Decommunization in Times of War: Ukraine's Militant Democracy Problem

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09.01.2018 doi: 10.17176/20180109-120812

The Ukrainian parliament *Verkhovna Rada* adopted four 'memory laws' shortly after the *Maidan* revolution in the spring of 2015. The decommunization 'package', prepared by the Ukrainian Institute of National Remembrance and signed into effect by President Petro Poroshenko soon thereafter, contains a legislation criminalizing both Nazi and Communist totalitarian regimes, prohibiting the propaganda of their symbols; two laws commemorating, respectively, Ukraine's fighters for twentieth-century independence movement and the victory over Nazism during the Second World War, and a law guaranteeing access to archives of repressive Soviet-era organs.

Besides the predictably pained reactions from Russia, the Ukrainian decommunization laws have been subjected to wide international legal, scholarly and domestic criticism. Soon after the ban on communist parties in Ukraine in December 2015, the European Commission for Democracy through Law (the Council of Europe's advisory body on constitutional matters, aka the Venice Commission) adopted a joint interim report together with the OSCE/ODIHR, criticizing the broad scope of the Ukrainian law banning Communist and Nazi propaganda and symbols for its obstruction of free expression, introduction of unfair sanctions and consequent non-compliance with 'the European standards', and urging the country to bring its decommunization stipulations in line with European human rights legislation. Acknowledging the aims of the respective law as 'legitimate', the Venice Commission nevertheless took issue with the law failing the 'three-fold test of legality, legitimacy and necessity in a democratic society'. However, the carefully and delicately suggested amendments to the decommunization laws (namely the clarification of the list of prohibited symbols, along with the notion of propaganda; linking the denial of crimes to specific crimes rather than vaguely to the 'criminal nature' of a regime as a whole; streamlining the disproportionality of sanctions and banning of associations) remain yet to be introduced in Ukraine.

Thorny Questions

Ukraine's decommunization laws raise fundamental questions about the legitimate defense of democracy in times of political transformation and war. Is there a 'right' democratic response to confining antidemocratic legacies and their palpably present effects in the context of an active intrastate (if internationally instigated) conflict, such as in the case of Ukraine? Has Ukraine struck a good balance between protecting its 'national memory' and sustaining the claim of thus defending its nascent democracy through its legal regulation of the public memory of communism, Nazism and the Second World War? Or do the decommunization laws rather undermine the country's democratization efforts due to the challenge that banning the communist party and criminalizing pertinent speech acts ('propaganda') present to such fundamental democratic values as freedom of speech and association, and political pluralism?

Is the canonization of the Organization of Ukrainian Nationalists (OUN) and the Ukrainian Insurgent Army (UPA) obstructing academic research and public debate on their controversial historical record? Is militant democracy a more acceptable solution in the context of ongoing nation-building, regime change and active conflict (including a continued 'memory war') as compared to consolidated democracies during more 'normal' times?

The Debate

The advocates of decommunization in Ukraine have reminded the critics about the prospect of their insights becoming 'actively used by Russian propaganda in an information war against Ukraine'. The timing of the laws in response to Russia's annexation of Crimea and Russia's involvement in the conflict in eastern Ukraine suggests that the decommunization package is chiefly a strategic measure of mnemonical security in the context of the ongoing hybrid hostilities from Ukraine's eastern neighbor.

Ukraine's decommunization laws seek to patch a perceived key vulnerability in the Ukrainian nation and state's post-Soviet emancipation by streamlining and redressing the historical narrative of the infamously divided country's experiences with the twentieth-century totalitarianisms and the Second World War. Ukraine's process of coming to terms with the Soviet past has taken considerably longer compared to many of its Central European counterparts. The state-wide decommunization initiatives were only introduced by the 'Orange President' Viktor Yuschenko in the mid-2000s, with a focus on seeking international recognition of *Holodomor* as an act of genocide against the Ukrainian people. The pendulum struck back with the era of Viktor Yanukovich's presidency, to be followed by the *Euromaidan* and a spontaneous surge of*Leninopad* (i.e. 'Lenin fall'). Post-Maidan decommunization advocates make the case for decommunization/de-Sovietization as a matter of national security and a prerequisite for the country's Europeanization and democratization.

The critics, in turn, have raised a host of concerns on pragmatic, strategic, normative, internal consistency, societal, political, and legal grounds. Not only is Ukraine deemed to hamper its possible EU membership prospects by effectively making it illegal to criticize *inter alia* Holocaust perpetrators, there is an eerie rhetorical resemblance between the Ukrainian commemorative laws and the infamous Article 354.1. on the Rehabilitation of Nazism of the Russian Penal Code of 2014. That provision criminalizes public dissemination of 'knowingly false information' about the activities of the USSR during the Second World War, stipulating concrete penalties and banning the dissemination of information expressing 'obvious disrespect to the society' concerning days of military glory and Russia's memorial dates. The Ukrainian laws are consequently reprimanded as equally problematic attempts to legislate historical truth and police freedom of speech on issues of national importance for Ukraine's 'historical consciousness', thus entailing significant potential to close down discussion and silence criticism by prescribing a single state-endorsed narrative. Nuances are lost when extensive historical eras are legally codified into a simplified account of heroes and villains. The laws are accordingly criticized for their vague definitions (such as the 'criminal nature' of the communist regime, or 'propaganda') and far too broad a scope. Moreover, many regard the decommunization laws as dangerously divisive in an already ostensibly divided society.

…and the Gist of It

All four decommunization laws fall into the broadly regulatory category, while only the law on the condemnation of the Communist and Nazi regimes is specifically punitive, stipulating concrete limits on freedom of speech and association along with penalties for violating the law. The academic critics intervene in the debate from a largely historical-normative angle: decommunization laws are accordingly seen as a propagandistic effort, seeking to up the heroism of Ukraine's war-time independence fighters while deliberately obscuring some of their more problematic factual record. The academic critics further interrogate the ethical principles sustaining the idea of consolidating a nation by means of laws geared towards selective forgetfulness rather than assuming responsibility.

The Venice Commission and the OSCE/ODIHR enter the legal criticism of the method of these laws rather than question the substantive weightiness underpinning the views thus institutionalized. They are ostensibly less concerned about the legitimacy of memory laws as such, underscoring the 'legimate aims' of such a truth and justice-seeking process and targeting their criticism at the implementation and the

proportionality of means rather than the idea of and justification for memory laws altogether.

There are deeper currents running through the debate, however – the criticism of Ukraine that is implicitly of the Orientalizing and infantilizing kind. The proponents of decommunization have a point in sorting out Ukraine's belated *Vergangenheitsbewältigung* with the Soviet past. Yet, Ukraine cannot escape the basic dilemma of 'defending democracy' whilst tilting the ever-elusive balance between security and liberty too heavily in favor of the former. With the attempt to freeze a version of the difficult twentieth-century past under the lid of law, the purported object of defense might inadvertently become harmed instead.

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SUGGESTED CITATION

Mälksoo, Maria: Decommunization in Times of War: Ukraine's Militant Democracy Problem , Verfassungsblog, 09.01.2018, doi: 10.17176/20180109-120812.

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Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20180109-120812.