

Research Article

THE CONCEPT OF 'MILITANT DEMOCRACY' IN THE CONTEXT OF RUSSIA'S ARMED AGGRESSION AGAINST UKRAINE

Oleksandr Bakumov¹

Submitted on 6 Jun 2023 / Revised 2 Jul 2023 / Approved **12 Aug 2023**

Published online: **05 Sep 2023**

Summary: 1. Introduction. – 2. Militant democracy: general remarks. – 3. Militant democracy and war. – 4. Prohibition of political parties. – 5. Other means of militant democracy and their role in protection against Russia's armed aggression against Ukraine. – 6. Conclusions.

Keywords: militant democracy, populism, armed aggression, communism, lustration, totalitarian propaganda, occupation, political parties, constitutional judiciary, Ukraine

ABSTRACT

Background: *The fall of a dictatorship is accompanied by a period of democratic transit, which necessitates the use of special measures to protect a young and, thus far, unstable democracy. This model's use began in practice after the Second World War in connection with the spread of the doctrine of "democracy capable of defending itself," also known as militant democracy (English) or Wehrhafte (Streitbare) Demokratie (German). The flagship here was the German science of*

1 Dr. Sc (Law), Assoc. Prof. of the Department of Constitutional and International Law, Kharkiv National University of Internal Affairs, Kharkiv, Ukraine ba-kumov.aleks@gmail.com <https://orcid.org/0000-0002-4003-1974>

Author, responsible for writing and research. **Competing interests:** Any competing interests were included. **Disclaimer:** The author serves as the Chairman of the Interim Special Commission of the Verkhovna Rada of Ukraine on International Humanitarian and International Criminal Law in the Conditions of Armed Aggression of the Russian Federation against Ukraine, People's Deputy of Ukraine, though he declares that his opinion and views expressed in this manuscript are free of any impact of any organizations. **Translation:** The content of this article was translated with the participation of third parties under the author's responsibility.

Managing editor – Dr Serhii Kravtsov. **English Editor** – Nicole Robinson.

Copyright: © 2023 Oleksandr Bakumov. This is an open access article distributed under the terms of the [Creative Commons Attribution License](https://creativecommons.org/licenses/by/4.0/), (CC BY 4.0), which permits unrestricted use, distribution, and reproduction in any medium, provided the original author and source are credited.

How to cite: Bakumov O "The Concept of 'Militant Democracy' in the Context of Russia's Armed Aggression Against Ukraine" 2023 4 (21) Access to Justice in Eastern Europe. <https://doi.org/10.33327/AJEE-18-6.4-n000307>

constitutional law, which formed the tools for the creation of a new legal system accounting for the mistakes of the Weimar Republic. This experience is especially relevant for Ukraine, as since 2014, it has faced external armed aggression by revanchist forces that took power from the heir of the Soviet empire, Russia, in which a totalitarian regime was established and became a full-fledged aggressor state.

Methods: *The following methods were used in the work to study the concept of militant democracy in the conditions of Russia's armed aggression against Ukraine. The system multi-structural method was utilized to discover the means of militant democracy in Ukraine (ban of political parties, lustration, etc.), as well as problems associated with the use of certain militant democracy means. The logical-legal method made it possible to identify the essence of the decisions of the constitutional, supreme, and other courts, the decisions of the European Court of Human Rights, in which the means of militant democracy were used or the legality of their use was assessed (legality, constitutionality, or compliance with the European Convention on Human Rights). The comparative method justified the implementation of different countries' experience (primarily, European) in reforming the constitutional and legislative regulation of the militant democracy in Ukraine and the mechanisms required for further action.*

Results and Conclusions: *The work contains proposals for the constitutional and legislative improvement of the regulation of the means of militant democracy in Ukraine, which are based on the pre-existing experiences across the world and the use of already existing practices that have been successfully tested and achieved results.*

1 INTRODUCTION

The encroachment on the sovereignty and territorial integrity of Ukraine, carried out externally by Russia and supported by some internal forces starting in 2014, and which received a new development on 24 February, 2022, actualizes the discussion of the concept of "militant democracy." For Ukraine, this concept was not new in its essence, as certain legal constructions are laid down directly in the 1996 Constitution of Ukraine. However, the set of these tools was clearly insufficient if we compare Ukraine with other post-totalitarian and post-authoritarian regimes of the periods spanning after the Second World War or in the late 80s and early 90s of the 20th century in Eastern Europe. Until 2014, the application of the existing mechanisms in Ukraine was almost not implemented.

Another factor involved includes the evolution of militant democracy itself, which has gone through many stages. The first is from the doctrinal idea formulated by Karl Loewenstein² for the practice of its implementation in the late 1940s-1950s, primarily evident in Germany. The second stage covers the new wave of the late 1980s and 1990s of the 20th century (at first, Portugal and Spain, later, Eastern and Central Europe, post-communist and post-socialist countries). The third wave tentatively encompasses the 2000s and continues until now, characterised by the liberalisation of practice, and at the same time, the strengthening of a new threat: populism. Currently, this idea is growing in connection with Russia's aggression against Ukraine.

2 Karl Loewenstein, 'Militant Democracy and Fundamental Rights, I' (1937) 31(3) American Political Science Review 417, doi:10.2307/1948164; Karl Loewenstein, 'Militant Democracy and Fundamental Rights, II' (1937) 31(4) American Political Science Review 638, doi:10.2307/1948103.

2 MILITANT DEMOCRACY: GENERAL REMARKS

As A. Shayo and R. Uitz rightly claim, tolerance can become suicide under certain political circumstances. It ignores the platitude that Goebbels pointed out and abused with great pleasure: "It will always remain one of the best jokes of democracy — that it has given its mortal enemies the means by which it was destroyed."³

Not a new development to the scene are anti-democratic groups that attempt to get into government positions to undermine tolerant, pluralistic, democratic societies.⁴ There is a danger of abuse of rights by using legal procedures to protect the interests of populist or marginal political forces, referring to the principle of political and ideological pluralism.⁵

Among other tasks, the new democratic regimes needed to decide what to do with the symbols and doctrines, organisations, laws, officials, and leaders of the authoritarian system. S. Huntington analyses in detail the relevant practice of democratic regimes as well as the problems that these regimes confronted.⁶ As A. Pshevorsky points out, the process of the destruction of the authoritarian regime can veer in the opposite direction and, ultimately, lead to a new type of dictatorship.⁷

The key answer to this challenge should lie precisely at the constitutional level. As A. Shayo states, the new constitutions have become means for managing emotions. It is a matter of choosing which emotions are acceptable.⁸ The introduction of emotionalism into constitutional law is due to the ideas of Karl Loewenstein, who noticeably influenced the Basic Law of Germany in 1949. This is evidenced by the idea of the unconstitutionality of parties⁹ as well as the possibility of deprivation of rights.¹⁰ At the same time, as Konrad Hesse notes, the deprivation of fundamental rights has not yet acquired practical significance. While political criminal law and the practice of banning parties provide simpler and more effective opportunities for eliminating anti-constitutional forces, it is unlikely to acquire the proposed amount of significance.¹¹

- 3 András Sajó and Renáta Uitz, *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (OUP 2017) 438, doi:10.1093/oso/9780198732174.001.0001.
- 4 Samuel Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (Cambridge Studies in Election Law and Democracy, CUP 2015) 100, doi:10.1017/CBO9781139839334.
- 5 MV Savchyn, *Constitutionalism and the Nature of the Constitution* (Lira 2009) 189.
- 6 Samuel P Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (OU Press 1991) 211-31.
- 7 Adam Przeworski, *Democracy and the Market: Political and Economic Reforms in Eastern Europe and Latin America* (Studies in Rationality and Social Change, CUP 1991) 37.
- 8 András Sajó, 'Emotions in Constitutional Design' (2010) 8(3) *International Journal of Constitutional Law* 355, doi:10.1093/icon/moq009.
- 9 Para. 2 Art. 21 of the Basic Law of the Federal Republic of Germany of 1949 indicates that parties that aim, either through the actions or inaction of their members, to undermine or destroy the free democratic system, or to endanger the existence of the Federal Republic of Germany, are recognized as unconstitutional. See: *Grundgesetz für die Bundesrepublik Deutschland* (1949) <<https://www.gesetze-im-internet.de/gg/BJNR000010949.html>> accessed 06 April 2023.
- 10 According to Art. 18 of the Basic Law of the Federal Republic of Germany of 1949, any person who violates the right to free expression of one's views, especially in terms of freedom of mass media (Para 1 of Art. 5), freedom of assembly (Art. 8), freedom of association (Art. 9), secrecy of correspondence, postal correspondence and telephone conversations (Art. 10), the right to property (Art. 14) or the right to asylum (Art. 16a) in order to protect the free democratic fundamental order, may be deprived of these fundamental rights. The decision to deprive these basic rights and the duration of such deprivation is announced by the Federal Constitutional Court.
- 11 Konrad Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* (CF Müller 1999) 297.

