Ukraine's Decommunisation Laws:

A Hard Case for the EU Policy on Transitional Justice?

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Panel 2J: Different "Legal Memories" in Post-Second World War Europe

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Abstract. The Ukrainian imbroglio, in which the EU is deeply implicated, has resuscitated the discussions over the legitimate political handling of the 'other' totalitarian legacy of Europe and the appropriate legal standards in addressing the contemporary effects of past violations of human rights by communist regimes. This exploratory paper maps various domestic and external reactions to Ukraine's 'decommunisation laws', adopted shortly after the Maidan revolution in the spring of 2015. Drawing *inter alia* on the in-depth, semi-structured interviews with the diplomats of the European External Action Service (EEAS) and the members of the European Parliament's (EP) Delegation to the EU-Ukraine Parliamentary Association Committee, this paper outlines the multiple discourses on the Ukrainian handling of its communist legacy (e.g., security- vs rights and liberties-based framings of the issue). The emerging discursive matrix is critically contextualised in the EU's extant record in handling the pan-European remembrance of the various totalitarian legacies and national emphases vis-à-vis the Second World War of its member states.

1. Introduction

'Communism is dead, but nobody has yet seen its corpse,' pronounced the first post-Soviet president of Estonia, Lennart Meri in the early 1990s (Meri 1994). For Ukraine, it has taken inordinately longer compared to its Central and East European counterparts to bury the body of communism. The first, 'toponymic stage' of post-Soviet decommunisation took place in the early 1990s in the western regions of the country (e.g., Lviv),[1] followed by the broadening and state-wide systematisation of the decommunisation initiatives by the 'Orange President' Viktor Yuschenko,[2] central to which was the national and international campaign to seek recognition to Holodomor as an act of genocide against the Ukrainian people. The era of Viktor Yanukovich's presidency was marked by a partial halting of the state initiatives on decommunisation. Then came Euromaidan, accompanied by a spontaneous surge of 'Leninopad' (i.e. 'Lenin fall') 'from below'.[3] On 9 April 2015, a set of overarching decommunisation laws were adopted by the Ukrainian parliament Verkhovna Rada. This

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[1] http://europeinsight.net/specproekt/decommunization/ (accessed: 14 April 2017).

[2] This entailed the founding of the Ukrainian Institute of National Memory in 2006, with an aim to raise public awareness of Ukrainian history, the preservation of the historical memory of the Ukrainian people, study of the struggle for Ukrainian independence in the twentieth century, and preservation of the memory of the victims of the famines (i.e. the 1921–22 famine, the 1932–33 *Holodomor*, and the 1946–47 famine), of political repression, and of participants in the national liberation struggle; introducing the first national legal act on decommunisation (by the presidential decree 'On measures in connection with the 75th anniversary of the Holodomor 1932-1933 in Ukraine', http://zakon3.rada.gov.ua/laws/show/250/2007) (accessed: 27 April 2017); and the formation of the national Decommunisation Committee in 2009.

[3] See, e.g., http://odessareview.com/lenins-tumble-iconoclasm-ukraines-decommunization/ (accessed: 14 April 2017).

package of four laws, heralded by the Ukrainian Institute of National Memory,[4] contains a legislation condemning the Communist and National-Socialist (Nazi) totalitarian regimes in Ukraine and criminalising the production and dissemination of their symbols and propaganda; two laws commemorating, respectively, fighters for Ukraine's independence in the twentieth century and the victory over Nazism in World War II, and a law guaranteeing access to archives of repressive Soviet-era organs. [5]

Besides the predictably pained reactions from Russia,[6] the Ukrainian 'memory laws' have

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[4] Ukrainian Institute of National Memory, or Ukrainian Institute of National Remembrance (UINR) was originally founded in 2006, and reorganised in its current form as subordinate to the Ukrainian Cabinet of Ministers in November 2014.

[5] 'On the Condemnation of the Communist and National Socialist (Nazi) Regimes, and Prohibition of Propaganda of Their Symbols'; 'On the Legal Status and Honoring the Memory of Fighters for Ukraine's Independence in the Twentieth Century'; 'On Perpetuation of the Victory over Nazism in World War II of 1939-1945'; 'On Access to Archives of Repressive Organs of the Totalitarian Communist Regime, 1917-1991'. See: http://zakon4.rada.gov.ua/laws/show/317-viii; http://zakon2.rada.gov.ua/laws/show/314-viii; http://zakon4.rada.gov.ua/laws/show/315-viii; http://zakon2.rada.gov.ua/laws/show/316-viii (all accessed: 28 April 2017).

[6] http://www.mid.ru/en/web/guest/maps/ua/-/asset_publisher/ktn0ZLTvbbS3/content/id/1157723 (accessed: 15 April 2017). For the Russian official line on the international front of the commemorative politics related to WWII and the legacy of Nazism, see further http://www.mid.ru/en/web/guest/kommentarii_predstavitelya/-/asset_publisher/MCZ7HQuMdqBY/content/id/1737765 (accessed: 15 April 2017); http://www.mid.ru/en/web/guest/kommentarii_predstavitelya//asset_publisher/MCZ7HQuMdqBY/content/id/2408595 (accessed: 15 April 2017); http://www.mid.ru/en/web/guest/general_assembly//asset_publisher/lrzZMhfoyRUj/content/id/1945065 (accessed: 15 April 2017); http://www.mid.ru/en/web/guest/k-70-letiu-pobedy-v-velikoj-otecestvennoj-vojne//asset_publisher/fTsGoCVQTjkk/content/id/1251669 (accessed: 15 April 2017);

been subjected to a wide scholarly and media criticism in the West, expressing concern about their violation of the right to freedom of speech and thus general incompatibility with the aims of democratisation and Europeanisation, along with their alleged hampering of the intra- and inter-state reconciliation prospects in the conflict-ridden country.[7] Despite the concerns raised by the academic community, the Ukrainian President Petro Poroshenko signed the decommunisation legislation into effect on 15 May 2015. Soon after the ban of communist parties in Ukraine in December 2015,[8] the European Commission for Democracy through Law (i.e. the Council of Europe's advisory body on constitutional matters, aka the Venice Commission) adopted a joint interim report together with the OSCE/ODIHR, acknowledging the aims of the Ukrainian law banning Communist and Nazi propaganda and symbols as 'legitimate', yet criticising the respective legislation's broad scope, imprecise definitions, disproportionality of their stipulated sanctions, and the law's alleged interference with freedom

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http://www.mid.ru/en/web/guest/rossia-i-problematika-obespecenia-prav-celoveka-v-gosudarstvah-mira (accessed: 15 April 2017);

http://www.mid.ru/en/web/guest/general_assembly/-/asset_publisher/lrzZMhfoyRUj/content/id/2449354 (accessed: 15 April 2017). The laws have also received criticism from Poland, but see http://euromaidanpress.com/2016/10/21/ukraine-and-poland-adopt-declaration-of-memory-and-solidarity/#arvlbdata (accessed: 27 April 2017) and http://iportal.rada.gov.ua/en/news/News/136260.html (accessed: 27 April 2017).

[7] See, e.g., Open Letter from Scholars and Experts on Ukraine Regarding the So-called 'Anti- Communist Law', *Krytyka*, April 2015; available at: http://krytyka.com/en/articles/open-letter-scholars-and-experts-ukraine-re-so-called-anti-communist-law (accessed: 14 April 2017) and http://www.osce.org/fom/158581 (accessed: 15 April 2017).

