on holding elections under martial law.

The most relevant in terms of the context and the nature of the challenges is the experience of the United Kingdom during the Second World War when the "Battle of Britain" forced the cancellation of parliamentary elections. In May 1940, Winston Churchill succeeded Neville Chamberlain as Prime Minister and headed a coalition government with a military cabinet. The government of national unity consolidated representatives of the three main British political parties — Conservative, Labour, and Liberal. The same year, regular parliamentary elections were due to take place. Still, in November, the government received legislative consent from the House of Representatives to amend the Parliament Act and postpone them. Further, these amendments were extended annually by the British Parliament until the end of the war in Europe. So, the British government, which was elected in 1935, continued to operate without elections for ten years. The first post-war elections were held in July 1945, and Churchill and his Conservative Party suffered a crushing defeat.

Under extraordinary circumstances, when the state may not be able to ensure compliance with constitutional and international standards for free and democratic elections and exercise of electoral rights in compliance with these international standards, such as during martial law, we have seen democratic countries not holding elections.

Holding elections in Ukraine under such conditions is not only unconstitutional but irresponsible and harmful, especially for national unity. Holding elections under martial law and full-scale aggression would be contrary to international standards, Ukraine's international obligations, and its Constitution. It would also contradict the principles of electoral law, especially free elections, as security risks, restrictions on freedom of expression, and the prohibition of peaceful assembly make it a priori impossible to have free political competition and, therefore, free will formation and expression in times of war.

Is the government legitimate without periodic elections?

Postponing parliamentary, presidential, or local elections during martial law is legal, democratic, and legitimate. Naturally, making significant adjustments to the timing of electoral cycles does not negate democracy. Elections alone do not equal democracy, and the formal act of voting is not absolute proof of a regime's democratic character, for example, the presidential pseudo-election in Russia on March 17, 2024. Elections are certainly not free if a competitive political debate is not possible during a war. Elections are not a day of voting but a loud debate between different camps about the best program for the development of the state.

The lack of reasonable possibilities for holding regular elections and ensuring the periodicity prescribed by law while limiting democracy does not call into question the legitimacy of elected authorities. In this case, all other democratic procedures should be followed, if they are not subject to the restrictions of the martial law regime.

Article 83(4) of the Constitution of Ukraine explicitly prohibits the termination of the mandate of the Parliament and automatically extends it until a new convocation is elected after the war: "In the event that the term of authority of the Verkhovna Rada of Ukraine expires while martial law or a state of emergency is in effect, its authority is extended until the day of the first meeting of the first session of the Verkhovna Rada of Ukraine, elected after the cancellation of martial law or of the state of emergency."

Moreover, the laws explicitly prohibit holding any elections, including presidential ones, in wartime. Given the difficulty of electing the country's parliament as a national representative body, holding presidential elections would mean applying different approaches to forming the legislative and presidential branches of government, while the nature of elections and the principles of their conduct are the same for both bodies of power. Notably, the third section of the Ukrainian Constitution applies to all types of elections, meaning its requirements must be met during national and local elections.

Both the Verkhovna Rada and the President of Ukraine must exercise their powers until the military threat is averted and international standards and constitutional principles of electoral law hold democratic elections. All authorities must be fully operational, have complete legitimacy, and be united. These provisions are entirely in line with the principles that other democratic countries live by.

Any amendments to the legislation to make wartime elections formally "legal" would contradict the spirit of the Constitution and international standards. Firstly, the Constitution of Ukraine cannot be amended during martial law or a state of emergency (Article 157 of the Constitution). Secondly, an attempt to amend Article 19



of the Law on the Legal Regime of Martial Law, Article 20 of the Electoral Code, or a short-term formal cancellation of martial law to announce the start of the election process is not enough to legitimise elections in times of war - especially in a way that is legitimate and recognised by the civilised world as democratic.

Notably, the procedure for introducing martial law and its prolongation, which requires a presidential decree and its mandatory approval by the Verkhovna Rada, is a safeguard against the usurpation of power. Namely, in case of suspicion of usurpation of power (by the President or the Parliament), it can be restrained by the other party by not issuing a decree on the extension of martial law, not approving the relevant decree, or not agreeing with the term of introduction or extension of martial law.

However, there is no answer to maintaining a high level of public trust in the authorities, given that every year without elections will result in a decline in public confidence. The answer to this question lies in so-called political legitimacy.



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