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# Manifesting Memories: The 2023 Ukrainian Decolonization Law and EU Accession

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## *Introduction*

Defining moments for a country's history, be it regime change or conflict, are often accompanied by a reconsideration of its history. The formation of a collective memory (Halbwachs, 1992) can function as an important marker of identity and thereby foster the consolidation of power. Precisely because of its link to ontological security, memory has become an important aspect of politics, decribed by Maria Malksöo (2021) as 'mnemonical security'. Sometimes, political leaders decide to give a *legal* shape to political memory through the creation of so-called memory laws, which can be implemented in autocracies, to assert control, or in (future) democracies as a means of realizing democratic ambitions.

In Eastern Europe, the fall of communism brought about a change in 'memory regimes' and the rise of memory politics, in which memory laws served to materialise new ideologies and regimes (see Barton Hronešová & Hasić, 2023; Mälksoo, 2018a, 2021; Onken, 2007; Stojanović, 2022). The process of decommunization gave rise to many memory laws, in which the communist past would be presented as the 'Other', sometimes with the aim of depicting a country's 'true' European identity, in other cases as a political strategy of right-wing nationalists. Such decommunization laws, among them the Ukrainian 2015 'decommunization package', have been under scrutiny for their inherent tension of preserving democracy whilst at the same time undermining democratic principles and fostering a 'militant memocracy' (Mälksoo, 2021).

Considering Ukraine's recent EU candidate status and the full-scale Russian invasion on its territory (2022–), which inevitably forms, changes, and obstructs memory, such questions become even more pressing. Therefore, this paper will engage with the topic of memory laws in Ukraine and consider its implications for Ukraine's path towards EU accession. More specifically, I will study the law *On Condemnation and Prohibition of Propaganda of Russian Imperial Policy in Ukraine and Decolonization of Toponymy* and apply the previous recommendations of the Venice Commission on the decommunization law (2015) to the recent decolonization law (2023). This paper will also briefly touch upon the topic of post-coloniality, engaging with concepts of 'multi-directional memory' (Rothberg in Tlostanova, 2024) and 'hybridity' (Törnquist-Plewa & Yurchuk, 2017), which can play an important role for Ukraine's future ambitions.

## *Memory, identity, and post-coloniality*

Memory is a defining factor of a state's ontological security, as it consolidates the identity of a state. In times of heightened anxiety, historical narratives can play a big role in states' ontological security-seeking (Subotić, 2016). In Eastern Europe, this became apparent during the twenty-year commemoration of communism. Bernhard and Kubik (2014) found that political actors used certain strategies to make others remembers in their favour, depending on the feasibility of a certain memory. As such, mnemonic actors take up the role of either 'warriors', 'pluralists', 'abnegators' or 'prospectives' in their self-formed memory regimes (Bernhard & Kubik, 2014).

Following Subotić and Zarakol (2012), the *international* display of memories also has to do with the status of a country abroad and its own 'cultural intimacy'. States, especially in the case of ontological anxiety, enter a balancing act between allowing the aspects of a state's identity which give national comfort, and pushing them away because they lead to external embarrassment, which could de facto endanger a state's ontological security. Such anxieties, conceptualised by Mälksoo (2021) as 'mnemonical status anxiety' can in further stages lead to 'militant memocracy'. States that become a 'militant memocracy', mobilise a certain narrative and criminalise other views of the past which do not match the state's preferred self-identity.

One of the ways mnemonic actors can pursue a certain memory agenda is through the implementation of memory laws, which are not uncommon in the region of Eastern Europe. Comparing the memory laws of Poland, Russia, and Ukraine, Mälksoo (2021) finds that different forms of 'militant memocracies' exist. Whereas Poland appears to be a case of 'mnemonical revisionism' through portraying itself as a 'suffering nation' by the Nazi and Soviet regimes, Russia demonstrates 'mnemonical positionalism' by emphasizing Soviet victory over the Nazi's in World War II and its great power status. Ukraine tackles its status anxiety of being in-between East and West by opting for 'mnemonical self-emancipation' through a focus on decommunization. Memory laws in all three countries mentioned, depict a 'sanitised and exclusionary national self-vision', built on simplistic binaries (Mälksoo, 2021, p. 504).