[8] https://www.theguardian.com/world/2015/dec/17/ukraine-bans-communist-party-separatism (accessed: 17 April 2017).

of speech, freedom of association and freedom of press as set out by the international legal standards (The Venice Commission and OSCE/ODIHR 2015). While the appeal of the Communist Party of Ukraine contesting the ban of Ukraine's communist parties is pending at the European Court of Human Rights (ECtHR), the European Union (EU) has yet to make (public) use of its freshly-minted transitional justice policy (2015) on the admittedly hard case of Ukraine's truth and justice seeking via the respective decommunisation legislation.

The deafening silence of the EU on the decommunisation laws and policies of Ukraine provides the point of intervention for the current paper. Below, I will situate the meagre and hushed EU discourses on Ukraine's post-Maidan decommunisation policies against the backdrop of the reactions to these laws by other European organisations and academic critics. The central question animating this research is as follows: does the EU have an explicit transitional justice policy as part of its portfolio on post-Maidan Ukraine; if yes, what are its main parameters; if not, should it aim to develop one, in line with its recently adopted Policy Framework on support to transitional justice (2015)?

To tackle this question, the second section of the paper dissects the key tropes, reasoning and arguments used in the debate between the more sympathetic and more critical analysts of Ukraine's most recent decommunisation package. Distinguishing broadly between security-centric and rights and liberties-based readings of the issue, while well aware of the flawed idea and the elusive 'balance' between the two (cf. Waldron 2003; Neocleous 2007), the third part of the paper offers a critical assessment and contextualisation of the Ukrainian decommunisation package against the backdrop of the emerging literature on memory laws in Europe (Belavusau 2015; Belavusau and Gliszczyńska-Grabias 2017 forthcoming; Gliszczyńska-Grabias 2016; Heinze 2016, 2017 forthcoming; Mälksoo 2015, 2017 forthcoming, under review; Nuzov 2017). Consequently, the EU's concept and policy on

support to transitional justice is set out, discussing its limited applicability to the Ukrainian post-Maidan truth and justice-seeking policies. Drawing *inter alia* on the (currently only a handful of) in-depth, semi-structured interviews with the diplomats of the European External Action Service (EEAS) and the members of the European Parliament's (EP) Delegation to the EU-Ukraine Parliamentary Association Committee, the model of transitional justice that the European Union promotes is contextualised in its extant record in handling the pan-European remembrance of the various totalitarian legacies. It is argued here that the EU's transitional justice policy focuses strictly on the post-conflict/post-immediate regime change understanding of the term, leaving aside the kind of belated, historical or retrospective truth and justice-seeking processes we are currently witnessing in Ukraine. The Ukrainian decommunisation laws are notably not publicly engaged with by the EU, and if dug deeper on, these laws are understood in the context of Ukraine's resilience-building against the hybrid warfare from Russia in the struggle over symbolic dominance in the divided country (e.g., Interview 2) rather than considered as possibly within the remit of the EU's promotion of particular ways of pursuing transitional justice in Europe. This conclusion has significant implications for the IR norm constructivists studying the EU's normative power ambitions and projection in its eastern neighbourhood, as well as for transitional justice and memory studies scholars. The conclusion offers a preliminary summary of the findings and highlights further areas for research on the topic of Ukraine's handling of its twentieth-century past and the EU's position on it (or the lack thereof).

2. Decommunisation Laws: Reasoning, Criticism, Echoes

The four laws in question were introduced and adopted by the Ukrainian parliament as a package. They have consequently been largely analysed as such, for 'they logically

complement one another' (Motyl 2015), even though the decommunisation laws actually vary considerably along the declaratory-prescriptive-proscribing continuum of memory laws (cf. De Baets 2017 forthcoming; Heinze 2017 forthcoming).

The law 'On the condemnation of the Communist and National Socialist (Nazi) regimes, and prohibition of propaganda of their symbols' condemns '[c]ommunist totalitarian regime of 1917-1991 of Ukraine' as 'criminal' (Art. 2.1.) along with the Nazi totalitarian regime (Art 2.2.); prohibits propaganda and the use of symbols of the respective regimes by the threat of punishment 'by restraint of liberty for a term up to five years or imprisonment for the same term' (Art. 6.1.), and 'if committed by a person holding a public office, or repeated, or committed by an organized group of persons, or using mass media, by imprisonment for the term of five to ten years' (Art. 6.2.); outlaws communist and Nazi(-inspired) political parties (Art. 3); promulgates that the state will investigate and raise awareness of the most serious international crimes committed by the two totalitarian regimes in Ukraine (Art. 5); and stipulates procedures and timeframes for the related toponymic changes across the country.

The law 'On the legal status and honoring the memory of fighters for Ukraine's independence in the twentieth century' lists the names of fighters for the independence of Ukraine in the twentieth century (Art. 1); recognises their contribution by providing them legal status and honouring their memory (Art 2.); offers a rather weakly phrased and unsubstantiated promise of social guarantees and benefits to the respective fighters for independence; outlines state policy in respect of restoration, preservation and honouring the national memory about the independence struggle and fighters (Art. 5); and finally, deems the public denial of the legitimacy of such struggle an 'insult' to the respective memory, 'disparagement of the Ukrainian people', and thus unlawful (Art. 6).

The law 'On perpetuation of the victory over Nazism in World War II of 1939-1945' enshrines legally the co-culpability of the Nazi Germany and the USSR in the outbreak of

WWII, establishes the Memorial and Reconciliation Day on May 8 (Art 1.2.), yet sustaining the customary Victory Day of May 9. Linking Ukraine's remembrance of WWII with the European day of remembering the end of the war without giving up the publicly ingrained Victory Day, celebrated together with Russia on 9 May enables the Ukrainian authorities to have their cake and eat it too. The contemporary Ukrainian remembrance of WWII is sought to be publicly linked to the European commemorative calendar, yet without giving up the popular holiday of the Victory Day. The law furthermore seeks to prevent 'falsification' of the history of World War II of 1939-1945 in research, literature, textbooks, mass media and the political discourse of public officials and strives to facilitate 'objective and comprehensive research of history' thereof (Art 2.3., Art. 2.4.). Although 'responsibility under law' is foreseen for the desecration, destruction, or demolition of World War II monuments (Art 4.7.), the law does not stipulate concrete sanctions for such violations.

The law 'On access to archives of repressive agencies of totalitarian communist regime of 1917-1991' ensures 'the right of everyone on access to archival information of repressive agencies of the communist totalitarian regime of 1917-1991' (Art 1.1.) and stipulates the specific conditions of such general and free access.

Crudely put, the proponents of the Ukrainian decommunisation laws of 2015 highlight the security rationale of these legislations, while the laws' critics draw attention to their inherent contradictions with the preached aims of protecting human rights and liberties.[9] The penchant of these laws is ostensibly tilted towards the former validation, as evocatively outlined in the preamble of the most noteworthy of the four, 'On the condemnation of the Communist and

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[9] See further at http://www.memory.gov.ua/page/dekomunizatsiya-0 (accessed: 17 April 2017) and https://www.amnesty.org/en/latest/news/2015/12/ukraine-communist-party-ban-decisive-blow-for-freedom-of-speech-in-the-country/ (accessed: 19 April 2017).