It is worth emphasising that the concept of militant democracy radically differs from what was called the “value neutrality” of the Weimar Constitution.¹² Militant democracy in Germany became textually-based primarily in Para 2 of Art. 21 of the Basic Law (regarding the possibility of banning anti-constitutional parties that encroach on the free democratic order — “*die freiheitliche demokratische Grundordnung*”). As Konrad Hesse states, “the appearance of this norm owes itself mainly to the experience of the Weimar Republic, under which conditions the growth of the number of radical parties hostile to the constitution from 1930 led to a crisis and which was finally destroyed by the strongest of these parties. Therefore, anti-constitutional parties should be eliminated as early as possible.”¹³

Also worth mentioning is Para 4 of Art. 20 of the Basic Law of Germany, which appeared in the text of the Basic Law later, explaining that all Germans have the right to resist any person who encroaches on the constitutional legal order (“*die verfassungsmäßige Ordnung*”), in case other means are unavailable.

As for the practice of the Federal Constitutional Court of the Federal Republic of Germany, a direct reference to the concept of “militant democracy” occurred in the case of banning the Communist Party in 1956.¹⁴

The above-mentioned norms should not be considered as a denial of democracy. On the contrary, Philip Kunig emphasises that Para 1 of Art. 21 of the Basic Law of the Federal Republic of Germany gives parties the right to participate in public life, not for their own sake, but to provide society with the opportunity to form a state will. Such an opportunity, which is given to society to express its opinion, is itself an element of the constitutional understanding of democracy.¹⁵ As P. Kommers and A. Miller state, the German Basic Law combines the protection of the rule of law with the principle that democracy is not defenceless against parties or political movements that try to use the constitution to undermine or destroy it.¹⁶

Many countries adopted the German model of banning the party, linking possible grounds for such a ban with the wording of the German Basic Law, directly using the term “free constitutional order” (“*die freiheitliche demokratische Grundordnung*”) or similar analogues (Greece, Croatia, Cyprus, Republic of Korea). At the same time, the constitution can specify an ideology or regime, the totalitarian methods, and manner in which they serve as a basis for prohibition (references to the “fascist regime” are found in Italy in paragraph XII of the chapter “Final and transitional provisions” of the Constitution;¹⁷ references to communism, Nazism, and fascism in Poland¹⁸ are in Art. 13 of the Constitution; fascist ideology in Portugal found in Para 4 of Art. 46 of the Constitution¹⁹).

12 Donald P Kommers and Russell A Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (3rd edn, Duke UP 2012) 51-2.

13 Hesse (n 11) 297-8.

14 Urteil 1 BvB 2/51 [KPD Verbot] (Bundesverfassungsgericht (Ersten Senats), 17 August 1956) <<https://www.servat.unibe.ch/dfr/bv005085.html>> accessed 06 April 2023.

15 Josef Isensee und Paul Kirchhof (hg), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, bd 3: Demokratie – Bundesorgane (3 Aufl, CF Müller 2005) 297-356.

16 Kommers and Miller (n 12) 51-2.

17 Constitution of the Italian Republic (1947) <https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf> accessed 06 April 2023.

18 Constitution of the Republic of Poland (1997) <<https://www.sejm.gov.pl/prawo/konst/angielski/konse.htm>> accessed 06 April 2023.

19 Constitution of the Portuguese Republic (7th revision 2005) <<https://www.parlamento.pt/Legislacao/Paginas/ConstituicaoRepublicaPortuguesa.aspx>> accessed 06 April 2023.

The demand for the need to observe the democratic structure for the parties is essential. This is a direct norm of Para. 1 of Art. 21 of the Basic Law of the Federal Republic of Germany. It was once applied by the Federal Constitutional Court of Germany in the decision to ban the Socialist Party of the Reich in 1952.²⁰ A similar requirement is specified in a number of constitutions (Para 5 of Art. 51 of the Constitution of Portugal, Art. 6 of the Constitution of Spain,²¹ Para 1 of Art. 69 of the Constitution of Turkey²² and many others).²³

At the same time, there is a growing number of sceptics of militant democracy today. According to A. Shayo and R. Uitz, the experience of militant democracy is not convincing in its effectiveness, and it was the effectiveness that dictated the introduction of such a regime in liberal constitutions in the first place.²⁴

What specific concerns about militant democracy exist other than appeals to ineffectiveness? As known, militant democracy is characterised by tension, which can cause militant measures to limit rights in the name of maintaining free and open political competition, thus, harming democracy.²⁵

We do not remain strictly categorical in these conclusions. The fact is that countries that have not experienced totalitarianism are not inclined to the idea of militant democracy. Countries that are transitioning to democracy from an undemocratic regime introduce measures of militant democracy, rather than using it as a mechanism to combat consequences and prevent totalitarianism in the future.

We believe it is more accurate that neither procedural (formal) democracy nor substantive (militant) democracy protects democratic freedom. In fact, the survival of democracy depends on strengthening a strong democratic political culture.²⁶

Militant democracy cannot be considered without flaws. As Konrad Hesse points out, the external protection of a free democracy must be provided at the cost of limiting political freedom, that is, the basic premise of this democracy. Therefore, Hesse offers an interpretation of Para 2 of Art. 21 of the Basic Law of the Federal Republic of Germany with reservations.²⁷

The increasing concern of democracies about the proportionality of militant democracy measures is a completely normal process. One can notice regularity, the content of which is that the more the threat recedes in time (as it happened for old Europe after the Second World War), the less actuality these measures hold.

20 Urteil 1 BvB 1/51 [SRP Verbot] (Bundesverfassungsgericht (Ersten Senats), 23 Oktober 1952) <<https://www.servat.unibe.ch/dfr/bv002001.html>> accessed 06 April 2023.

21 The Spanish Constitution (1978) <<https://www.boe.es/legislacion/documentos/ConstitucionINGLES.pdf>> accessed 06 April 2023.

22 Constitution of the Republic of Türkiye (1982) <<https://global.tbmm.gov.tr/constitution>> accessed 6 April 2023.

23 See more: GV Berchenko, 'Internal organization of political parties as a subject of constitutional regulation' (2009) 12 Bulletin of the Ministry of Justice of Ukraine 111.

24 Sajo and Uitz (n 3) 439.

25 Max Steuer, 'Militant Democracy and COVID-19: Protecting the Regime, Protecting Rights?' (2020) 2 Hong Kong Journal of Law and Public Affairs 131.

26 Judith Wise, 'Dissent and the Militant Democracy: The German Constitution and the Banning of the Free German Workers Party' (1998) 5(1) The University of Chicago Law School Roundtable 335.

27 Hesse (n 11) 298.

Accordingly, in the practice of the ECtHR, a rigid standard for the application of militant democracy began to take shape. At the national level, the “softening” of the most militant democracy took place most vividly in Germany. Thus, after the 1950s, the Federal Constitutional Court of Germany never decided to ban parties despite the presence of relevant cases.