However, if memory laws can be of a militant nature and potentially complicate democratic ambitions, how does this play out in the context of the European Union? So far, the European Parliament has adopted several resolutions on memory as part of its 'EU memory framework', which are the policies, resolutions and decisions of the European Commission and

Parliament which 'reflect and guide collective moral and political attitudes towards the past' (Milošević & Touquet, 2018, p. 382). Small groups of 'memory entrepreneurs' from Central-Eastern Europe (CEE) pressed for including the communist experience in EU's memory framework, which in 2009 led to the adoption of the resolution on 'European Conscience and Totalitarianisms' (Neumayer, 2015). For Gal Kirn (2019), the "push to rewrite history" in the East-European context, formalised by the equation of the communist and Nazi regimes, represents a post-1989 shift in Europe of antifascism to anti-communism and lacks a proper understanding and comparison of historical events. Such simplistic versions of history also allow Russia to frame itself as the authentic critic of fascism and a global anti-imperialist power (Kirn, 2019).

In the context of Ukraine, which has official EU candidate status since February 2022, the post-Euromaidan period led to the emergence of memory politics. Most notable was the implementation of the 'decommunization package' in 2015, which served to create a memory regime distinct from Russian-Soviet narratives of the USSR and the Second World War (Shevel, 2016). Decommunization remains a complicated process. On the one hand, 'neo-Soviet methods', condoning only one 'correct' interpretation of the past should be avoided. On the other hand, whilst there are critics of decommunization laws who genuinely care about the freedom of expression and free historical research, there are also those who want to keep Ukraine in the "Russian sphere of influence" (Shevel, 2016, p. 263).

Despite the latter, Shevel (2016, p. 263) argues that, to move towards Europe, 'Ukrainian leaders need to be aware that a true break from the authoritarianism of the 'Russian world' and the communist era cannot be accomplished by neo-Soviet methods'. The complex binaries of such laws also become apparent in the practical implementation of decommunization and/or decolonization.[1] For instance, the rehabilitation of contested figures, such as Stepan Bandera, continues to be a problem, just as the renaming of certain places in Ukraine, like the city of Kirovohrad (Shevel, 2016, p. 262). In a similar fashion, Betlii (2022, p. 168) explains that Kyiv-born author Mikhail Bulgakov represents an 'old imperial Kyiv' admired by many Kyiv citizens, whilst he is also known for his display of 'anti-Ukrainian views' (Betlii, 2022, p. 168).

[1] Different authors understand decommunization either as similar to decolonization (Betlii, 2022; Törnquist-Plewa & Yurchuk, 2017) or as part of the broader project of decolonization (Zhurzhenko, 2022).

Drawing on a postcolonial perspective,[2] Törnquist-Plewa & Yurchuk (2017) delve into the concepts of 'anti-nationalism' and 'hybridity' to study the case of Ukraine and the dilemma's presented above. 'Anti-nationalism', regarded as a radical counterculture and subversion of dominant ideology, has been criticised by many for producing the same binaries it fights against and accused of suffering from 'selective amnesia'. What would be more useful instead, the authors claim, is the notion of 'hybridity', which opposes essentialism and creates new transcultural forms. This third space allows Ukrainian independence, its Soviet past and the road towards the EU, to coexist, and refuses to think in terms of Soviet versus Ukrainian or Russian versus Ukrainian (Törnquist-Plewa & Yurchuk, 2017, p. 13).

Similarly, Tlostanova (2024) explains how post-soviet postcolonial nation-states, partially or completely freed from Soviet colonialism, use anticolonial nationalism, which 'ultimately reproduces the logic of coloniality' through 'closed national consciousness' and ignorance of other people's experiences. Instead of this form of decolonization, she suggests critiquing the coloniality of memory. Tlostanova (2024) borrows the term 'multidirectional memory' from Michael Rothberg (2009) to explain how different histories and positions can share the same space and reject notions of competitive victimhood, linearity or simplicity, thereby forming a 'larger greatness' of unheard voices. 'Double critique' can criticise both coloniality and Euromodernity for creating 'absolutization' and having blindness to other levels of coloniality (Tlostanova, 2024).

The postcolonial transformation of Ukraine is challenging because of the international community's view of Ukraine as the subaltern, which makes it hard to 'leave the condition of postcoloniality behind' (Törnquist-Plewa & Yurchuk, 2017, p. 16). In a similar nature, Mälksoo (2018b) warned, in the debate on communization, for criticism on Ukraine 'that is implicitly of the Orientalizing and infantilizing kind'. Rightfully, Mälksoo (2018b) raised the question on whether a right democratic response to undemocratic tendencies in the context of war exist, and whether protecting national memory can coexist with defending natural democracy, suggesting that 'militant memocracy' may be more understandable or justifiable during big changes, such as war, nation-building or regime change. Therefore, the starting point of debates on decommunization and decolonization in the context of the Ukrainian war, should not be driven by an understanding of Ukraine as merely a colonial project of Russia or a buffer zone between East and West (Mälksoo, 2023).

