Elections in Wartime Ukraine Would Test Ukraine’s Legal-Political Flexibility

By Mykhailo Minakov

President Volodymyr Zelensky and the current Ukrainian parliament are approaching the hour when their formal legitimacy, their mandate, comes to an end. Under normal conditions, elections to the Verkhovna Rada would have been held last October, while candidates for the presidency would have started preparing for elections scheduled for the last Sunday in March of 2024.

But the country is consumed by war, and elections are probably not an option. Or are they? President Zelensky is considering the answer to this question.¹ I should state at the outset that I find the idea of organizing elections, whether presidential only or both presidential and parliamentary, during wartime is a very bad idea. At the same time, I also disagree with those who think the matter of postponing elections can be settled purely by having recourse to existing laws.

In this brief I show that the ruling group could, if it chose, adopt some legal maneuvering that would formally respect the constitution and the nation’s laws (though violating their spirit), and that these maneuvers have been tested several times in Ukraine since 2014.
But such formally legal if doubtfully legitimate elections could also pose unjustifiably high sociopolitical risks for a state at war, and this creates a dilemma for the nation.

Defining the Wartime Electoral Dilemma

Currently, the Zelensky administration is under pressure to organize parliamentary and presidential elections soon. The first source of the pressure is the West. Behind the scenes, Ukraine’s allies are allegedly demanding that Kyiv renew its government’s legitimacy, despite the ongoing war and the mass dislocation of citizens.

Ukraine’s allies know well the constitutional limitations on wartime elections in Ukraine. They also know that the current legal regime is “flexible” enough to find legal ways of organizing elections. After all, they point out, the war started in 2014, and thereafter two presidents and two parliaments were elected. Also, some opposition-minded groups in the United States and Europe are casting doubt on the democratic nature of Ukraine’s government as a reason to reduce the military and financial support being provided to Ukraine. Elections would help the Western pro-Ukrainian governments overcome these objections at home in the upcoming budgetary debates.

A second source of pressure to hold elections is the domestic political situation. After a very uneven, challenging, and tragic five-year governing effort that had to deal with the “Green Wave” of radical reforms, the COVID-19 pandemic, growing clashes with opposition groups, and Russia’s full-fledged invasion, President Zelensky and his party need to renew their mandate. For the sake of political stability they must demonstrate their democratic legitimacy to the nation, the opposition, and, especially, the army. Whatever future awaits Ukraine, whether protracted war or peace negotiations, the government must be regarded as fully legitimate and must be trusted by its constituencies and the military to cope with upcoming challenges.

Under such circumstances, Volodymyr Zelensky and his closest associates must resolve the dilemma: to hold elections or not to hold elections. Each choice has pros and cons.

Reasons to defer elections. Russia’s war of attrition goes on and demands all the government’s attention and all the nation’s resources.

There are also many constitutional, legal, and political reasons for not holding elections. To organize meaningful, free, and fair elections, Kyiv would need to lift the many political restrictions that were put in place to create national solidarity and a singular national focus on achieving victory. This means that the government would need to revise electoral legislation, create new tools to enable the vast number of displaced citizens to vote, allow a more capacious writ and greater ideological diversity of the media, and restart political competition.

Reasons not to defer elections. On the other hand, without the essential democratic legitimacy conferred by free and fair elections, it may soon be impossible to govern a nation embroiled in a war for freedom. Even more, if elections were organized, they would need to be conducted in a way that citizens—whether serving at the front or working in the rear or living in the occupied territories—fully recognized that the campaign and ballot count were honest.
Ukrainians have a record of revolts provoked by a suspicious electoral process and results. The wartime legal, administrative, socioeconomic, and demographic problems could influence any elections in a big way and so rattle the political order and divert the government’s attention from the needs of the front.