Proceedings to ban the National Democratic Party of Germany (NPD) in 2001 were dropped in 2003 for procedural reasons. In the decision on January 17, 2017, the court could not find “evidence of the successful implementation of its anti-constitutional goals” when questioning the unconstitutionality of the NPD (National Democratic Party). Thus, the party was not banned, but recognised as unconstitutional.²⁸ As a result, amendments were made to the Basic Law of the Federal Republic of Germany (the amendment to Art 21 of the Basic Law entered into force on July 20, 2017): “Parties that, based on their goals or the behaviour of their supporters, aim to impair or destroy the free democratic basic order or endanger the existence of the Federal Republic of Germany, are excluded from state funding.”²⁹ This means the unconstitutionality of the party and its ban began to be distinguished, as unconstitutionality can only lead to the loss of state funding.

In addition, the possibility of deprivation of funding was directly provided for in Para 8 of Art. 69 of the Constitution of Turkey. It states that instead of the final dissolution of a political party in accordance with the above-mentioned points, the Constitutional Court can rule that the relevant party will be completely or partially deprived of state aid, accounting for the intensity of the claims submitted to the court.

But the manipulation of militant democracy and the idea of emergency by populist regimes is an imitation of militant democracy. Violations of rights by authoritarian and populist regimes are mistakenly attributed to measures of militant democracy. In this case, there is no corresponding feature, i.e., the legitimate goal of protecting democracy and the constitution; these measures, while appearing externally similar to the tools of militant democracy, are created and used with another goal: the establishment of authoritarianism.

Such cases can be termed abusive (harmful) militant democracy. For example, T Drinóczy, G Mészáros³⁰ emphasise the abusive characteristics. The fundamental study “Constitutional Democracy in Crisis?” mentions many other European cases, and identifies the key factors of the crisis of constitutional democracy, such as populism, racism, migration, etc.³¹

The emergence of populist regimes often demonstrates precisely the unsuccessful model of the transition from totalitarianism to democracy, in which the true mechanisms of militant democracy were not implemented sufficiently and were used at some point for their opposite purpose.

28 Judgment 2 BvB 1/13 (Federal Constitutional Court (Second Senate), 17 January 2017) <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2017/01/bs20170117_2bvb000113en.html> accessed 06 April 2023; Federal Constitutional Court, ‘No prohibition of the National Democratic Party of Germany as there are no indications that it will succeed in achieving its anti-constitutional aims: Press Release No 4/2017’ (Bundesverfassungsgericht, 17 January 2017) <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2017/01/bs20170117_2bvb000113en.html> accessed 06 April 2023. See: Roy H Gordon, ‘The Second Attempt at a Third Successful Ban of an Established German Political Party’ (2016) 17 Rutgers Journal Law & Religion 527.

29 Grundgesetz für die Bundesrepublik Deutschland (n 9).

30 Tímea Drinóczy and Gábor Mészáros, ‘Hungary: An Abusive Neo-Militant Democracy’ in Roman Bäcker and Joanna Rak (eds), *Neo-Militant Democracies in Post-Communist Member States of the European Union* (Routledge, 2022) 98, doi:10.4324/9781003245162-8-8.

31 Mark A Graber, Sanford Levinson, and Mark Tushnet (eds), *Constitutional Democracy in Crisis?* (OUP 2018) doi:10.1093/law/9780190888985.001.0001.

In Hungary, after the victory of the current governing party, FIDESZ, in 2010, all state power lies in the hands of representatives of one party. In the context of Hungary's EU membership, a rather serious conclusion states: "If Hungarians choose an illiberal system, they must accept certain consequences, including parting with the European Union and the wider community of liberal democracies."³²

We agree that even if it is true that the democracies of Central and Eastern Europe are not going to collapse, and even if the existence of the EU eliminates some of the danger of rising authoritarianism, there are still reasons to be concerned about the authoritarian leaders attacking liberal democracies.³³

As the well-known researcher of democracy and populism, Jan-Werner Müller, writes, there can be no absolute pluralism. As one political community, the EU has external and internal boundaries. Therefore, when constitutional mutations go so far that liberal democracy and the rule of law do not function, Europe ends. In this regard, the scientist proposes a new institution with the previous name "Copenhagen Commission," as well as a set of tools (financial sanctions). All this is considered by Müller as a European militant democracy, which should function on the level of the EU itself.³⁴

Thus, the current anxiety among scientific discourse in the West is caused by two positions that hold opposing arguments. The first position is being trapped in the Fukuyama End of History (at least within the framework of a specific country), that is, the final victory of the democratic project and the absence of a real threat to it (or unwillingness to see it). This is clearly evidenced by the experience of the Federal Republic of Germany regarding the latest decision on the unconstitutionality of the NPD. The second position is a view of authoritarian and populist regimes that ban parties and limit other political rights and unwillingness to provide appropriate tools for power in their countries in case populists suddenly come to power, which are anti-pluralists by nature. The paradox of this view lies in the fact that, with a reasonable application of militant democracy, such forces be unable to claim power. We believe that in the future, with a possible reform of the EU, the idea of individual supranational instruments of militant democracy could be another answer in the fight against populists.

3. MILITANT DEMOCRACY AND WAR

Considerable attention is traditionally paid to issues of power and its limitations during wartime. The Western science of constitutional law once again reviewed this problem during the second war in Iraq in the 2000s.³⁵ M. Takshnet tentatively singles out two generations of scientists who studied the war and the constitution. The scholars of the second generation use the emergence of war to reflect on such questions: is war an exception to the constitution, or an example of when compliance with the constitution is particularly important?³⁶

32 Gábor Halmai, 'A Coup Against Constitutional Democracy The Case of Hungary' in Mark A Graber, Sanford Levinson, and Mark Tushnet (eds), *Constitutional Democracy in Crisis?* (OUP 2018) ch 15.

33 Bojan Bugarič, 'A Crisis of Constitutional Democracy in Post-Communist Europe: "Lands in-between" Democracy and Authoritarianism' (2015) 13(1) *International Journal of Constitutional Law* 244-5, doi:10.1093/icon/mov010.

34 Jan-Werner Müller, 'The EU as a Militant Democracy, or: Are there Limits to Constitutional Mutations with-in EU Member States?' (2014) 165 *Revista de Estudios Políticos (nueva época)* 141.

35 See: Mariah Zeisberg, *War Powers : The Politics of Constitutional Authority* (Princeton UP 2013) 276.

36 Mark Tushnet (ed), *The Constitution in Wartime: Beyond Alarmism and Complacency* (2nd edn, Duke UP 2005) 3, doi:10.1215/9780822386902.

One of the most cited scientists today on this issue is Carl Schmitt, who set forth his main ideas in his writings in the 1920s and developed the doctrine of sovereignty, considering the question of emergency, extreme conditions, and the possibility of suspending the constitution to eliminate such emergency or extreme conditions.³⁷

An important trend of modern times is described by Guy Lurie regarding the difficulty of protecting against the normalisation of emergency situations and the blurring of the distinction between state powers during a crisis and under normal conditions. The threat of the normalisation of emergency situations is more acute than ever.³⁸

A. Shayo and R. Uitz, in their work on “The Constitution of Freedom,” in the section “Constitutions Under Stress,” write that constitutions serve to ensure society’s safety and survival. Constitutionalism is concerned about the fate of the democratic system. At the same time, such survival must be a worthy survival.³⁹ It is within the framework of this section that they consider the concept of militant democracy. Moreover, one can understand that they consider militant democracy not so much as a way to avoid the blow to the constitution, but due to the presence of examples of abuse, on the contrary, as a phenomenon, puts the constitution under stress (Under Stress).

Instead, we believe that the successful application of militant democracy can help when the constitution is under stress due to war. As an example, the use of the doctrine of militant democracy in conditions of war is Ukraine’s experience, which was formed after the start of full-scale Russian aggression on February 24, 2022, as well as the previous period of armed aggression by Russia, which has been ongoing since 2014.

