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ON MATTERS CONSTITUTIONAL

Our Fighting Democracy

A Letter from Ukraine

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Two years ago, Russia launched its full-scale war against Ukraine. Our country is fighting for its democracy. The conditions for this could hardly be more extreme. Since 1945, no democracy on the European continent has faced challenges similar to those of Ukraine.

Under these extreme wartime conditions, the Ukrainian people have demonstrated their resilience and commitment to fight for freedom and independence. Simultaneously, the public governance system has proven its ability to sustain democracy and adhere to democratic principles of state administration in practice.

Despite the enemy's efforts, Ukrainian democracy continues to uphold constitutional provisions, even amidst military operations. The Constitution enshrines the European identity of the Ukrainian people and the irrevocability of Ukraine's European and Euro-Atlantic trajectory.

This vector is evidenced by Ukraine's status as a candidate country for the European Union (EU) in the summer of 2022 and its subsequent fulfillment of relevant EU requirements. As of February 2024, the Government of Ukraine has already approved the Action Plan for the implementation of the European Commission's recommendations. This progress was made possible thanks to the Ukrainian people's armed defense of their democracy.

We, two constitutional law experts from Ukraine, would like to use the second anniversary of Russia's full-scale assault to report in our "Letter from Ukraine" on how Ukrainian democracy manages to persist in these challenging times.

The Parliament and the President

Despite the inherent military risks, the Ukrainian Parliament continues to operate under martial law, carrying out almost all of its constitutional functions. The Parliament's legislative function has led to the adoption of numerous significant laws. In addition to enacting laws in the military, humanitarian, and social sectors, the Parliament has also passed laws related to European integration.

The President of Ukraine also continued to exercise his powers in accordance with the Constitution of Ukraine. Under parts two and three of Article 102 of the Constitution, the President serves as the guarantor of state sovereignty, territorial integrity of Ukraine, adherence to the Constitution, and the rights and freedoms of its citizens. He also ensures the implementation of the strategic course of the state towards full membership in the European Union and the North Atlantic Treaty Organization.

In practice, the President of Ukraine, in his role as Supreme Commander-in-Chief of the Armed Forces of Ukraine (Article 106, paragraph 17, part one of the Constitution), prioritizes the defense of Ukraine and the protection of state sovereignty as his primary responsibilities during the full-scale invasion by Russia.

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Wartime elections: Neither constitutionally nor practically possible

But what is the response to the speculations of some that the Ukrainian government lacks legitimacy because no elections were held? Our answer is straightforward: Since the end of World War II, no democracy in Europe has faced a challenge comparable to what Ukraine is currently experiencing.There is almost no practical experience in constitutional and legal regulation of public authorities' activities under these extraordinary conditions.

As per Ukrainian legislation, parliamentary elections in Ukraine were scheduled for October 29, 2023. However, Article 19 of the Law of Ukraine "On the legal regime of martial law" stipulates that parliamentary, presidential, and local elections are all prohibited under martial law. Furthermore, part four of Article 83 of the Constitution of Ukraine clearly states that if the term of authority of the Verkhovna Rada expires during the state of martial law, its powers are extended until the day when the newly elected Verkhovna Rada convenes for its first meeting of the first session, following the cancellation of the state of martial law. Most foreign constitutions contain similar provisions.

Regarding the presidential elections in Ukraine, the Constitution of Ukraine stipulates that regular presidential elections are held on the last Sunday of March in the fifth year of the President's term. Therefore, under peaceful circumstances, the elections should have taken place on March 31, 2024, with the Parliament scheduling them no later than December 21, 2023.

However, due to the legal regime of martial law, the next presidential election will not adhere to the constitutional timeline. In such a scenario, Article 108 of the Constitution of Ukraine is invoked to prevent a power vacuum and ensure the continuity of power. This means that the current President of Ukraine retains their authority until a newly-elected President assumes office after the first post-war elections.

Conducting elections under martial law is therefore not possible according to either constitutional law or electoral law provisions. But also beyond legal considerations: there is no public demand for wartime elections.These arguments justify the constitutional and legal feasibility and appropriateness of extending the terms of the Parliament and the President under martial law, particularly to safeguard democracy in Ukraine.

Judiciary and local self-government: Under pressure, but functional

The judiciary in Ukraine continues to function in line with the country's Constitution. There is a noticeable enhancement of judicial institutions and the implementation of the European Commission's recommendations.