**Legal-Political Flexibility as Ukraine’s Answer to a Long War**

Despite pressures for—and expert voices against—holding the elections in wartime, Zelensky’s team is taking into account Ukraine’s recent experience in living under conditions of war. The war in Ukraine started de facto with Russia’s first acts of aggression, in 2014, and has now spread throughout the country with Russia’s full-scale invasion in 2022. However, de jure, the war between Russia and Ukraine has seen three different legal regimes during the past nine years.

First, between April 15, 2014, and April 30, 2018, Ukraine existed in the regime of the Anti-Terrorist Operation (ATO), which was a set of military and legal measures adopted by Ukrainian law enforcement agencies and aimed at countering Russian and pro-Russian armed groups in the war in eastern Ukraine. This regime limited some civil rights in some territories, but it was not martial law. So both presidential and parliamentary elections could be conducted in 2014 in all regions not directly affected by war.

Both presidential and parliamentary elections were internationally recognized as free and fair, despite military actions in some oblasts and the inability of voters to participate in elections in Crimea and some districts of the Donbas. The legal regime flexibly mixed elements of martial law and peacetime politics.

Second, between April 30, 2018, and February 24, 2022, the regime of the Joint Forces Operation was in effect which continued the logic of the ATO in slightly different military and administrative terms. Again, this flexible legal-political regime allowed free and fair presidential and parliamentary elections to be held in 2019, despite the ongoing war in the Donbas and the annexed Crimea. Even though President Petro Poroshenko attempted to impose martial law and postpone the elections of 2019, the Verkhovna Rada resisted his efforts and saved the elections in a form characteristic of peacetime.

The same legal flexibility allowed Zelensky to use military elements of the legal regime and to start using the Security Council as a core instrument in his fight with the oligarchs in 2020–2021.

The third legal regime started with Russia’s full-fledged invasion on February 24, 2022. It was thought that this time, Ukraine’s legal-political flexibility would not be up to the task. But again, some legal-political flexibility remained: martial law (воинский стан) was imposed without declaration of a state of war (стан виин) and war on Russia.

Indeed, de jure, martial law was initiated by Volodymyr Zelensky and approved by the Rada on February 24, 2022. Since then the process has been repeated regularly, with martial law being continued for several months ahead at each approval. This time, the legal order of war was additionally defined by the Law on the Use of the Armed Forces and other military formations to defend the country. Military-civil administrations started governing all regions of Ukraine, and civilian associations, mass media outlets, and political parties began functioning under wartime restrictions.
According to the laws on the legal regime of martial law and on defense, martial law was introduced to avert the threat to the nation and to repel armed aggression in all regions of Ukraine. The laws on martial law and on defense provide state authorities, the military command, military administrations, and local self-government bodies with special powers necessary to fight the enemy. Also, as allowed by the constitution’s Article 64, certain temporary restrictions on many civil rights and freedoms were imposed. Altogether, the various ramifications of the legal regime of martial law have directly affected domestic political processes.

At the same time, the Ukrainian government did not announce a state of war and did not declare war on Russia. Volodymyr Zelensky submitted to parliament a draft law on the declaration of a state of war, but it was never considered by parliament (and only the web archive has actually preserved some traces of this step). Even though a state of war regime is mentioned in the Ukrainian constitution, it has never been defined.

Where does the concept of a “state of war” come from, particularly with reference to Ukraine and its political-legal flexibility? In a nutshell, the concept stems from international agreements such as the Third Hague Convention on the Opening of Hostilities (1907) or the UN General Assembly Resolution 3314 (1974), both of which introduce the concepts of war and aggression. They define the norm according to which one state may not initiate military action against another state absent a declaration of war or an ultimatum. They also stipulate that the use of armed force by one state is sufficient evidence of an act of aggression against another state.

By not announcing war on Russia and not introducing a state of war, the Ukrainian government has some flexibility, for example, in continuing to transit Russian gas to the EU. So, even after announcing martial law, the government of Ukraine has preserved some element of legal-political flexibility by not declaring war on Russia.