[2] The post-colonial perspective is sometimes hard to find as the USSR is still regarded an 'anti-imperialist' power by others, whilst some Ukrainians also feel humiliated to be associated with the 'Third World' (Törnquist-Plewa & Yurchuk, 2017, p. 3).

## *Memory Laws and the Venice Commission*

This paper offers a study on memory laws in Ukraine and its potential implications for Ukraine's path towards EU membership. The European Union itself has not formed clear guidelines or principles on memory laws, decommunization, or decolonization practices in the 'post-Soviet space', or Eastern Europe more generally, but has adopted a few broad resolutions.[3] The Council of Europe, a European institution concerned with upholding democracy, the rule of law and human rights in its member states, did take up this task. The legal advisory board of the council, the 'Venice Commission', is responsible for addressing judicial reforms or law amendments in its member states, including memory laws.

Although the European Union and the Council of Europe cannot be treated as equal institutions, neither from a historical point of view nor in terms of their ambitions, one can hardly ignore the link between the two. The Council of Europe plays an important role for prospective members of the European Union, as is demonstrated by the fact that no state has become part of the EU without being a member of the Council of Europe first.[4] Moreover, the European Union asked Ukraine to follow the recommendations for judicial reforms proposed by the Venice Commission to ameliorate the state's EU accession process.[5]

Therefore, this study will follow a content analysis of a joint interim opinion by the Venice Commission and OSCE/ODIHR on one of the four 'decommunization laws' in Ukraine, which is according to the commission 'a term often applied to the process of dismantling communist legacies in post-communist States'. The law under scrutiny by the Venice Commission was Law No. 317-VIII *'On the condemnation of the communist and national socialist (Nazi) regimes and prohibition of propaganda of their symbols'* (2015),[6] which had previously sparked discussion among a group of experts on Ukraine as the law supposedly lacked prior public debate and violated through its 'content and spirit' the right to freedom of expression (Council of Europe, 2015, p. 5). Subsequently, the Venice Commission and OSCE/ODIHR were asked to analyse the law and discuss its content with the Ukrainian Ministry of Justice, parliamentary representatives, and several NGOs, in order to check whether

[3] Examples are the one on Holodomor (2008), the strong condemnation of totalitarian regimes (2009), and on the condemnation of all totalitarian regimes (2019).

[4] See https://www.coe.int/en/web/portal/46-members-states

[5] For an overview of the recommendations, see https://sceeus.se/en/publications/ukraine-preparation-for-the-eu-accession-process/

[6] *Закон України No. 317-VIII Про засудження комуністичного та націонал-соціалістичного (нацистського) тоталітарних режимів в Україні та заборону пропаганди їхньої символіки*

the law met the principles of the European Convention of Human Rights (ECHR) (Council of Europe, 2015, pp. 3–4).

The delegation stated that the intentions of the decommunization laws, that is, the condemnation, prevention, and awareness of crimes committed by totalitarian regimes, were driven by 'legitimate aims', but that laws, especially because of the situation in Ukraine, should be implemented in a 'balanced manner' (Council of Europe, 2015, p. 6). The discussion and recommendations set out by the Venice Commission, and the potential risks of memory laws for the judiciary, democracy and human rights, are also relevant for similar laws in scope and nature, one of them being the law '*On Condemnation and Prohibition of Propaganda of Russian Imperial Policy in Ukraine and Decolonization of Place Names*' (2023), drafted by the government body 'Ukrainian Institute of National Memory'.[7] Therefore, in the second part of my analysis, the recommendations provided by the Venice Commission will function as a framework for interpreting the recent law on decolonization and de-russification mentioned above. As no translated version of the law could be found online, I have consulted DeepL for a translation of the draft, which will most likely impact the precision of the analysis, but not interfere with understanding the main aims and motives of the law.

## *On Decommunization*

The freedom of expression, which was the main concern raised about Law No. 317-VIII, was measured by the Venice Commission based on the legal framework of the European Convention of Human Rights (ECHR). Following the ECHR principles, the Venice Commission and OSCE gave their opinion on the 'problematic aspects' of the decommunization law. The main points of reference were the three criteria set forth by the ECHR for limiting certain rights, that is, prescription by law (legality), pursuing a legitimate aim (legitimacy), and the necessity for democratic society (Council of Europe, 2015, p. 19).