National Socialist (Nazi) Regimes, and prohibition of propaganda of their symbols', which states its aims as follows:

> striving to protect human rights and liberties,
>
> striving **to develop and strengthen the independent, democratic, constitutional state**,
>
> being guided by Article 11 of the Constitution of Ukraine **binding the state to facilitate the consolidation and development of the Ukrainian nation**,
>
> **its historical consciousness** in order to prevent repetition of crimes of communist and national socialist (Nazi) regimes, any discrimination by national or social origin, class, ethnicity, race or other basis in future, **restore historical and social justice, eliminate the threat to independence, sovereignty, territorial integrity and national security of Ukraine** adopts this Law condemning communist and national socialist (Nazi) regimes in Ukraine /--/ (my emphases).

The heavily state- and nation-building-centric framing of the law which has sparked most legal and political controversy thus far is furthermore amplified by the context and manner of the adoption of the decommunisation laws.[10] Their timing in response to Russia's annexation of Crimea and its involvement in the conflict in eastern Ukraine is suggestive of the decommunisation package's main purpose as a strategic measure of mnemonic security in the context of the ongoing hybrid hostilities from Ukraine's eastern neighbour (cf. Mälksoo 2015; Nuzov 2017: 16).[11] The critics of decommunisation are accordingly reminded about the likelihood of their insights becoming 'actively used by Russian propaganda in an information

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[10] The decommunisation laws were adopted a few days after having been tabled in the parliament with minimal discussion and according to accelerated procedure, without the possibility of making amendments to the draft bills. All four laws entered into force on 21 May 2015.

[11] On the Russian information campaign against earlier, President Yushchenko-led politics of memory, see Kasyanov (2015: 153).

war against Ukraine' (Viatrovych 2015).

The decommunisation laws seek to patch a perceived key vulnerability in the Ukrainian nation and state's post-Soviet emancipation,[12] by streamlining and redressing the historical narrative of the infamously divided country's experiences with the twentieth-century totalitarianisms and the Second World War.[13] This argument is most evocatively expressed by Alexander Motyl, Professor of Political Science at Rutgers University, Newark:

> …Ukraine's move westward is impossible without a complete break with the Soviet past – and with the Soviet and neo-Soviet ideological constructs that reduced Ukraine and Ukrainians to passive objects of history. By pursuing both reform and de-Communization, Ukraine is acknowledging the demands of historical memory, taking control of its destiny, and breaking into the modern world (Motyl 2015).

Decommunisation is accordingly depicted as a matter of national security,[14] aimed at Ukrainian nation-building (Interview 4), and deemed 'essential to Ukraine's integration into the civilized world' and for cleansing its past for a brighter future (Motyl 2015; see also Lozynskyj 2015).

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[12] Cf. the trope of 'cutting the umbilical cord between Ukraine and Moscow', as expressed by Ivan Krulko, a MP from the All-Ukrainian Union 'Fatherland' (Verkhovna Rada Ukrainy 2015).

[13] Social psychologist Karina Korostelina (2013) has identified no less than five different narratives about Ukraine's national concept and national identity, all of which are highly coherent and articulate, connected with a particular conception of power and morality and in many ways opposite to other narratives. As she argues: 'All these features of the narratives lead to the perception that conceiving a society is a zero-sum game where one narrative must prevail over all others. This produces aggressiveness, enemy hunts, antagonism, and hostility among people. At the same time, these features of the narratives ensure that there can be neither an overwhelming victory of one narrative over others nor a satisfying compromise between them' (Korostelina 2013, 312-313).

[14] http://112.international/politics/poroshenko-we-must-complete-decommunization-it-is-a-matter-of-national-security-4877.html (accessed: 17 April 2017).

A direct link between the Euromaidan-toppled regime of Yanukovich and the belated decommunisation policy is built by Volodymyr Viatrovych, director of the Ukrainian Institute of National Memory and a key instigator behind the decommunisation laws.[15] Equaling decommunisation substantively with Europeanisation, he argues as follows:

> The persistent totalitarian past still stands in the way of Ukraine's development as a European, democratic state. It is precisely on this island of "Sovietness," which for historic reasons remained strongest in the Donbas and in Crimea, that Putin's aggression against Ukraine is taking place. The bearers of Soviet values (and not ethnic Russians or Russophones, as Russian propaganda would have it) are today the main source of manpower for the terrorist bands of the so-called DNR and LNR (footnote omitted). For this reason, the question of the decommunization of Ukraine is today not only related to social policy, but to security policy (Viatrovych 2015).

Highlighting the non-uniqueness of Ukraine's efforts among other Central and East European countries is a symptomatic riposte of the proponents of decommunisation laws to their critics. Motyl (2015) makes a powerful *tu quoque*-argument, defending Ukraine's decommunisation laws against the backdrop of the 'ubiquitous' controversial monuments and heroes throughout the world. He interprets the Western scholars' concern about the Ukraine's decommunisation laws through the lens of Orientalism which 'reduces Ukrainian history to the status of a minor subplot in grander historical narratives, deprives Ukrainians of a voice, and depicts them as the quintessential "Other"—savage, violent, mindless, and destructive'. Decommunisation package hence emerges as a forceful reclaiming of the independent voice, directly challenging hegemonic stereotypes and 'neo-colonial narratives' of Ukraine and its history. Condemning the related criticism as 'disproportionately hysterical', Motyl (2015)

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[15] 'The lack of a decommunization policy in Ukraine after its declaration of independence in 1991 was in part responsible for the revanchist neo-Soviet regime of Yanukovych' (Viatrovych 2015).

offers a characteristically essentialist comfort to the critics of the legal opacities of the decommunisation laws: 'Ukrainians are actually reasonable people who do not interpret legal ambiguities as a license to kill, repress, or oppress'.

To those questioning the glorifying zeal of the law on the legal status of the more controversial fighters for Ukraine's independence in the twentieth century, namely the OUN (Organization of Ukrainian Nationalists) and the UPA (Ukrainian Insurgent Army),[16] the proponents offer a rebuke according to which the decommunisation laws enable 'a level-headed, liberal, and genuinely scholarly approach to the nationalists (and all the other "fighters")' (Motyl 2015). In a rather self-contradictory rhetorical move, Viatrovych (2015) deems the adoption of the respective law on independence fighters 'a powerful incentive for the de-politicization of the history of the OUN and the UPA', yet considers sending '[a] political signal – at the highest level – that the Ukrainian State honors those who fought for its independence extremely important for today's soldiers and volunteers', since

> The history of the UPA, particularly its resistance to the Soviet totalitarian regime, is not simply a dramatic period of history. It is a part of Ukrainian culture. /--/ It has become an integral part of the tradition of the struggle for independence all the way to our times (Viatrovych 2015).

Undisturbedly, such essentialist reasoning goes hand in hand with a claim for decommunisation laws making possible liberal truth-seeking whereby 'the fighters can, finally, be integrated into the Ukrainian historical narrative in a realistic way' (Motyl 2015).

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[16] E.g., Open Letter from Scholars and Experts (2015); Cohen (2016). Himka (2015) argues against the enshrinement of the OUN and the UPA in law for the former 'believed firmly in dictatorship and found democracy, political parties, and civil liberties contemptible' and was 'deeply implicated' in the Holocaust in Galicia and Volhynia in 1941.