All three legal-political regimes have allowed and prepared Ukrainians to adapt their political and legal systems, as well as their communal life and economy, to the conditions of a temporally protracted and spatially enlarging war. This adaptability has immersed Ukrainian institutions in a state of legal, political, security, and even military affairs that has proved rather flexible in merging de jure and de facto situations.

For example, it has allowed the nation to survive when some of its territory was occupied by Russia or Russia-backed separatists—yet there are front-line areas with vast Ukrainian military operations. There are also the rear regions where, prior to the current state of conflict, Ukrainians continued to live and work. And before 2022, but during wartime, they enjoyed competitive elections, the division of power, functional courts, and active participation in international relations. This flexibility, whose roots survived even after 2022, may be used by the ruling group to organize yet another wartime election. And Western allies know it well.

**Does the Current Legal Regime Allow Elections in Ukraine?**

Usually, elections are not conducted in countries at war. However, if the war is protracted, elections might be needed to reestablish the domestic and international legitimacy of the government. The Ukrainian constitution and its laws do not provide
a clear answer to this question, and this ambiguity is one of the sources of wartime Ukraine’s legal-political flexibility.

Indeed, the constitution’s Article 83 states that if the term of service of the Verkhovna Rada expires when the country is under martial law, its authority is extended until a new parliament is elected. This and other constitutional provisions cannot be changed while martial law is in effect (Article 157). However, the constitution does not prohibit either presidential or local elections from being held.

The restrictions on presidential and local elections are provided for in the Law on Martial Law and the Electoral Code’s Articles 20 and 280. These stipulations, however, can be changed by parliament and approved by the president, if there is political will to do so. Thus, if the Ukrainian political class agrees, presidential elections can be conducted under martial law next year.

Even more, if the president and the Rada agree, they could stop continuing the regime of martial law, despite ongoing military actions on the soil of Ukraine. That way even parliamentary elections could be legally held. However, in such a case the legality and the legitimacy of the decisions would openly contradict each other.

In sum, the existing legal-political flexibility indeed provides an opportunity for elections. But it neither resolves the question of the essential democratic legitimacy of elections held during a de facto war nor decreases the risk of desolidarization of society during competitive elections.

Security Risks around Wartime Elections

Despite all the legal workarounds and some benefits that flexibility can bring, elections pose an existential risk for a nation at war. Ukraine has nonetheless held elections in the face of this risk after 2014, but with the current war of vastly greater scale than earlier stages of the conflict and having an incalculably greater influence on Ukrainian society, economy, and political institutions, the former success may not be repeatable. If elections are attempted in 2024, they may lead to disaster for Ukraine.

Ukrainian experts who publicly oppose the decision to hold elections in 2024 typically adduce two arguments. The first is that the constitution and laws prohibit elections when the country is under martial law. This argument has its weak side: there are ways to get around such prohibitions, as discussed above.

The second argument is stronger: the sociopolitical order will face overwhelming challenges to its stability if elections are conducted during wartime. The reasoning here usually refers to the unjustifiably high costs of elections and the fact that they would undermine national unity during war. Wartime elections would indeed drag a hugely sensitized society into debates that might still be constrained by the needs of war and into voting that might not be well attended by so many displaced citizens, reducing representation.

Here is the major contradiction that makes wartime elections so potentially destructive. If the aim is to uphold and reinforce by democratic means the legitimacy of the government, elections must be free, honest, based on open debate and
competition, and accessible to all voters. If some element on this list is missing, the aim of elections will not be achieved. Also, if some element on this list is missing, the sensitized Ukrainian society, which already trusts military institutions more than it trusts civilian, democratic ones, might protest en masse. The picture is even more contradictory: if resources are so scarce as to hamper the country’s defense efforts, and if international support is slowing, then diverting resources away from defense and toward some other purpose is counterproductive.

Indeed, allocating human, administrative, and financial resources to elections during a war of attrition is an unjustifiable luxury. Over 50 percent of the Ukrainian budget for 2024 is planned to come from external sources. And these sources, as the current debates in the U.S. Congress demonstrate, may not be as generous as in 2022–2023.