The first principle, *legality*, needs interference of rights to be in accordance with law, also referred to as the *nullum crimen sine lege* principle.[8] The principle also requires laws to be accessible and clear for individuals to 'regulate their conduct'. Otherwise, the circumstances might risk authorities to arbitrarily interfere with the law (Council of Europe, 2015, p. 13). Although Law No. 317-VIII was deemed accessible enough, the law's unclear terminology and

[7] *Закон України «Про засудження та заборону пропаганди російської імперської політики в Україні і деколонізацію топонімії*

[8] The *nullum crimen sine lege principle* entails that one cannot be held guilty of an offence which was not a criminal offence under (inter)national law at the time.

wording raised concerns to the commission. The definitions of symbols which are prohibited were very broad, among them 'communist party' and 'Soviet security bodies', 'propaganda' was not differentiated from other forms of expression, and 'public denial' was not defined at all.

The experts also underlined the 'vagueness' of certain aspects of banned symbols, for instance, 'any image of state flags, coats of arms and *other symbols* of the USSR' and 'symbols of the communist party *or its elements*' (Council of Europe, 2015, pp. 19–20). Moreover, the Venice Commission emphasised the changing meaning of symbols in different contexts, which would make a complete ban on certain symbols undesirable. Lastly, the delegation warned that the prohibition of the justification of the 'criminal nature of the regime', which is one of the law's most important objectives, did not discuss how criminal intent, *mens rea*, would be measured, which would be important to establish 'justification'. In sum, the 'broadness, vagueness, openness, lack of objective detectability and ambiguity in meaning' made it difficult for individuals to assess what is forbidden, which therefore did not respond to the requirements of clarity and foreseeability (Council of Europe, 2015, pp. 20–21).

Concerning the second requirement of the ECHR, the *legitimacy* of the law, the preamble of the decommunization law referred to the law's far-reaching ambitions, including the protection of human rights, strengthening of democracy, development of the nation, prevention of crimes, and achieving justice – aims regularly to be found in decommunization laws. The law also explicitly mentioned the need to eliminate threats to independence, sovereignty, territorial integrity and national security, which according to the Commission must be read in light of 'recent and current events' of modern Ukrainian history (Council of Europe, 2015, p. 8). The condemnation of the Soviet regime and Nazi regime is thus a way to assert the right to self-determination and independent statehood by creating a common historical record, which the commission, together with the aims above, considered to be of a legitimate nature (Council of Europe, 2015, p. 21).

The requirements of ECHR also refer to the *necessity* or 'pressing social need' in democratic society of interference with existing rights. According to the delegation, stakeholders in Kyiv referred to the 'political and security situation' of Ukraine as a reason for 'necessity', but the commission underlined that 'extreme care must be taken' to guarantee that provisions of national security are applied properly (Council of Europe, 2015, p. 21). For instance, limiting political speech and expression would need more than a sentiment of the public, because of the special protection status of political speech for democracy (Council of Europe, 2015, p. 12). Banning alternative versions or interpretations of modern Ukrainian

history and shutting down public debate would risk interfering with the law's aim of restoring historical and social justice. The same goes for conducting free research into Ukraine's history (Council of Europe, 2015, p. 22).

## *On Decolonization*

The law on decolonization and de-russification of Ukraine bares similarities with the law on decommunization. The draft made by the Ukrainian Institute of National Memory includes a ban on the public glorification or justification of imperialism, the dissemination of information for justifying imperialism, the public use of products which include symbols of Russian imperial policy, and the public denial of crimes and repression against the Ukrainian people (Bohush et al., 2023, p. 15). On two aspects, the law seems to experience the same problems with regards to the ECHR requirement of *legality*. Although the law does provide a (limited) explanation of 'propaganda' this time, 'public denial' is again not specified.

Moreover, the ban on propaganda and symbolism connected to Russia's 'imperial policy', includes a time period of several centuries, and targets the names of places and institutions which honour persons, events or cultural objects associated with this imperial policy (Bohush et al., 2023, p. 17). Because of the large scope of the ban, the list of symbols is very long, encompassing flags, coats, arms, images, slogans, quotes, names, and other signs of 'Russification' or 'Ukrainophobia', leading to a similar 'extensive and exhaustive' list (Council of Europe, 2015) as the decommunization law. However, more exceptions are taken up in the decolonization law. Memorials cannot be banned just because they were made during the USSR but without any connection to imperial policy, and exceptions are also made for museums, library collections, cemeteries, documents, scientific works, works of art, and educational purposes (Bohush et al., 2023, pp. 33–34).