4. PROHIBITION OF POLITICAL PARTIES IN UKRAINE

Militant democracy is one of the central concepts of Samuel Isaaharov’s book, *Fragile Democracies. Contested Power in the Era of Constitutional Courts*, which draws attention to the threat of excessive intolerance. At the same time, according to the scientist, “... the prerequisites for banning parties or other restrictions on political expression in the electoral arena obviously exist for parties that are allies of rebel or regional military forces, since there is a direct organisational connection with illegal activities and the immediacy of possible harm.”⁴⁰

For Ukraine, in the conditions of armed aggression by Russia, this concept has become more relevant than ever. By 2014, due to liberal legislation and the practice of its application, the number of political parties had grown to several hundred. Moreover, there were almost no legal claims to the content of the programs and actions of the parties by official authorities. Many leadership parties appeared (using the leader’s last name in the party name), parties whose names included the criterion of gender, regional, religious, or foreign political identity. When the claims were officially presented to the party, “Ukrainian National Assembly” (now, “Right Sector”), they were rejected the Supreme Court of Ukraine’s decision dated 05.11.2004,

37 See: Carl Schmitt, *Dictatorship* (Polity Press 2013); Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (CUP 2005).

38 Richard Albert and Yaniv Roznai (eds), *Constitutionalism under Extreme Conditions: Law, Emergency, Exception* (Ius Gentium: Comparative Perspectives on Law and Justice, Springer Cham 2020) 17, doi:10.1007/978-3-030-49000-3.

39 Sajo and Uitz (n 3) 416.

40 Issacharoff (n 4) 100.

and the Supreme Court of Ukraine refused to ban the party due to the lack of proper evidence and arguments.⁴¹ Also, this case characterises the abuse of militant democracy, since in 2004, the fight against “nationalism” was central to Viktor Yanukovich’s election campaign and the official authorities were active in labelling it as such.

In 2014, the District Administrative Court of Kyiv banned the political parties “Russian Bloc” and “Russian Unity” for encroachment on territorial integrity (they helped Russia occupy Crimea and carry out an unrecognised annexation). On April 9, 2015, the Law of Ukraine “On Condemnation of Communist and National Socialist (Nazi) Totalitarian Regimes in Ukraine and Prohibition of Propaganda of Their Symbols” No. 317-VIII was adopted. Among other items, this law introduced an additional basis for banning political parties, if they promote propaganda of National Socialist or Communist totalitarian regimes. Subsequently, the constitutionality of this law was confirmed in the Decision of the Constitutional Court of Ukraine in the case based on the constitutional submission of 46 people’s deputies regarding the conformity with the Constitution of Ukraine (constitutionality) of the Law of Ukraine “On Condemnation of Communist and National Socialist (Nazi) Totalitarian Regimes in Ukraine and Prohibition of Propaganda of Their Symbols,” dated July 16, 2019, No. 9-r/2019.⁴² The corresponding law became the basis for the ban in 2015 of parties such as, “Communist Party of Workers and Peasants,” “Communist Party of Ukraine (updated),” “Communist Party of Ukraine,” though the decision became legal only in 2022 after review by the appeals court. In 2022, the “Workers’ Party of Ukraine (Marxist-Leninist)” was banned.

On May 3, 2022, the grounds for banning political parties was expanded by the adoption of Law No. 2243-IX⁴³ “On Amendments to Certain Legislative Acts of Ukraine Regarding the Prohibition of Political Parties.” Thanks to this law, during 2022-2023, a significant number of political parties had already been banned through court.

The question now is whether we could follow Germany’s path and use already existing constitutional constructions without such detailed specification at the level of current legislation. In particular, this refers to Art. 37 of the Constitution which specifies the following grounds for banning parties: if their program goals or actions are aimed at eliminating the independence of Ukraine, changing the constitutional order by violent means, violating the sovereignty and territorial integrity of the state, undermining its security, etc.

This issue was once ignored by the CCU in the previously mentioned decision on July 16, 2019. When motivated to make the decision, he did not refer to Art. 37 and did not analyse it, although it would have been appropriate. In our opinion, the need for legislative specification in 2015 arose due the text’s wording in Art. 37 of the Constitution of Ukraine. The word “change” is used, not “encroachment” on the constitutional system, and it specifies the violent criterion for changing the constitutional system (the basis for banning the party). The very construction of the constitutional system is still considered rather uncertain. Therefore, when reforming the Basic Law, it would be appropriate to revise the relevant wording so that it is universal. For example, it would be successful to use the term “free democratic order” (“*die freiheit-liche demokratische Grundordnung*”), as is done in Germany. As an option, even without textual replacement of the wording itself, one can interpret the already used term “constitutional system” in the appropriate way (in line with the interpretation of the Federal

41 Decision [On the ban of a political party] (Supreme Court of Ukraine, 5 November 2004) <<https://zakon.rada.gov.ua/laws/show/n0114700-04>> accessed 06 April 2023.

42 Decision No 9-p/2019 in Case No 1-24/2018(1919/17) (Constitutional Court of Ukraine, 16 July 2019) [2019] Official Gazette of Ukraine 62/2163.

43 Law of Ukraine No 2243-IX ‘On Amendments to Some Legislative Acts of Ukraine Regarding the ban on Political Parties’ of 3 May 2022 [2022] Official Gazette of Ukraine 41/2211.

Constitutional Court of Germany) by judicial and other law enforcement bodies. In this way, the national concept of the constitutional system would transform and give it the features that should have inherently existed from the beginning.

This was partly done by the Constitutional Court of Ukraine in the decision on July 16, 2019, No. 9-r/2019, where it used certain terms, such as “democratic constitutional system,” “denial of the fundamentals of the constitutional system of Ukraine,” and “democratic essence of the content of the Constitution of Ukraine,” for the development of current constitutional provisions, thereby justifying the existence of grounds in the Constitution for banning parties that carry out propaganda of totalitarian regimes without referencing the text of Art. 37. However, the CCU still does not carry out a direct correlation with the experience of the Federal Republic of Germany, which would be extremely appropriate.

Also, the condemnation of the “Nazi totalitarian regime,” which was introduced in the context of Russian aggression by the law of May 22, 2022, “On the prohibition of propaganda of the Russian Nazi totalitarian regime, the armed aggression of the Russian Federation as a terrorist state against Ukraine, symbols of the military invasion of the Russian Nazi totalitarian regime in Ukraine” No. 2265-IX,⁴⁴ it is reasonably proposed to transform it into a condemnation of “russism.”⁴⁵ A draft resolution of the parliament on this matter already exists.⁴⁶

Regarding the violation of the sovereignty and territorial integrity of the state, the wording in Art. 37 of the Constitution of Ukraine is precise, as evidenced by the practice of banning political parties in 2014. In 2022, the legislator determined to push law enforcement into active action by filing the law, “On political parties in Ukraine,” with additional grounds for banning parties, which detailed the already existing instruction on encroachment on sovereignty and territorial integrity (in the context of existing Russian aggression).

Summarising the issue of banning political parties, we will identify a few problems that arose resulting from the use of the means of militant democracy in the form of banning political parties in Ukraine.

First, uncertainty regarding the consequences of such a ban for elected deputies on different levels, from local councils to the Verkhovna Rada of Ukraine.

After the appearance of so many court decisions on the banning of parties, the question arose regarding the mechanism of early termination of the deputies’ powers of banned parties. At the level of the parliament, there was a faction of the banned party, “Opposition Platform — For Life,” at the local council level, a significant number of banned parties had their own factions and deputies. To date, there is no special mechanism for early termination of the

44 Law of Ukraine No 2265-IX ‘On the Prohibition of Propaganda of the Russian Nazi Totalitarian Regime, Armed Aggression of the Russian Federation as a Terrorist State against Ukraine, Symbols of the Military Invasion of the Russian Nazi Totalitarian Regime in Ukraine’ of 22 May 2022 [2022] Official Gazette of Ukraine 49/2681.