Every public and economic sector in Ukraine reports a growing deficit in human resources. Well over six million Ukrainians have left the country, and many of them—over a million, at a minimum—live on the territory of the aggressor state. Over three million Ukrainians are fighting to survive in internal displacement. Another four million Ukrainians live in Russia-occupied Ukrainian territory. Under such conditions, it would be close to impossible to organize an inclusive and accessible voting apparatus. And that would put in doubt the legitimacy of any government elected under such conditions.

The question of legitimacy gains another wrinkle when citizens’ fading trust in the government and democratic institutions is considered. After almost two years of life under martial law, Ukrainian society shows signs of stable trust in security institutions and declining trust in public organizations. Even though polls conducted under conditions of war have, as expected, a large margin of error, the results still deserve attention for the social dynamics and the relative ratios they reveal.

For example, according to a recent poll by the Razumkov Center, a nongovernmental think tank, the most trusted state bodies include military or war-related institutions and organizations: the armed forces (93 percent of respondents trust them), volunteer organizations (that support the army, 84 percent), the National Guard (81 percent), the State Border Service (76.5 percent), the president (who is commander in chief, 72 percent), the Ministry of Defense (71 percent), and the Security Service (66 percent). But trust in democracy-related institutions is falling. The majority of respondents expressed distrust in political parties (74 percent), public officials (72 percent), the courts (70 percent), parliament (64 percent), the National Anti-Corruption Bureau (53 percent), and the National Agency for the Prevention of Corruption (52 percent).

Despite being dissatisfied with the civil part of government, the population remaining within Ukraine’s borders is opposed to the prospect of elections in 2024. According to the same Razumkov Center poll, only 15 percent of respondents support holding national elections before the end of the war, with almost two-thirds (64 percent) rejecting such a proposal and 21 percent of respondents undecided. Election supporters argue that elections are necessary to support democracy in the country (6 percent) and to show the world that Ukraine is a democratic state (5 percent); another 5 percent see the need to change the government or at least to renew President Zelensky’s mandate (5 percent). Election opponents argue that elections are too
expensive for the current state budget (36 percent), that the legislation does not allow them (32 percent), that voting would be insecure (31 percent), and that, under martial law, it is impossible to observe democratic standards (29 percent).

These data are supported by many other polls (such as ones conducted by KIIS and the IRI/Rating Group). Altogether they show that Ukraine’s wartime society has greater trust in the army than in civil authorities and values elections only if they are conducted as a genuine democratic process. More generally, even if a political system were to develop some adaptive legal-political flexibility, war is not conducive to democracy-reinforcing elections.

**Let’s Wait on Elections and Focus on Core Issues**

I want to stress that the vox populi as represented, with all caveats, in the above polls and in experts’ analysis is aligned, for one good reason:

Under current military conditions in Ukraine, it would be hugely risky to conduct elections. All available resources must be poured into defense and achieving victory.

Elections would most likely not respond to the legitimate expectations of citizens and would not comply with OSCE standards. Even if the wartime restrictions on the political rights and freedoms of citizens and on the operations of the mass media were canceled, it would arguably take another year to return to the pre-2022 mode of operations. Public debate has long been absent, and Ukrainian society is fragmented, with new cleavages. It will take time for political parties to address both issues and restart meaningful competition for the voters’ sympathies in Ukraine.

Without such careful preparation of society, elections would be a senseless formality that would only intensify the population’s dissatisfaction with the government and negative reactions to those Western nations pushing for elections to be held. Even if some European politicians might not insist on the proper democratic quality to any election, the Ukrainian citizenry would be quite unlikely to tolerate electoral incongruencies. And Zelensky needs real, essential democratic legitimacy in 2024.

I believe that the Zelensky administration should resist all pressures and postpone elections. Instead, it should address legitimate dissatisfaction with the public administration and the lack of access to trusted mass media, and focus on the major security needs of Ukraine.

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Endnotes