Remarkably, however, is the fact that local councils are advised to investigate themselves whether a name, symbol, landmark, date or event could be part of 'Russian colonial policy', by consulting open databases, toponymical dictionaries or archival materials (Bohush et al., 2023, p. 19). If no clarity exists on whether a symbol has a connection to the imperial past, the question raises whether it should be prohibited, considering the statement of the ECHR that symbols have different meanings and should therefore not be banned in its entirety. The law does give exceptions in case of memorials of local or national significance, for which only the prohibited element can be removed (Bohush et al., 2023, p. 21), but here again, the question remains why that would not be allowed for other memorials as well.

According to the Ukrainian Institute of National Memory, the aim of the law is to eliminate 'imperial stereotypes, myths, narratives, and markers' from public space to guarantee Ukrainian national security (Bohush et al., 2023, p. 3). The draft states that Russian propaganda has undermined the Ukrainian space by myths and stereotypes since the 18th century, aimed at weakening the Ukrainian society and denying Ukrainians the right to exist. For the institute, these laws are part of the process of decolonization in Ukraine, which is defined as the removal of the 'markers' of imperialism, which can be monuments, memorials, but also toponyms, such as names of streets, squares, alleys (Bohush et al., 2023, p. 8). As this touches upon similar issues as mentioned in the decommunization law, e.g. human rights and national security, the requirement of *legitimacy* seems to be fulfilled.

However, when it comes to *necessity* of democratic society, this forms a less clear picture. The draft explains that overcoming long-lasting myths and narratives in public space can offer national security because of its 'mental resistance to the aggressor' (Bohush et al., 2023, p. 4), which seems to insinuate that the decolonization law is a strategy of symbolic warfare, giving 'necessity' a different meaning. Still, one asks oneself whether all aspects of the laws, such as the change in inscriptions of World War II dates and the change of 'civilians' into 'victims of Nazism' (Bohush et al., 2023, p. 25) are necessary for achieving the aims of the law. Important to mention is also the inclusion of contested memories in the decolonization law, such as the 'respectful memory of the victory over Nazism', which states that the Ukrainian Liberation movement was wrongly 'called fascist and its leaders, among them Bandera, as murderers' (Bohush et al., 2023, p. 9).[9]

## *Conclusion*

Repeatedly, memory has turned out to be at the forefront of politics. This paper tried to contribute to the debate on memory politics by engaging with the topic of memory laws in Ukraine, more specifically, the 2023 law on decolonization and its potential implications for Ukraine's EU accession. By considering the recommendations of the Venice Commission, the judicial body of the Council of Europe, on the previous decommunization law in Ukraine and the potential threats to freedom of expression, I analysed to what extent the suggestions of the commission could be traced back in the law on decolonization.

[9] Previously, the President of the European Center for the Development of Democracy, claimed that laws 'glorifying' criminals would evoke anti-semitism and interfere with the rights of minorities (see Engel, 2019).

The decolonization law suffered from the same broadness and vagueness as the law on decommunization, risking individuals to unintentionally violate the law and authorities to arbitrarily interfere, but did show improvements in its provision of exceptions to the law, such as the research into the imperial history of Ukraine. However, the necessity of the law remains a topic of debate, as it risks 'absoluteness' and restricts the freedom of expression. Democratic ambitions, such as those of free speech, should be respected in the Council states, and moving towards one 'correct' interpretation or association of events, complicates this picture.

Albeit my analysis only studied the *legal* aspect of decolonization, it brings us to the bigger debate on political memory and memory laws. In countries which experience heightened ontological anxiety, partially because of their 'subaltern' position in world politics but also because of political changes at home, memory laws can provide the states tools for self-assessment and signalling to 'outsiders'. As such, memory laws in Ukraine could be interpreted as a break from Ukraine's Soviet past and the creation of Ukraine's own memory regime, while also distancing itself from the oppressive 'Other' in a world that pushes binaries of 'East' and 'West', taking up the role of 'mnemonic self-emancipation'.

In this complex position, the 'militant memocracy' turn of Ukraine, increased by the full-scale invasion, potentially puts the country's democratic ambitions at risk. However, as Mälksoo (2018b) suggested, 'militant memocracy' can be a survival strategy when little options are at a country's disposal. Institutions such as the Council of Europe, as well as the European Union, could be more lenient in their approach in the context of war, notwithstanding that getting rid of simplistic binaries and colonial logic would prove futile for the future of Ukraine. Decolonization should continue to be one of Ukraine's main ambitions in the period *after* the war, hopefully in a less 'absolutised' manner. Although this change in 'mnemonic security-seeking' seems to be far away, the recent case of Ukraine giving Poland access to the mass graves of the Volyn massacre, provides a hopeful picture.[10]

[10] See https://www.euronews.com/my-europe/2025/01/15/zelenskyy-visits-poland-after-deal-on-exhumation-of-polish-victims-of-wwii-era-massacres

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