45 See: Yurii Barabash and Hryhorii Berchenko, ‘Can democracy Protect Itself in Conditions of War? (On the Experience of State Building During Russian Aggression)’ (2023) 1 Law of Ukraine 54; Mykhailo Savchyn, ‘Russo-Ukrainian War and the Transformation of Constitutional Law’ (2023) 1 Law of Ukraine 12.

46 Draft Resolution of the Verkhovna Rada of Ukraine No 9101 ‘On the Statement of the Verkhovna Rada of Ukraine “On defining the existing political regime in the Russian Federation as racism and condemning its ideological foundations and social practices as totalitarian and antihuman” of 13 March 2023 <<https://itd.rada.gov.ua/billInfo/Bills/Card/41531>> accessed 06 April 2023.

mandate of elected deputies from the respective parties. During the last elections, more than 3,700 deputies were elected from parties that were subsequently banned.⁴⁷

What are the ways to solve this problem? Of course, it would be ideal to have a direct rule on this matter in the Constitution of Ukraine (for people's deputies) and in the law (for deputies of local councils). To solve this problem in the future, changes should be made to the Constitution (in the conditions of martial law, due to the direct assembly on making changes to the Constitution itself, this is not yet possible). On the other hand, even without making changes, foreign experience can be referred to and, if possible, used.

Although this was not directly reflected in the Basic Law of Germany, the famous German constitutionalist, Konrad Hesse, claims that after the decision of the Federal Constitutional Court comes into force, the ban on the party will lead to the automatic loss of mandates for all deputies of the dissolved party.⁴⁸ Hesse refers to the textbook decision of the Constitutional Court of Germany on the banning of the Socialist Party of the Reich in 1952 — SRP (BVerfGE 2.1 (72 ff)), as mentioned at the beginning of the article. As a reminder, in the decision of October 23, 1952, the Federal Constitutional Court (BVerfG) determined to deprive the members of the non-constitutional party of their mandates in the federal parliament and the state parliament. This party was represented by two deputies in the Bundestag, as well as the parliament of the state of Schleswig-Holstein and the senate of Bremen. Despite a tension between the idea of militant democracy and the principle of a free mandate, the position of militant democracy won.⁴⁹

As another example, the Constitutional Court of the Republic of Korea also ruled on the loss of mandate in the case of the United Progressive Party in 2014⁵⁰ without any special legal basis, since the party's ban was based solely on the institutionalisation of a party ban and the principle of defensive democracy.⁵¹ After the adoption by the Constitutional Court of the Federal Republic of Germany, appropriate changes were made to the current legislation. In the Republic of Korea, there is still no legislative regulation for this issue.

Unfortunately, on June 20, 2022, the Eighth Administrative Court of Appeal, satisfying the Ministry of Justice's lawsuit and banning the "Opposition Platform for Life" party, ignored the relevant problem of the loss of mandates of already elected people's deputies and deputies of local councils. The ruling of the Supreme Court, dated on September 15, 2022, No. P/857/8/22 as an appellate body, confirmed the ban's legality for the party, "Opposition platform — for

47 Viktoriya Oliynyk, 'Deputies of pro-Russian parties — to be held accountable: The results of the social survey' (LB.ua, 25 January 2023) <https://lb.ua/news/2023/01/25/543560_deputativ_prorosyiskih_partiy-.html> accessed 6 April 2023.

48 Hesse (n 11) 300.

49 See more: Sven Soltau, 'Mandatsverlust von Mitgliedern verfassungswidriger Parteien – Das freie Mandat vs. das Prinzip der Parteienstaatlichkeit' (GRIN Verlag, 2002) <<https://www.grin.com/document/7692>> accessed 06 April 2023.

50 Див.: Case [Dissolution of the Unified Progressive Party] (South Korea's Constitutional Court, 19 December 2014) <<https://casenote.kr/%ED%97%8C%EB%B2%95%EC%9E%AC%ED%8C%90%EC%86%8C/2013%ED%97%8C%EB%8B%A41>> accessed 6 April 2023.

51 See: Myeongjin Han, 'Mandatsverlust von Mitgliedern verfassungswidriger Parteien im Deutschen Recht' (2018) 19(3) Public Law Journal 109, doi:10.31779/plj.19.3.201808.004.

life,”⁵² though it did not say a word about the loss of mandates. Courts also ignored relevant issues in other decisions regarding the banning of remaining parties that had representatives in local councils.

Related to this problem is the issue of the impossibility of registration by deputies of those candidates who are next on the list of the banned party, so this issue must be solved in a complex manner.

A temporary decision from the people’s deputies, while amendments to the constitution are not possible given the judicial branch’s disregard for the relevant issue, could lead to the adoption of draft Law No. 8345 dated January 10, 2023, on amendments to some legislative acts of Ukraine to ensure state sovereignty under martial law.⁵³ It is proposed to use the existing constitutional provision, namely Clause 6, Para 2 of Art. 81 of the Constitution of Ukraine, which stipulates that the powers of a people’s deputy of Ukraine are terminated early in the event that a people’s deputy of Ukraine elected from a political party (electoral bloc of political parties) does not join the parliamentary faction of this political party (electoral bloc of political parties), or the people’s deputy of Ukraine leaves such a faction. As another additional option, it is possible to provide an official interpretation of the Constitution on this issue by the Constitutional Court of Ukraine (in the case of a corresponding constitutional submission).

Secondly, consider suspension of parties.

The Decree of the President of Ukraine, dated on March 19, 2022, No. 153/2022, put into effect the Decision of the National Security and Defense Council of Ukraine, “Regarding the suspension of the activities of certain political parties.”⁵⁴ At the same time, this issue requires more detailed normalisation. Additionally, according to Art. 64 of the Constitution of Ukraine, the right to association, like many other rights, may be subject to restrictions under martial law. Unfortunately, the procedural mechanism of such a restriction is not documented in the current legislation. The suspension of the activities of parties and other associations should become a constitutionally and legally regulated mechanism. An example of constitutional regulation of this issue can be the provision of Art. 33 of the Constitution of Turkey, where the decision to stop the activity of the association (as well as the ban) must be determined by the court.⁵⁵

Thirdly, another problem is solving the issue of further political activity of persons who belonged to governing bodies or deputies from banned parties.

To date, there are no such restrictions on this, but in the future, after the end of the legal regime of martial law and the opening of legal possibilities for holding elections, this issue will become extremely relevant. After all, granting such persons the passive right to vote is quite controversial, considering the negative consequences that have already occurred in Ukraine

52 Case No П/857/8/22 (Administrative Cassation Court of the Supreme Court of Ukraine, 15 September 2022) <<https://reyestr.court.gov.ua/Review/106339460>> accessed 06 April 2023.

53 Draft Law of Ukraine No 8345 ‘On Amendments to Certain Legislative Acts of Ukraine on Ensuring State Sovereignty in Martial Law’ of 10 January 2023 <<https://itd.rada.gov.ua/billInfo/Bills/Card/41129>> accessed 06 April 2023.

54 Decree of the President of Ukraine No 153/2022 ‘On the decision of the National Security and Defense Council of Ukraine dated March 18, 2022 “Regarding the suspension of the activities of certain political parties” of 19 March 2022 [2022] Official Gazette of Ukraine 48/2633.

55 Constitution of the Republic of Türkiye (n 22) art 33.

associated with many human victims and forced displacement of persons, destruction of infrastructure, loss of property, drop in the economic level, etc.