To the sceptics about the overarching trope of the 'criminal nature' of the Soviet communist regime, Viatrovych (2015) underscores that Communism and Nazism are 'equally criminal, and thus all of these regimes' victims deserve remembrance and respect equally, no matter where they were killed — in Auschwitz or in the Gulag.' The 'equally criminal'-phrase has a notable pedigree in other Central and Eastern European countries (see Mälksoo 2014, for an overview) and provides a ready cushion for the ethos of Ukrainian decommunisation policies. The critics, ranging from moderate to virulent, invariably see the trend of equating the criminality of the two major European totalitarian regimes of the twentieth century as dangerously consequential for the memory of Holocaust. Volodymyr Ischenko observes how during the tail end of the Yuschenko presidency 'state anti-Communist politics of memory provided legitimacy for the far right mobilization' (Ishchenko 2011: 369). Jelena Subotić warns against the particularisation and nationalisation of Holocaust remembrance in today's 'global environment of anticommunism, especially across postcommunist states in Eastern Europe' (Subotić 2017: 15) more generally, for '[o]nce anti-fascism is removed from Holocaust memory, this opens up political space for fascism's gradual rehabilitation and normalization to very serious political consequences for the present international order' (ibid.: 4).[17] The fiercest critic of all, a Vilnius Yiddish scholar Dovid Katz regards the so-called 'double genocide' model as 'a potent and coherent political and intellectual movement' though 'not the same as a sum total of myriad local Eastern European (and indeed other) forms of Holocaust obfuscation, diminuation and nationalist-minded revisionism' (Katz 2016: 220). The Ukrainian

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[17] As she maintains: 'The great delegitimation of communism that has swept Europe since 1991 has also produced a de-delegitimation of fascism, which is repackaged, retold, and reinterpreted to look more palatable and polite in the 21st century. This ideological inversion is so complete that it has become a social fact. But fascism is fascism, and its reconstitution as a legitimate ideological position is alarming. The great tragedy of the anticommunist moment is that it weakened and made less imperative our collective antifascist moment' (Subotić 2017: 38).

decommunisation laws with their palpably anticommunist fervour have a solid potential to become the next poster child for the concerns about obfuscation of the Holocaust memory among the critical observers.

A panoply of critical arguments against the Ukrainian most recent memory laws have been raised by domestic and foreign scholars on pragmatic, strategic, normative, internal consistency, societal, political, and legal grounds. According to an authoritative Canadian historian of Eastern Europe, David Marples (2015b; 2016a), the Ukrainian lawmakers could have done better in getting the security-liberty balance right with their decommunisation package. From the strategic perspective, decommunisation laws are thought to hamper Ukraine's (possible) EU membership prospects for '[a] law that makes it illegal to criticize Holocaust perpetrators may cause problems for Ukraine down the road, since the European Union requires candidate members to make a clean breast of their Holocaust history' (Himka 2015). The more controversial paragraphs of the decommunisation laws allegedly entail not only reputational costs in the eyes of Ukraine's North American and European allies, but inadvertently play into the tune of the Russian state-endorsed public narrative of Ukraine's new regime as a 'fascist junta' (ibid.). Moreover, Ukraine's decommunisation laws provide a curious mirror image of Russia's 'memory law' on WWII remembrance of 5 May 2014 (i.e. Art. 354.1. on the Rehabilitation of Nazism of the Russian Penal Code) which, in its turn, criminalises public dissemination of 'knowingly false information' about the activities of the USSR during the Second World War, stipulating concrete penalties in case of its violation. This law further banned disseminating information expressing 'obvious disrespect to the society' concerning days of military glory and Russia's memorial dates, as well as publicly insulting the symbols of Russia's military achievements (Ibid., Art. 354.1(3)). The rhetorical resemblance of the respective Ukrainian and Russian commemorative laws is eerie.

The Ukrainian laws are consequently seen as equally problematic attempts to legislate historical truth, to police freedom of speech on issues of national importance for Ukraine's 'historical consciousness' and thus entailing significant potential to close down discussion and silence criticism by prescribing a single state-endorsed narrative. The methods of imposing a certain public narrative memory reminiscent of the USSR-like ideological unification are deemed all the more disturbing: Ukrainian historian Georgiy Kasyanov compares the actions of the initiators of decommunisation to those of Komsomol activists of the bygone era (Kasyanov 2016; see also Marples 2016b: 434; Coynash 2015; Kulyk 2015; Portnov 2015).[18] 'This way of dealing with history will not contribute to the intellectual growth of Ukraine,' John-Paul Himka (2015) warns along similar lines. Indeed, the decommunisation laws are reckoned to be intellectually deficient for their simplified personification of complicated historical processes to heroes and villains, or labelling regimes covering extensive historical eras without recognising the nuances in their legacy.[19] The laws are generally criticised for

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[18] For a fierce criticism of Volodymyr Viatrovych's role in the decommunisation process specifically, and the problems with the otherwise generally benignly regarded law on opening the Soviet-era archives, see McBride (2015). See further: https://www.wilsoncenter.org/event/ukraines-decommunization-laws-legislating-the-past (accessed: 18 April 2017). For the proponents' explication of the archives law and the ongoing lustration process in Ukraine, see http://www.svoboda.org/a/28432252.html (accessed: 17 April 2017).

[19] 'Distinctions are an important part of intellectual processing. From my own point of view, communism was a vile system – even when it was not mass murdering alleged opponents, it repressed thought and creativity; it produced a poor standard of living for its population at the best of times and terrible famines at the worst of times; and all the while it trumpeted its supposed glorious accomplishments. Yet Soviet communism did have some positive achievements, not only in the victory over Nazi Germany but also in the sphere of modernization. Like all historical phenomena, the Soviet experience needs to remain a subject of ever renewed analysis and open discussion' (Himka 2015). Note, however, that the recognition of such nuances is only called for in remembering

their vague definitions (such as the 'criminal nature' of the communist regime, or 'propaganda') and far too broad a scope (e.g., Stadny 2015; Yavorsky 2015).

What is more, while ostensibly related to security policy, the decommunisation laws are regarded by many as 'dangerously divisive' (Coynash 2015; see further Nuzov 2016, 2017). Quite alike the initiatives of the Yuschenko era (and indeed against the grain of their postulated aim to unite the nation at war), the decommunisation laws 'do more to polarize various elements in society rather than unite them' (Marples 2016b: 433; cf. Schevel 2016).[20] David Marples characterises the adoption of the law on the legal status and honoring of the memory of the fighters for Ukrainian independence in the twentieth century as 'a major error, even akin to a death wish vis-à-vis the Donbas, where a quite different version of the 20th century prevails'; 'a crude distortion of the past … inimical to the values embraced at the peak of Euromaidan' (Marples 2015a).[21] Legal scholar Ilya Nuzov opines, in his turn, that the decommunisation laws 'will likely perpetuate the unilateral historical narratives sponsored by the Russian and Ukrainian political elites, respectively, and ultimately deepen the divide among Ukrainians, as well as between Ukraine and Russia' (Nuzov 2017: 5). Astrid Thors, OSCE High Commissioner on National Minorities has accordingly urged the Ukrainian authorities to implement the decommunisation laws 'in a balanced manner, making room for discussion at the local level', 'respect[ing] 'political pluralism and human rights, including minority rights

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Soviet communism, while the subject of possible 'positive achievements' of the Nazi Germany is never raised in the discussion.

[20] For an instance of the dreaded 'Sovok's reaction, see http://www.rferl.org/a/ukraine-kharkiv-decommunization/27377959.html (accessed: 18 April 2017).