In 2023, a competitive selection process was introduced for the Constitutional Court of Ukraine (CCU), confirming the sustainability of Ukrainian democracy. For the first time in Ukraine's history, the appointment of judges to the CCU will involve international experts. The selection process will assess candidates based on their level of competence in law and their high moral standards. Furthermore, in 2023, both the High Council of Justice and the High Qualification Commission of Judges of Ukraine recommenced their operations.

Ukraine's local self-government has also continued to function under conditions of extreme pressure. Before Russia's full-scale invasion, Ukraine's decentralization reform of 2014 has shown some positive results. (However, progress has stalled since 2019).

The imposition of martial law necessitated the establishment of military administrations, which assumed the responsibilities of local self-governance in certain areas. At the same time, even under martial

law, the local government system, a cornerstone of the constitutional order, has persevered, continues to operate, and maintains interaction with government bodies. Notably, at the onset of the war, municipal authorities shouldered the responsibility of ensuring territorial defense and accommodating internally displaced persons.

A good example is the work of the municipal authorities in Kharkiv, a city of over a million residents near the frontline. Despite the proximity to the Russian border and constant shelling, local self-government in the city and the region remains functional and responsive to the needs of the local population. The local authorities' initiative to construct and organize underground preschools and schools, which continue to operate in an in-person classroom format even amidst almost daily shelling, is noteworthy.

Regrettably, there have been instances where the state has imposed certain restrictions on local self-governance, primarily involving the curtailment of local governments' budgetary powers and constraints on local budget revenues.

Russia's military aggression against Ukraine has revealed a very interesting fact. The Ukrainian people have demonstrated their legal consciousness. Recognizing the risks of losing their statehood, the nation has entered into a new, unwritten social contract with the authorities. The content of this agreement is unity and a joint fight against the enemy. The preservation and protection of the fundamental principles of the constitutional order, even in the face of military aggression, attest to this. The struggle, however, continues.

The survival of Ukrainian statehood and the operation of public authorities post-February 24, 2022, are undoubtedly a testament to the heroism of the Ukrainian military, volunteers, and the nation as a whole.

We hope that this letter gives an impression that our democracy is resilient – and that it is fighting.

However, we would like to conclude this letter by expressing our gratitude. We thank all military servicemen and we thank our colleagues and legal scholars Volodymyr Nesterovych and Roman Kuybida, who have been defending their homeland from the Russian Federation for over two years.

Kyiv/Kharkiv, February 24, 2024

The Week on Verfassungsblog

In the United States, **Trump** is facing multiple legal proceedings, both civil and criminal, ranging from the trivial to the egregious. But particular attention has been paid to the invocation of section 3 of the 14th Amendment by the Colorado Supreme Court to strike Trump from the ballot for inciting the insurrection on January 6th. SAMUEL ISSACHAROFF is skeptical of utilizing section 3 specifically and legal proceedings generally to disqualify insincere democrats.

MARK GRABER replied to this the very next day. The relevant **constitutional amendment** is not that complicated, he explained. Ultimately, there is a (somewhat historical) consensus among historians that Section 3 should exclude precisely those people from high office who, like Trump, have sinned against the constitution and its institutions.

How can regulatory law at universities enable the protection of **spaces for discourse** without criminalising unnecessarily? After recent conflicts at universities in Berlin, NIKOLAS EISENTRAUT asks the Berlin state legislature to make adjustments with a sense of proportion instead of simply swinging the "exmatriculation club".

LARS DITTRICH considers the idea of a reservation of consent by the **Federal Constitutional Court** for amendments to the BVerfGG and warns that better institutional protection of the Federal Constitutional Court could release democrats from their duty to stand up and protect the institutions themselves.

The influence of the German Federal Constitutional Court's **climate ruling** beyond its specific regulatory content can be seen in the current double judgment on emergency climate programmes by the Berlin-Brandenburg Higher Administrative Court. NIKLAS TÄUBER puts emphasis on the high level of argumentation in the decision, but also criticizes unused potential.

In a case breaking new ground for women's rights, the **CJEU** held that women, especially those facing

domestic violence in their country of origin, qualify as a protected 'social group,' allowing them to access refugee status or subsidiary protection in the Common European Asylum System. SILVIA STEININGER welcomes the decision as a step forward in remedying the **gendered nature of the EU's asylum system** while reminding us that gender based violence remains a pervasive problem within the EU too.