An example to review is the provisions of Art. 69 of the Constitution of Turkey (in general, we refer to it often as it is possibly the most detailed article on this issue among foreign constitutions). These are the following provisions: A party that has been dissolved forever must not be re-established under a different name; members, including founders of a political party, whose actions or statements led to the dissolution of the party on a permanent basis, may no longer be founders, members, directors, or leaders of any other party within five years from the date of publication of the final decision of the Constitutional Court justifying the final dissolution of the party in the official gazette.⁵⁶

As a legislative regulation of this issue, we propose to adopt draft law No. 9081 of 03/06/2023, "On Amendments to Certain Laws of Ukraine," regarding the limitation of participation of persons associated with political parties, whose activities are prohibited in state management.⁵⁷ It proposes to restrict the right of persons associated with parties whose activities are prohibited, for reasons of ensuring national security or countering the spread of totalitarian ideology, to be elected people's deputies of Ukraine, deputies of local councils, or village and town mayors for a period of 10 years after the termination or abolition of martial law in Ukraine.

Fourth, the regulation of the judicial jurisdiction issue over the banning of political parties is of some concern.

Until 2005, the jurisdiction fell to the Supreme Court of Ukraine, from 2005 to 2021, the district administrative court of the city of Kyiv, from 2022, the appellate administrative court, the jurisdiction of which extends to the city of Lviv (under the conditions of martial law) or to the city of Kyiv (under normal conditions).

According to the Venice Commission, a significant number of constitutional courts have jurisdiction to rule on the constitutionality of political parties and, as a result, on their dissolution and ban (examples: Czech Republic, Germany, Republic of Korea, Poland, Portugal, Slovakia, Slovenia, Turkey). In some countries, the jurisdiction of the constitutional court extends not only to parties, but also to other organisations. In Albania and Bulgaria, it includes other political organisations, and in Azerbaijan, associations in general (see Section I, Subsection 6 of the Report CDL-INF(2001)009-e "Decisions of constitutional courts and equivalent bodies and their execution," approved at the 46th plenary session (Venice, March 9-10, 2001)).⁵⁸ Therefore, it is logical to transfer the authority to ban political parties to the Constitutional Court of Ukraine in the future.⁵⁹

56 *ibid*, art 69.

57 Draft Law of Ukraine No 9081 'On Amendments to Certain Laws of Ukraine (Regarding Limiting the Participation of Persons Associated with Political Parties, whose Activity is Prohibited, in State Administration)' of 06 March 2023 <<https://itd.rada.gov.ua/billInfo/Bills/Card/41482>> accessed 06 April 2023.

58 Decisions of Constitutional Courts and Equivalent Bodies and their Execution: Report (Venice Commission, 9-10 March 2001) <[https://www.venice.coe.int/webforms/documents/?pdf=CDL-INF\(2001\)009-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-INF(2001)009-e)> accessed 06 April 2023.

59 Yurii Barabash and Hryhorii Berchenko, 'Freedom of Speech under Militant Democracy: The History of Struggle against Separatism and Communism in Ukraine' (2019) 9(3) *Baltic Journal of European Studies* 9, doi:10.1515/bjes-2019-0019.

Removal of this type of cases from the jurisdiction of the CCU will not best effect the quality of decisions. Specialists have already repeatedly analysed in detail the cases of banning political parties during 2014-2015 and reached conclusions about problems with the application of the three-fold test.⁶⁰ A better situation with additional grounds for banning parties was introduced in 2022, because then, it was possible to avoid excessive formalism. At the same time, the literature claims that the current legislation does not clearly regulate the procedure for collecting evidence of political parties' illegal activities, does not distinguish between the actions of individual representatives of the political party and the political force itself, and some positions expressed in the decisions of the Eighth Administrative Court of Appeal, under certain conditions, contradict the conclusions of the Venice Commission and the European Court of Human Rights in cases related to the prohibition of the activity of political parties.⁶¹

In addition, as we have seen, the issue of the loss of mandates in court decisions on the banning of the party was completely ignored by the courts; instead, it was the Should this be CCU in this sentence both times — Germany & Republic of Korea? of Germany that played a key role in this process in 1952, as did the CC of the Republic of Korea in 2014. We can assume that being immersed in constitutional issues would not allow the CCU to ignore the relevant issue if the decision to ban parties was attributed to its competence.

5. OTHER MEANS OF MILITANT DEMOCRACY AND THEIR ROLE IN PROTECTION AGAINST RUSSIA'S ARMED AGGRESSION AGAINST UKRAINE

In addition to the ban on parties and other restrictions stemming from the Law of Ukraine "On Condemnation of Communist and National Socialist (Nazi) Totalitarian Regimes in Ukraine and Prohibition of Propaganda of Their Symbols" No. 317-VIII of April 9, 2015, other measures of militant democracy were also taken.

Lustration became the most extensive measure in its field of application. Law "On Purification of Power" No. 1682-VII was adopted on September 16, 2014. The problems of this law included its belated nature (regarding members of the Communist Party of Ukraine and KGB employees) as well as insufficient quality. Despite the absence of a decision of the Supreme Court of Ukraine regarding the Law "On Purification of Power" for more than 8 years,⁶² two of the ECtHR's decisions have already been passed against Ukraine regarding the application of the Law "On Purification of Authorities": "Polyakh et al. v. Ukraine" dated October 17, 2019,⁶³ and "Samsin v. Ukraine" dated October 14, 2021.⁶⁴ In both cases, Ukraine was found to have violated the ECHR and no concessions were made for Ukraine.

60 See: Bohdan Vitaliyovych Bernatsky, 'Formation of the Ukrainian Model of Banning Political Parties in the Light of International Standards and Practices' (PhD (Law) thesis, National National University of Kyiv-Mohyla Academy 2019).

61 See: Olha Kotsiuruba, 'State Influence on Political Parties: A View Through the Prism of the Russian Federation's Aggression against Ukraine' (2022) 2 Ukrainian Journal of Constitutional Law 23, doi:10.30970/jcl.2.2022.3.

62 Constitutional Submission of the Supreme Court of Ukraine of 20 November 2014 <<http://www.ccu.gov.ua/sites/default/files/46.pdf>> accessed 06 April 2023.

63 Polyakh and others v Ukraine App nos 58812/15 and 4 others (ECtHR, 17 October 2019) <<https://hudoc.echr.coe.int/?i=001-196607>> accessed 06 April 2023.

64 Samsin v Ukraine App no 38977/19 (ECtHR, 14 October 2021) <<http://hudoc.echr.coe.int/eng?i=001-212148>> accessed 06 April 2023.

The Ukrainian lustration was not related to the restriction of the right to vote, but only related to access to public service. At the same time, in foreign countries when applying lustration, we saw the constitutionalising of restrictions on the right to vote. Thus, in Italy, according to para. 2 p. of Section XII of the Transitional and Final Provisions of the Constitution, a temporary restriction of active and passive voting rights was established for responsible leaders of the fascist regime for a period of no more than 5 years from the date of entry into force of the Constitution. In addition, in accordance with Para 4 of Art. 48 of the Constitution of Italy, the right to vote may be particularly limited by virtue of a final criminal sentence or in cases of inappropriate behaviour as determined by law. We should also mention the limitation of the passive voting right in Latvia, the compliance of which was checked by the European Court of Human Rights in the decision on June 17, 2004, in the case "Zhdanoka v. Latvia."⁶⁵ Without limiting the right to vote, in accordance with Art. 6 and 7 of the Law of the Republic of Estonia "On the Implementation of the Constitution,"⁶⁶ the obligation for certain categories of persons to take an oath of assurance was foreseen, especially for those persons elected to the State Assembly. If the court proves that the information confirmed by the oath is untrue, the candidate is excluded from the list of candidates or loses his powers (if elected).⁶⁷

As previously noted, in the future, a question will certainly arise regarding the electoral rights of leaders of banned parties, and this question will require a separate legislative (perhaps constitutional) regulation.

In addition, in connection with the issues of reintegration of de-occupied territories, primarily those that were occupied since 2014-2015 (but not only), lustration should obviously receive a new scope of application and be extended to certain categories for persons who cooperated with the occupiers. Moreover, lustration was mentioned before the large-scale aggression in the draft law, "On the principles of state policy of the transitional period," developed by the government, regarding which the Opinion No. 1046/2021 of October 18, 2021, by the Venice Commission CDL-AD(2021)038 (adopted at the 128th plenary session (Venice, online, October 15-16, 2021).⁶⁸ At the same time, the lustration procedure itself must be written out in detail and must account for the ECtHR's existing practice as well as the positions of the Venice Commission.