[21] For the sociological discussion of the Ukrainian memory of the OUN-UPA and World War II, see Wylegala (2016).

and views (Thors, 2015). On balance, a member of the EP's Delegation to the EU-Ukraine Parliamentary Association Committee maintains that 'these laws do not divide *per se*, they just reflect the depth of the actual division in Ukraine. Leashing out that harshly [i.e. by means of law - MM] demonstrates that the division in the society is, in fact, very severe indeed. This is also an expression of a fear of discursive subversion or weakness of a sort – if nothing else helps, a law is adopted' (Interview 3).

The most comprehensive and authoritative legal critique of the Ukrainian decommunisation laws, specifically the legislation on the condemnation of the Communist and Nazi regimes, has been provided by the Joint Report of the Council of Europe's Venice Commission and OSCE/ODIHR (2015). The report highlights the need for the pertinent legislation to comply with requirements set out by the European Convention on Human Rights (ECHR) and other regional and international human rights instruments. It finds the law lacking in precision, failing the 'three-fold test of legality, legitimacy and necessity in a democratic society' (ibid.: 4). The law is described as too broad in scope, introducing disproportionate sanctions, restraining individuals' freedom of association and the freedom of speech. The carefully crafted and delicately suggested amendments to the decommunisation laws, concerning 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 (notably political parties), are yet to be introduced in Ukraine, however.[22]

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[22] On the amendments promised to be introduced, see hromadskeradio.org/programs/kyiv-donbas/my-gotovi-v-zakon-pro-dekomunizaciyu-vnosyty-pravky-shcho-rekomenduye-venecianska-komisiya-vyatrovych (accessed: 20 April 2017).

Meanwhile, the EU has kept a notably low profile in publicly commenting on the issue. This is puzzling from the perspective of the long-held self-image of the EU as a 'normative/ethical power' (Manners 2002), yet quite in line with an apparent shift towards a more pragmatic, resilience- rather than democracy promotion-oriented turn in the post-Crimea, post-economic crisis foreign policy of the EU (Mälksoo 2016; Wagner and Anholt 2016). 'The EU is not supposed to act as some memory police,' an EEAS diplomat emphasised in an interview (Interview 2). However, it could be debated that it already does insofar as regulating the remembrance practices and the limits of free speech among its member states is concerned, in light of the Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law. It can furthermore be argued that the EU has explicitly practiced 'mnemonic conditionality' during its enlargement to the post-communist Eastern European states in relation to the Holocaust remembrance. I will delve into this question in the penultimate section of this paper, after offering a conceptual 'diagnosis' of the Ukrainian decommunisation laws first – a necessary preparatory move for outlining the implications for the EU's existing policy on support to transitional justice.

3. A Conceptual Diagnosis of the Ukrainian Decommunisation Package

What kind of memory laws are Ukraine's decommunisation laws? What do they *do* – what kind of redress are they seeking to offer? What is their claim to justice – and of which kind? What potential do the laws of the 'decommunisation package' have for affecting Ukrainian historical memory?

This section identifies Ukrainian decommunisation laws as (i) an example of belated, or retrospective transitional justice; (ii) as overarchingly regulatory, and at times punitive in their aims and measures; (iii) as generally oriented to mnemonic security-seeking rather than

showcasing self-reflexivity; (iv) as complexly intertwined with the more immediate post-Maidan transitional justice policies targeted mainly against the former members of the Yanukovich regime, and (v) as generally restorative in their gist (Interview 4), that is, bound to 're-establish some lost ideal of what the new state and nation should look like' (Sakwa 2015: 18).

From the brief overview of the contents and reactions to the decommunisation laws above, we learnt that the laws in question vary considerably along the merely declaratory to specifically sanctioning continuum. Following Eric Heinze's (2017 forthcoming) helpful classification of memory laws into non-regulatory (i.e. declaratory) and regulatory kind (i.e. authorising pertinent state action which might be either punitive or non-punitive), Ukrainian decommunisation laws all fall into the broadly regulatory category, while only the law on condemnation of the Communist and Nazi regimes is specifically punitive, stipulating concrete limits on freedom of speech and association along with the penalties in case of violating the law. What the decommunisation laws seek to do *en masse* is to emphatically add 'expressive weight' to the history as understood from the national Ukrainian perspective (cf. Heinze 2017 forthcoming: 2). In that sense, decommunisation laws explicitly seek to 'prescribe and proscribe' certain views of historical regimes, figures, dates, symbols and events (cf. De Baets 2017 forthcoming). As the explanations provided by Volodymyr Viatrovych, the key architect of the Ukrainian decommunisation laws unashamedly underscore, an authoritative version of the 'true' Ukrainian history is sought to be legally enshrined and promoted while intentionally sidelining certain views and political actors who are deemed endangering for the contemporary Ukrainian polity. The decommunisation laws are thus quite openly mnemonic security devices, seeking to buttress a particular national narrative of the country (Mälksoo 2015; Nuzov 2017: 5). The 'decommunisation package' is oriented at making a version of national Ukrainian memory secure, rather than exhibiting critical self-reflexivity, self-interrogation and

introspection. A mnemonic security-oriented approach to dealing with the past tends to resist the calls to revisit a state's past 'self' and to depict the alternative approaches as distorted or plainly dangerous for their potential to undermine the state's sense of ontological security (Mälksoo under review).

The main points of contention between the proponents and opponents of these laws consider the worthiness of enhancing the expressive weight of certain moments and figures in Ukraine's twentieth-century past in light of their actual (or alleged) substantive weight by means of law (cf. Heinze 2017 forthcoming). The Ukrainian authorities' claim is essentially about re-adjusting the expressive weight of views that have been underrepresented in the official state policy, particularly during the Yanukovich rule, and that continue to be manipulated by Russian authorities and media in the context of the ongoing conflict in eastern Ukraine. The academic critics intervene in the debate from a largely *historical-normative* angle, finding decommunisation laws to be essentially a propagandistic effort due to the dubious substantive weight of some views now institutionally enshrined (such as brushing aside the issue of OUN and UPA's complicity with the Nazi Holocaust at the expense of their glorification as Ukraine's independence fighters). The Venice Commission and the OSCE/ODIHR enter the *legal* criticism of the method of these laws rather than question the substantive weight underpinning the views thus institutionalised. They are ostensibly less concerned about the legitimacy of memory laws as such, emphasising the 'legimate aims' of such a truth and justice-seeking process, criticising the ways of implementation and the proportionality of means rather than the idea of and justification for memory laws as such.

The academic critics, however, fundamentally question whether the laws do not actually seek to increase the substantive weight of the OUN-UPA heroism, by deliberately obscuring some of the materially factual record of their deeds. They further interrogate the ethical

principles sustaining the idea of consolidating a nation by means of laws geared towards selective forgetfulness rather than assuming responsibility. Paraphrasing Timothy Snyder at the Babyn Yar memorial conference in Kyiv in 2016, the rationale of inventing a 21st-century nation by 19th-century models is problematic in and of itself.[23] The ethos of a critical historian is to 'come to fully understand [the] heterogeneity and inconsistencies [of the Soviet past]', and thus to recognise the 'interconnection of (not) knowing and condemning, the means and methods of disseminating knowledge, the phenomenon of aestheticizing political evil and the "forbidden fruit"' (Portnov 2015). A legislator, meanwhile, should first and foremost 'keep in mind that primary aim of such legislation should be preventing the repetition of the crimes committed by totalitarian regimes, not merely emotional desire to intercept Ukraine's habit to relate country's present to Soviet past' (Dronova 2015). Belavusau and Gliszczyńska-Grabias's apt criticism of memory laws in general is suitable to be quoted at length here:

> The law is peremptory. The law does not describe, announce, declare. The law determines the prescribed behaviour of individuals, authorities and other public and private entities within its jurisdiction. To use the law for making a statement rather than to regulate behaviour, to interpret the past rather than determine the future actions, to express a political or moral judgment rather than issue a legal norm of behaviour – is to fundamentally misunderstand and distort the central nature and function of law in a society (Belavusau and Gliszczyńska-Grabias 2017 forthcoming).