The **European Commission** paid Hungary a country visit this week and should use the occasion to take a closer look at an often ignored aspect of Hungary's rule of law-backsliding. VICTOR Z. KAZAI explains that contrary to wide-spread belief, the Orbán-government did not pass its illiberal legislative reforms in a legally correct manner. Instead, the governmental majority has consistently violated the formal and procedural rules of parliamentary law-making.

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*In einer **Kooperationsveranstaltung mit der GEW Thüringen** gehen wir Szenarien und Strategien für den autoritär-populistischen Ernstfall in Schulen auf den Grund. In dem Workshop werden die Ergebnisse der Recherche des Thüringen-Projekts präsentiert und gemeinsam mit der Seminargruppe Möglichkeiten erarbeitet, Schulen und Lehrkräfte für politische Vereinnahmungsstrategien zu sensibilisieren und Resilienz aufzubauen. Hier geht es zur Anmeldung für die Termine im Mai und Juni 2024.*

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In **Pakistan**, the delayed, disrupted and highly disputed elections have been finally held on February 8, 2024. However, electoral democracy in Pakistan will now be haunted by the irrational decisions of the current Supreme Court of Pakistan, which suppressed the campaign of Imran Khan's Tehreek-e-Insaf party (PTI) and denied the PTI its' electoral symbol: the cricket bat. MOEEN CHEEMA explains the role of the Qazi Court in the worst elections in Pakistan's recent history.

The presidential elections in **Senegal** have been postponed at short notice, which has caused some concern. In his article, DIMITRIOS PARASHU explains the role of the Senegalese Constitutional Council in this context and how this constitutional body opposes political "mischief".

In **India**, the Supreme Court has ruled that anonymous donations to parties under the so-called "Electoral Bond Scheme" are unconstitutional. ANMOL JAIN explains why this is an important ruling for democracy – and why it strengthens both transparency and accountability.

Given the announcement by Donald Trump to withhold **US military support** in case of an attack on a NATO member by Russia, a discussion has been sparked on whether Europe itself should have their own nuclear weapons for nuclear deterrence. PHILIPP SAUTER explains why European nuclear weapons would violate international law. Hence, only one option remains for European nuclear deterrence without the US involved: France could unilaterally declare that it is willing to use its nuclear weapons once a Member State invokes a mutual defense clause.

In **Spain**, the Council of the Judiciary cannot be renewed due to the inability of the major political opponents to find a political solution. To overcome the stalemate, the parties asked the European Commission to intervene and help to untangle this political knot. MIKEL DÍEZ SARASOLA explains the situation and warns that the Commission's role in domestic constitutional matters can have important yet uncertain and questionable consequences.

The provisional measures ordered by the **International Court of Justice** (ICJ) against Israel have been a frequent topic of discussion on our blog. As a reminder: On January 26, 2024, the court found that there was a risk of irreparable harm to the rights of the Palestinians under the Genocide Convention. But what are the implications of this decision for third countries, especially in terms of arms exports? NORA SALEM has answers.

In recent months, **Israel** captured hundreds of alleged Hamas fighters, many directly responsible for the October 7 attacks. How can and should Israel try them? NOAM KOZLOV gave an overview, arguing for civil, not military trials.

Finally: We also had a comparative symposium on new developments and old tricks in the new European platform regulation, the Digital Services Act. Particularly noteworthy was that the contributions curated by João Pedro Quintais often combined US and European voices, which uncovered how some of the supposed innovations from Brussels build on pre-existing ideas from the US. Rebecca Tushnet, for example, criticized the constant (self-)regulatory strive for consistency, while Rachel Griffin and Erik Stallman questioned the 'human-in-the-loop' fetish of contemporary AI regulation. Eric Goldman and Sebastian Schwemer detailed how the US DMCA anticipated some of the innovations of the DSA. Martin Senftleben and Eleonora Rosati questioned the role of users in the DSA and Giancarlo Frosio and Christophe Geiger spelled out principles of digital constitutionalization. Martin Husovec and Jennifer Urban, in turn, examined the extent to which the DSA will have a 'Brussels Effect'. Niva Elkin-Koren focused on the fundamentally new data access for scientists that is actually regulated by the DSA.

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That's all for this week. Take care and all the best,
the Verfassungsblog Editorial Team

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