During 2014-2023, the means of militant democracy acquired other areas of application.

Thus, administrative responsibility was established for the public use, demonstration, or wearing of St. George's (Guards) ribbon or its image, being recognised as an offence that entails administrative responsibility in the form of a fine.⁶⁹ Amendments were made to the Law of Ukraine "On Television and Radio Broadcasting," "On Cinematography" (which was subsequently recognised as constitutional by the CCU in its decision No. 3-p/2021 of December

65 Zhdanoka v Latvia App no 58278/00 (ECtHR, 17 June 2004) <<https://hudoc.echr.coe.int/?i=001-61827>> accessed 06 April 2023.

66 The Constitution of the Republic of Estonia Implementation Act (passed 28 June 1992) <<https://www.riigiteataja.ee/en/eli/530102013012/consolide>> accessed 06 April 2023.

67 For additional information on the practice of the ECtHR regarding the right to free elections, see: Oleksandr Bakumov, 'The Legal Position of the European Court of Human Rights on the Right to Free Elections: Disputes Practice' (2016) 3 Journal of the National Academy of Legal Sciences of Ukraine 183.

68 Opinion No 1046/2021 'On the Draft Law of Ukraine "On the Principles of State Policy of the Transition Period"' (Venice Commission, 15-16 October 2021) <[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2021\)038-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2021)038-e)> accessed 06 April 2023.

69 Law of Ukraine No 2031-VIII 'On Amendments to the Code of Ukraine on Administrative Offenses Regarding the Prohibition of the Production and Propaganda of St. George's (Guards) Ribbon' of 16 May 2017 [2017] Official Gazette of Ukraine 49/1507.

21, 2021, precisely in view of the concept of “democracy capable of defending itself” and its previous decision, namely the first paragraph of paragraph 11 of the motivational part of the Decision of July 16, 2019, No. 9-p/2019).⁷⁰

Public denial of the legitimacy of the struggle for the independence of Ukraine in the 20th century is considered an insult to the memory of the fighters for the independence of Ukraine, a humiliation of the Ukrainian people’s dignity, and is illegal.⁷¹

In the context of militant democracy, one cannot fail to mention the Law of Ukraine No. 2116-IX of March 3, 2022, “On the Basic Principles of Forcible Expropriation in Ukraine of Objects of Property Rights of the Russian Federation and its Residents”⁷² and the Law of Ukraine “On Amendments to Certain Legislative Acts of Ukraine Regarding Increasing the Effectiveness of Sanctions Related to the Assets of Individuals” of May 12, 2022, No. 2257-IX.⁷³

There are also specific measures of militant democracy used as a test of loyalty to Ukraine. Thus, according to the Law “On Amendments to Chapter II Final Provisions” of the Law of Ukraine “On the National Anti-Corruption Bureau of Ukraine,” Should this be CCU in this sentence both times - Germany & Republic of Korea? There was one quotation mark in here to end, but I’m not certain where or if it was supposed to begin. Is some part of this also part of the law that should be in quotation marks? No. 2582-IX in 2022, a person, after the introduction of martial law, cannot be appointed to the position of Director of the National Anti-Corruption Bureau of Ukraine state, if they remained outside the borders of Ukraine for a total of more than 21 days.⁷⁴

One way or another, restrictions can be associated with militant democracy in accordance with the Law of Ukraine “On Sanctions” dated August 14, 2014, No. 1644-VII,⁷⁵ the Law of Ukraine “On Prevention of Threats to National Security Associated with the Excessive Influence of Persons Who Have Significant Economic and Political Weight in Public Life (oligarchs)” dated September 23, 2021, No. 1780-IX,⁷⁶ and more.

Regarding the Law of Ukraine “On Amending Article 12 of the Law of Ukraine,” “On Freedom of Conscience and Religious Organizations,” in reference to the name of religious organisations (associations), which are part of the structure of a religious organisation (association),

70 Decision No 3-p/2021 in Case No 1-252/2018(3492/18) (Constitutional Court of Ukraine, 21 December 2021) [2022] Official Gazette of Ukraine 5/311.

71 Law of Ukraine No 314-VIII ‘On the Legal Status and Commemoration of the Fighters for the Independence of Ukraine in the 20th century’ of 9 April 2015 [2015] Official Gazette of Ukraine 40/1178.

72 Law of Ukraine No 2116-IX ‘On the Basic Principles of Forced Expropriation in Ukraine of Objects of Property Rights of the Russian Federation and Its Residents’ of 3 March 2022 [2022] Official Gazette of Ukraine 33/1720.

73 Law of Ukraine No 2257-IX ‘On Amendments to Certain Legislative Acts of Ukraine on Increasing the Effectiveness of Sanctions Related to the Assets of Individuals’ of 12 May 2022 [2022] Official Gazette of Ukraine 43/2317.

74 The Law of Ukraine No 2582-IX ‘On Amendments to Section II “Final Provisions” of the Law of Ukraine “On the National Anti-Corruption Bureau of Ukraine” Regarding the Establishment of Restrictions for the Appointment of the Director of the National Anti-Corruption Bureau of Ukraine in Connection with the Introduction of Martial Law in Ukraine’ of 7 September 2022 [2022] Official Gazette of Ukraine 80/4811.

75 Law of Ukraine No 1644-VII ‘On Sanctions’ of 14 August 2014 <<https://zakon.rada.gov.ua/laws/show/1644-18>> accessed 06 April 2023.

76 Law of Ukraine No 1780-IX ‘On Prevention of Threats to National Security Associated with Excessive Influence of Persons who have Significant Economic and Political Weight in Public Life (Oligarchs)’ of 23 September 2021 [2021] Official Gazette of Ukraine 88/5599.

the management centre of which is located outside Ukraine in a state recognised by law as having carried out military aggression against Ukraine and/or temporarily occupying part of the territory of Ukraine, dated December 20, 2018, No. 2662–VIII, in the decision dated December 27, 2022, No. 4-p/2022 (case regarding the full name of religious organisations),⁷⁷ the CCU recognised the relevant law as constitutional. Although the CCU did not refer directly to the concept of militant democracy, it nevertheless emphasised that this law “contributes to ensuring the defence capability of the state and the combat capability of units of the Armed Forces of Ukraine in conditions of armed aggression” (paragraph 5, clause 4.9 of the motivational part).⁷⁸

In our opinion, the improvement of the militant democracy tools in the conditions of martial law could be the strengthening of the block of constitutional norms on martial law/state of emergency in the future. So, for example, at one time in the Federal Republic of Germany, an entire section under the number “Xa” was introduced into the text of the Basic Law. It regulates the extension of powers of bodies whose term of powers expired during martial law; activities of the joint committee; Chancellor’s powers; making peace and cancelling emergency measures; and much more.

6. CONCLUSIONS

Thus, we consider militant democracy to be an integral element of the constitutional design of post-totalitarian and post-authoritarian countries. There is a certain loss of relevance of militant democracy for stable democracies (which have already passed their critical period after the Second World War), as well as concern about the use of its means to excessively restrict human rights. On the other hand, in Ukraine, the means of militant democracy have not yet fulfilled their function; they continue to fulfil it in the conditions of Russia’s armed aggression against Ukraine and will certainly continue to after its completion. Ukraine found itself in a unique situation of Russian attempts, wherein the successor of the Soviet empire desired to take revenge with absolute denial of Ukrainian independence and its democratic vector of development on the part of the aggressor.

Starting in 2014, although not without problems and mistakes, means of militant democracy such as banning political parties, means related to banning propaganda of totalitarian regimes, lustration, and many others have been utilized. Today, Ukraine can benefit from the experience of post-totalitarian countries, constitutional and legislative regulation of the means of militant democracy, as well as judicial and other law enforcement practice. It is also important to use the ECtHR’s practices and the recommendations of the Venice Commission.