More specifically, legal analysts furthermore highlight the likelihood of the law on honouring Ukraine's twentieth-century independence fighters becoming challenged at the ECtHR due to its problematic and contestable 'antislander' gist (e.g., Nuzov 2017).

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[23] I am grateful to Toomas Hiio for this reference. Cf. Luuk van der Middelaar (2014) on the nation creation models of the late 19th-century.

In the parlance of transitional justice – a multi-disciplinary approach to redressing past human rights violations and international crimes in the post-conflict or post-authoritarian/post-totalitarian setting through a variety of judicial and non-judicial means of accountability, the essence of Ukrainian decommunisation laws is largely of political-administrative and symbolic-representational kind (cf. Pettai and Pettai, 2015: 25). Along the dimensions of criminal-judicial, political-administrative and symbolic-representational justice, the mechanisms and reckoning practices of transitional justice could include court trials against former decision-makers, banning of former officials and secret agents from occupying public positions in the new regime, public identification of former agents, enabling access to previous regime's secret files, rehabilitation and restitution policies vis-à-vis victims, and various symbolic measures, ranging from the establishment of truth commissions and state-sponsored memory collection, government-funded museums and other historical research institutions, victim organisations and reconciliation programs, reordering history curricula, memorialisation policies, and official acts of contrition (ibid.).

Yet another category offered by Eva-Clarita and Vello Pettai's analytical framework, that is the distinction between *transitional* and *retrospective justice*, proves particularly useful in the Ukrainian case. By *transitional justice*, Pettai and Pettai refer to the immediate reckoning with the crimes, repression, and wrongdoing of the regime that has just been toppled from power, whereas *retrospective justice* signifies truth and justice initiatives vis-à-vis the early wrongdoings of the previous regime that lasted for many decades (Pettai and Pettai 2015: 22-31). Accordingly, the decommunisation laws really fall into the realm of *retrospective* justice, while the lustration and vetting policies adopted after the Maidan revolution occupy that of the more immediate *transitional justice* proper.[24] The latter are consequently targeted at purging

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[24] See, e.g., http://www.bbc.com/news/world-europe-29239447 (accessed: 20 April 2017).

the country's governing institutions of former members of the Yanukovich regime, along with the former KGB agents, and ridding the justice system of rampant corruption. A strive for even further-going *historical justice* is detectable in the decommunisation laws as they also mark the legitimation of the Ukrainian historical struggle for independent statehood, shedding the oppression of the past, and seeking European recognition for the legitimacy of the Ukrainian struggle for independence and its mnemonical self-empowerment thereof (see further Klymenko 2016: 345; Löytömäki 2014: 122-123).

In both transitional and retrospective variants of the politics of truth and justice seeking, the related process bears strong similarity to rites of transition, as described in cultural anthropology (e.g., Turner 1969). The politics of truth and justice[25] in the course of political transitions generally pertains to fracturing and changing identities and the transgression of boundaries, supposedly leading to the healing and reconciliation of a society. The toolkit of transitional justice is indeed symbolically charged as trials, truth commissions and memorialisations 'not only enact liberal ideals and subjectivities but also signify a purification of the social body, which is symbolically moved from a contaminating state of conflict and illiberalism to a condition of liberal democratic purity' (Hinton 2010: 8). Especially for the democratic transitions in Eastern Europe and Latin America Western liberal market democracy has been deemed as an end point of the transition in question (Sharp 2013). For contemporary Ukraine, shedding the Soviet legacy is deemed vital for 'becoming European'. Transitional justice is hence not only about confronting a violent or nondemocratic past, but also 'symbolic

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[25] Pettai and Pettai (2015, 4) have utilised this notion in order to keep the focus on 'the struggles waged by political and social actors to influence the role the state plays (a) in setting prevailing truth discourses about a non-democratic past and (b) in passing measures to enact some interpretation of justice in relation to this past'. See also Barahona de Brito et al. (2001).

resource legitimating, directing, and consolidating democratic transition processes' (Fein 2005: 216). Akin to the rites of re-aggregation or incorporation described by cultural anthropologists (Mälksoo 2018 forthcoming), transitional justice aims to lead to the delineation of the violent past in a way that increases the social cohesion of the fractured society as well as legitimates the post-conflict government that initiated the transitional justice process (Osiel 1997).

Originally emerged as 'handmaiden to liberal political transitions' and increasingly associated with post-conflict peacebuilding and reconciliation more generally (Sharp 2015; 150), transitional justice is a quintessentially collective rite of passage. In her genealogy of transitional justice, Ruti G. Teitel associated transitional justice 'with periods of political change', aimed at 'confront[ing] the wrongdoings of repressive predecessor regimes' (Teitel 2003: 69). According to a 2004 report by the then-UN Secretary General Kofi Annan, transitional justice comprises 'the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecution, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof' (UN SecGen 2004: 3). The core aspirational goals of transitional justice – accountability, democratisation, reconciliation – consequently find expression in the 'four pillars' of transitional justice: the right to justice, truth, reparation and guarantees of non-recurrence (Sharp 2013).

Analysing the ways post-Maidan Ukraine has been dealing with the past, Bachmann and Lybaschenko (2017) discuss four major streams:

(1) transitional justice in the narrow sense of the term: utilising judicial measures to hold accountable officers and politicians of the Yanukovich regime for the atrocities

committed during the Maidan uprising by invoking international criminal law and referring cases to the International Criminal Court (ICC);

(2) vetting and lustration of (i) prominent employees of the Yanukovich regime and (ii) collaborators of the Soviet regime. Herein we can observe the intertwining and co-existence of various temporal modes of transitional justice, as described by Pettai and Pettai (2015);

(3) retrospective criminal justice/retrospective crime control with an aim to deprive the antecedent regime of any remaining legitimacy. This includes, for instance, the institutional reform of the civilian justice system of the country to rid the courts from extant corruption.[26]

(4) Transitional justice in an ongoing conflict in eastern Ukraine: dealing with the abuses committed during the armed conflict in the east of Ukraine that followed the events between November 2013 and February 2014.

Evidently, Bachmann and Lyubschenko (ibid.) adopt an altogether rather specifically post-conflict/post-regime change understanding of transitional justice, disregarding the decommunisation legislation in the context of the multi-layered truth and justice-seeking policies adopted in post-Maidan Ukraine. As the next section demonstrates, this is likewise very much the case with the EU policy on support to transitional justice.

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[26] See https://www.ceps.eu/publications/ukraine%E2%80%99s-unimplemented-anti-corruption-reform for discussion (accessed: 24 April 2017).

4. Ukraine Remembers, the European Union Recognises?[27]

Ukraine's decommunisation laws present a puzzle to the EU's Policy Framework on support to transitional justice (hereinafter, EU policy on TJ). The Union's policy on TJ was adopted by the Foreign Affairs Council along with the Council Conclusions on the EU's support to transitional justice as part of the implementation of the EU Action Plan on Human Rights and Democracy 2015-2019 in November 2015. With this Policy Framework, the Council underscores the EU's intention 'to play an active and consistent role in its engagement with partner countries and international and regional organisations in support of transitional justice processes' (Council Conclusions, 16 Nov 2015). A closer look at the gist of the EU's understanding of TJ and its emerging rationalities on TJ support worldwide illuminates how the EU's focus is ostensibly on the post-conflict and somewhat less on post-authoritarian interpretation of the notion (cf. Bell 2009). The historical or retrospective truth and justice seeking processes are thus excluded from the remit of the EU's pertinent policies.[28] The way the Ukrainian decommunisation policies are intertwined with more immediate, post-Maidan concerns to hold the Yanukovich cronies accountable for their misdemeanours exemplifies that this distinction might not be quite so tenable to sustain in practice, however. Facing a case of multi-layered politics of truth and justice-seeking in post-Maidan Ukraine where the state seeks to set prevailing truth discourses about the country's experience with totalitarian regimes and pass certain measures to enact some interpretation of justice in relation to this past (Pettai and Pettai 2015: 4), along with dealing with the more immediate abuses of the just toppled regime in an ongoing conflict with a neighbouring state (which self-identifies as a legal successor of

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[27] The subtitle is a paraphrase of the Yuschenko-era commemoration campaign 'Ukraine Remembers, the World Recognizes', aimed at achieving international recognition of the *Holodomor* as genocide and carried out by the 'Ukraine 3000' Foundation (see further Finkel 2010: 67).

[28] See also http://www.hlc-rdc.org/?p=30804&lang=de (accessed: 25 April 2017).

the USSR) is a difficult nut to crack for the EU's take on TJ.

The EU's Policy Framework on support to TJ proceeds from the UN definition of TJ, as adopted in the UN Secretary-General's 2004 report on the rule of law and transitional justice in conflict and post-conflict societies. The EU's TJ approach is thus geared towards 'preventing the recurrence of crises, addressing the most serious crimes of concern to the international community as a whole, and averting future violations of human rights' (Sect. 1). While '[h]uman rights, democracy and rule of law lie at the heart of EU external action' (Sect. II), the Union's TJ policy emphasises the equal importance of 'other components', such as security and development, in the reconciliation process (Sect. 1). The EU's approach is holistic, incorporating four main elements of TJ (i.e. criminal justice, truth, reparations, and guarantees of non-recurrence/institutional reform), and aiming at attaining such key objectives as: a) ending impunity; b) providing recognition and redress to victims; c) fostering trust; d) strengthening the rule of law; and d) contributing to reconciliation. Yet, as Laura Davis observes, regardless of the policy's strive for a comprehensive approach, the 'how' of developing such a coherent strategy is still to emerge (Davis 2016: 41).

The promotion of the commitment to the International Criminal Court (the ICC) is a centrepiece of the EU's political dialogues with third countries in the justice arena (*inter alia* the European Neighbourhood Policy which targets specifically human rights and the rule of law, including reform of justice, of the public administration and of the security sector) (Davis 2014, 2016; Stahn 2016).[29] The main instruments in the EU toolbox of pursuing justice in its

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[29] Part of the EU's European Neighbourhood Policy (ENP) is encouraging the partner countries to sign and ratify the Rome Statute of the ICC. While Ukraine is yet to become a full state party of the ICC due to a transition provision of the pertinent constitutional amendments adopted by the Ukrainian parliament in 2016 entering into

external action are the European Instrument for Democracy and Human Rights (EIDHR) and the Instrument for Stability (IfS),[30] with a focus on emerging and ongoing crises (Rangelov et al. 2016: 4-5). There are further Common Foreign and Security Policy (CFSP) instruments, such as the CSDP missions and EU Special Representatives (EUSRs). Yet, local and national ownership, along with inclusiveness, are stressed as key principles of the EU's TJ policy. Altogether, the EU is one of the weightiest financial contributors to TJ initiatives worldwide, providing political, financial and technical support to criminal justice, truth seeking initiatives, institutional reform and reparations programmes. The major areas of EU interventions in the sphere of supporting TJ include disarmament, demobilisation and reintegration (DDR) and security sector reform (SSR) programmes (Davis 2016: 34).

Along these lines, the EU's TJ initiatives in post-Maidan Ukraine have focused on supporting the country's security and justice sector reforms. The European Union Advisory Mission (EUAM) for civilian security sector reform Ukraine was launched by the EU Council decisions 2014/800/CFSP of 17 November 2014 and reached its full operational capability on 1 July 2015. The EUAM's mandate is 'to assist the Ukrainian authorities towards a sustainable reform of the civilian security sector through strategic advice and hands-on support for specific reform measures based on EU standards and international principles of good governance and human rights' in order 'to achieve a civilian security sector that is efficient, accountable, and enjoys the trust of the public'.[31] This civilian, non-executive CSDP mission aimed at Ukraine's security sector capacity building is a compromise solution instead of the previously discussed

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force only after three years, the country has accepted the court's jurisdiction over alleged crimes committed on its territory since November 2013.

[30] Its successor is the Instrument contributing to Stability and Peace (IcSP).

[31] http://www.euam-ukraine.eu/en/what-we-do/our-mission (accessed: 25 April 2017).

EU's monitoring mission to the eastern part of the country (Zarembo 2017: 8).

The EU's support on TJ activities in Ukraine does not encompass the decommunisation laws and policies. While the EU insists on not having an official policy on decommunisation, it is arguably 'fully concurring' with the Venice Commission verdict on Ukraine's law on condemnation of the communist and Nazi regimes, and prohibition of propaganda of their symbols (Interview 2), and indeed endorsing some of the OSCE/ODIHR's criticism in its public communication thereof. [32] It would be a misnomer to assert that the Union completely lacks a stance on the issues of concern for the Ukrainian decommunisation laws (i.e. the public remembrance of the twentieth-century totalitarian regimes and their legacies in Europe) in principle. The Union's publicly thus far rather restrained position on the issue is justified with a reference to the 2010 Commission communication on remembering the crimes of the totalitarian regimes as the basis for the Union's engagement with both its member states and third countries in the related issue area (Interview 2). As the report on 'The memory of the

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[32] Consider, for instance, points 38 and 39 from the Final Statement and Recommendations of the EU-Ukraine Parliamentary Association Committee Fifth Meeting, 24 March 2017, whereby the Parliamentary Association Committe (PAC) '[u]nderlines the importance of the implementation of the national human rights strategy for 2016-2020 and the action plan; calls for further progress in the investigations into the crimes committed during the EuroMaidan protests and the violence in Odessa of 2 May 2014, in order to bring to justice those responsible without delay; recognises the benefits of the Istanbul Convention and hopes for a speedy ratification by Ukraine; points out that Ukraine is not a party to the Rome Statute of the International Criminal Court (ICC), and underlines the importance of adopting relevant legislation; **calls for the full respect of freedom of expression and of information; underlines the importance to further respect the rights and specific interests of persons belonging to national and ethnic minorities'** and **'[r]eiterates its call to the Ukrainian authorities to take a decisive step to reform and unify the electoral code and adopt a law on parliamentary elections, in line with the OSCE/ODIHR recommendations**' (my emphases); http://iportal.rada.gov.ua/en/news/News/142163.html (accessed: 25 April 2017).

crimes committed by totalitarian regimes in Europe' by the EU Commission to the European Parliament and to the Council states, '...each Member State has adopted different measures …depending on its specific national circumstances. Even among Member States with similar experiences of totalitarian regimes, the legal instruments, measures and practices adopted may be different as may be the timing for their adoption and implementation'.[33] Accordingly, the decommunisation measures are deemed to be in 'the sphere of sovereign ownership of each and every country', and therefore 'it is up to the Ukrainian authorities themselves to decide what is the scope of such laws' (Interview 2; Interview 3).