We consider it urgent to resolve a few issues. First of all, we identify terminating the powers of deputies elected on the lists of political parties, which are prohibited by the courts, as well as limiting their passive right to vote in the future. Secondly is the adoption of legislation in the field of reintegration of de-occupied territories with the establishment of clear criteria for future lustration. Thirdly, we recognise the needed improvement of the constitutional regulation

77 Decision No 4-p/2022 in Case No 1-13/2019(374/19) (Constitutional Court of Ukraine, 27 December 2022) [2023] Official Gazette of Ukraine 7/588.

78 On the protection of the principles of independence and territorial integrity in the practice of the Constitutional Court of Ukraine, see: Hryhorii Berchenko, Tetiana Slinko and Oleh Horai, ‘Unamendable Provisions of the Constitution and the Territorial Integrity of Ukraine’ (2022) 5(4-2S) Access to Justice in Eastern Europe 122, doi:10.33327/AJEE-18-5.4-n000447.

of the means of militant democracy used both in conditions of war and a state of emergency, and without its use (suspension of the activities of associations, transfer of consideration of cases on the banning political parties to the Constitutional Court of Ukraine). Fourthly, Ukraine, as an active player in the international arena, can propose in the future, in the event of possible EU reform, the introduction of supranational tools of militant democracy, which is especially relevant given the strengthening of populist forces within the EU and outside it, as well as the conduct of hybrid wars of a new type. Such means may consist of intensifying the application of various financial instruments and sanctions as well as a possible reform of the procedures for making such decisions within the EU.

REFERENCES

1. Albert R and Roznai Y (eds), *Constitutionalism under Extreme Conditions: Law, Emergency, Exception* (Ius Gentium: Comparative Perspectives on Law and Justice, Springer Cham 2020) doi:10.1007/978-3-030-49000-3.
2. Bakumov O, 'The Legal Position of the European Court of Human Rights on the Right to Free Elections: Disputes Practice' (2016) 3 Journal of the National Academy of Legal Sciences of Ukraine 183.
3. Barabash Yu and Berchenko H, 'Freedom of Speech under Militant Democracy: The History of Struggle against Separatism and Communism in Ukraine' (2019) 9(3) Baltic Journal of European Studies 3, doi:10.1515/bjes-2019-0019.
4. Barabash Yu and Berchenko H, 'Can Democracy Protect Itself in Conditions of War? (On the Experience of State Building During Russian Aggression)' (2023) 1 Law of Ukraine 54.
5. Berchenko GV, 'Internal organization of political parties as a subject of constitutional regulation' (2009) 12 Bulletin of the Ministry of Justice of Ukraine 111.
6. Berchenko H, Slinko T and Horai O, 'Unamendable Provisions of the Constitution and the Territorial Integrity of Ukraine' (2022) 5(4-2S) Access to Justice in Eastern Europe 122, doi:10.33327/AJEE-18-5.4-n000447.
7. Bernatsky BV, 'Formation of the Ukrainian Model of Banning Political Parties in the Light of International Standards and Practices' (PhD (Law) thesis, National National University of Kyiv-Mohyla Academy 2019).
8. Bugarič B, 'A Crisis of Constitutional Democracy in Post-Communist Europe: "Lands in-between" Democracy and Authoritarianism' (2015) 13(1) International Journal of Constitutional Law 219, doi:10.1093/icon/mov010.
9. Drinóczi T and Mészáros G, 'Hungary: An Abusive Neo-Militant Democracy' in Bäcker R and Rak J (eds), *Neo-Militant Democracies in Post-Communist Member States of the European Union* (Routledge, 2022) 98, doi:10.4324/9781003245162-8-8.
10. Gordon RH, 'The Second Attempt at a Third Successful Ban of an Established German Political Party' (2016) 17 Rutgers Journal Law & Religion 527.
11. Graber MA, Levinson S, and Tushnet M (eds), *Constitutional Democracy in Crisis?* (OUP 2018) doi:10.1093/law/9780190888985.001.0001.
12. Halmai G, 'A Coup Against Constitutional Democracy The Case of Hungary' in Graber MA, Levinson S, and Tushnet M (eds), *Constitutional Democracy in Crisis?* (OUP 2018) ch 15.
13. Han M, 'Mandatsverlust von Mitgliedern verfassungswidriger Parteien im Deutschen Recht' (2018) 19(3) Public Law Journal 109, doi:10.31779/plj.19.3.201808.004.
14. Hesse K, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* (CF Müller 1999).
15. Huntington SP, *The Third Wave: Democratization in the Late Twentieth Century* (OU Press 1991).

16. Isensee J und Kirchhof P (hg), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, bd 3: *Demokratie – Bundesorgane* (3 Aufl, CF Müller 2005).
17. Issacharoff S, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (Cambridge Studies in Election Law and Democracy, CUP 2015) doi:10.1017/CBO9781139839334.
18. Kommers DP and Miller RA, *The Constitutional Jurisprudence of the Federal Republic of Germany* (3rd edn, Duke UP 2012).
19. Kotsiuruba O, 'State Influence on Political Parties: A View Through the Prism of the Russian Federation's Aggression against Ukraine' (2022) 2 Ukrainian Journal of Constitutional Law 23, doi:10.30970/jcl.2.2022.3.
20. Loewenstein K, 'Militant Democracy and Fundamental Rights, I' (1937) 31(3) American Political Science Review 417, doi:10.2307/1948164.
21. Loewenstein K, 'Militant Democracy and Fundamental Rights, II' (1937) 31(4) American Political Science Review 638, doi:10.2307/1948103.
22. Müller JW, 'The EU as a Militant Democracy, or: Are there Limits to Constitutional Mutations with-in EU Member States?' (2014) 165 Revista de Estudios Políticos (nueva época) 141.
23. Oliyныk V, 'Deputies of pro-Russian parties – to be held accountable: The results of the social survey' (*LB.ua*, 25 January 2023) <https://lb.ua/news/2023/01/25/543560_deputativ_prorosyyskih_partiy-.html> accessed 6 April 2023.
24. Przeworski A, *Democracy and the Market: Political and Economic Reforms in Eastern Europe and Latin America* (Studies in Rationality and Social Change, CUP 1991).
25. Sajó A and Uitz R, *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (OUP 2017) doi:10.1093/oso/9780198732174.001.0001.
26. Sajó A, 'Emotions in Constitutional Design' (2010) 8(3) International Journal of Constitutional Law 354, doi:10.1093/icon/moq009.
27. Savchyn M, 'Russo-Ukrainian War and the Transformation of Constitutional Law' (2023) 1 Law of Ukraine 12.
28. Savchyn MV, *Constitutionalism and the Nature of the Constitution* (Lira 2009).
29. Schmitt C, *Dictatorship* (Polity Press 2013).
30. Schmitt C, *Political Theology: Four Chapters on the Concept of Sovereignty* (CUP 2005).
31. Soltau S, 'Mandatsverlust von Mitgliedern verfassungswidriger Parteien – Das freie Mandat vs. das Prinzip der Parteienstaatlichkeit' (*GRIN Verlag*, 2002) <<https://www.grin.com/document/7692>> accessed 06 April 2023.
32. Steuer M, 'Militant Democracy and COVID-19: Protecting the Regime, Protecting Rights?' (2020) 2 Hong Kong Journal of Law and Public Affairs 131.
33. Tushnet M (ed), *The Constitution in Wartime: Beyond Alarmism and Complacency* (2nd edn, Duke UP 2005) doi:10.1215/9780822386902.
34. Wise J, 'Dissent and the Militant Democracy: The German Constitution and the Banning of the Free German Workers Party' (1998) 5(1) The University of Chicago Law School Roundtable 335.
35. Zeisberg M, *War Powers : The Politics of Constitutional Authority* (Princeton UP 2013).