Nonetheless, to state that 'the EU does not have a memory policy' (Interview 2) or that 'the European Parliament does not engage with history for the fear of thus opening a Pandora's box' (Interview 3) is empirically not quite correct either as such a policy is indeed emerging from the so-called 'soft law' of the Union. This 'soft law' has recently come to shape, in the apposite formulation of Uladislau Belavusau, 'a strong legal invitation to remember via various resolutions of the Parliament and Commission' (Belavusau 2015: 550). Numerous European Parliament (EP) Resolutions, such as the one of 23 October 2008 on the Commemoration of the Holodomor, the Ukraine artificial Famine (1932-1933); EP Resolution of 2 April 2009 on European Conscience and Totalitarianism; Resolution on the Remembrance of the Holocaust, Anti-Semitism and Racism of 27 January 2005; Resolution on a Political Solution of the Armenian Question of 18 June 1987, and Declaration of the European Parliament of 23 August 2008 on the proclamation of 23 August as European Day of Remembrance for Victims of Stalinism and Nazism, have laid the ground for the alleged right to have one's memory recognised by others on the pan-European level (Belavusau 2015; see further Mälksoo 2014).

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[33] 'The memory of the crimes committed by totalitarian regimes in Europe' of December 2010 (COM(2010)783).

As the EP has increasingly established itself as 'an institutional memory entrepreneur' in history politics (Kaiser 2012, 2017; Neumayer 2015), it is hardly surprising that some of these soft law pronouncements also provide the Ukrainian condemnation of the communist and Nazi regime with transnational legal grounding, serving as an important source of inspiration, legitimation and identity-linking for the respective discourses and policies in Ukraine. The European remembrance of totalitarianism has been further buttressed by increasing the funds for the *Europe for Citizens Program 2014-2020*, enabling various human rights-promoting research institutes, associations of survivors, museums, and organisations to network and collaborate at the EU level (Littoz-Monnet 2012; Belavusau 2015: 551).

It is furthermore notable that the only mention about Ukraine's decommunisation policies on the website of the otherwise remarkably trigger-happy anti-communist Platform of European Memory and Conscience is a brief and neutral report of the annual gathering of the Platform hosted by the Ukrainian Institute of National Memory in Kyiv in November 2016, wherein 'decommunisation in Ukraine and elsewhere' were 'discussed'.[34] However, in an Open Letter of 2 December 2016 to the President of the National Assembly of the Republic of Bulgaria Ms Tsetska Tsacheva Dangovska, Göran Lindblad, the President of the Platform of European Memory and Conscience, 'welcomes' 'the ongoing decommunisation legislative measures recently adopted or under way in several European countries, including Ukraine, Poland, and most recently, Bulgaria'. The letter (and the Platform thereof) furthermore 'wholeheartedly endorses an objective and truthful education about the Communist regime, as well as the removal of objects, symbols, monuments glorifying totalitarian dictatorships from public spaces in Europe and elsewhere'. This is well in line with the proclamation of the EP

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[34]   See   https://www.memoryandconscience.eu/2016/11/28/platform-meets-politicians-accepts-five-new-members-and-participates-in-official-holodomor-commemoration-in-kyiv-ukraine/ (accessed: 24 April 2017).

Resolution of April 2009 according to which 'Europe will not be united unless it is able to form a common view of its history, recognises Nazism, Stalinism and fascist and communist regimes as a common legacy and brings about an honest and thorough debate on their crimes in the past century'. The respective resolution furthermore referred specifically to the crimes committed by the communist totalitarian regimes, stating as the ultimate goal of their disclosure and assessment to be reconciliation, 'which can be achieved by admitting responsibility, asking for forgiveness and fostering moral renewal' (EP Res April 2009).

An indication of the shift in the EU law from *invitation to remember* towards *duty to remember* has been detected by the emerging scholarship on memory laws, identifying the EU Council Framework decision of 28 November 2008 on combating certain forms and expressions of racism and xenophobia (e.g., by 'publicly condoning, denying or grossly trivialising crimes of genocide') by means of criminal law as the key element in European politics of memory (Belavusau 2015; Belavusau and Gliszczyńska-Grabias 2017 forthcoming; Cajani 2017 forthcoming). The Framework Decision has been criticised as 'the slippery slope of prosecution of denial in its various forms' (Cajani 2017 forthcoming: 20), even though it does not quite amount to creating a common historical policy standard, as per more optimistic assessments (e.g., Leggewie and Meier 2012). It certainly has inspired calls by some post-communist member states of the EU to broaden the pertinent legislation so that it would also include the condoning or denial of Stalinist and communist crimes (Mälksoo 2014). The European Commission has declined such calls with a reminder that the member states of the EU and the Council of Europe have a wide discretion and leverage to adopt national legislation in a way which reflects their attitudes to the crimes of different regimes (Gliszczyńska-Grabias 2016: 76).

The EU's emerging, and for the time being, implicit rather than explicit discourse on

Ukrainian decommunisation laws is reflective of the existing inconsistencies and self-contradictions in wider Europe's declaratory and actual ways of dealing with the multiple totalitarian legacies of the continent. A good example of the ECtHR's differential treatment of the prohibition of communist symbols (as compared to the absolute ban of the Nazi ones) is offered by the Court's judgment on the Vajnai v. Hungary case (no.33629/06, § 57, ECHR, 2008). The Court outlines a clear position in support of freedom of speech:

> The Court is of course aware that the systematic terror applied to consolidate communist rule in several countries, including Hungary, remains a serious scar in the mind and heart of Europe. It accepts that the display of a symbol which was ubiquitous during the reign of those regimes may create uneasiness among past victims and their relatives, who may rightly find such displays disrespectful. It nevertheless considers that **such sentiments, however understandable, cannot alone set the limits of freedom of expression**. Given the well-known assurances which the Republic of Hungary provided legally, morally and materially to the victims of communism, **such emotions cannot be regarded as rational fears.** In the Court's view, **a legal system which applies restrictions on human rights in order to satisfy the dictates of public feeling – real or imaginary – cannot be regarded as meeting the pressing social needs recognised in a democratic society, since that society must remain reasonable in its judgement. To hold otherwise would mean that freedom of speech and opinion is subjected to the heckler's veto** (para. 57; my emphases throughout).

The European Union has kept a low profile in taking a clear public position on the decommunisation package of Ukraine, framing the issue in private conversations as first and foremost an issue of Ukraine's security rather than that of free speech. The ambiguous position of the Union on the issue of Ukraine's decommunisation laws might be partially due to a sense of complicity in the emergence of such legislation in the first place for setting an example by its own recent legislation on the condemnation of the criminal legacy of totalitarian communist regimes in Europe. More pragmatically, 'the EU is not the Council of Europe (who does not have real money and thus focuses on dealing with ethical values and moral assessments) while

the EU is very much absorbed by practical issues and economic policy' (Interview 3). Pre-emptive ethical and moral assessments are thus not in the daily agenda of the Union, and the Ukrainian decommunisation laws are likely to make it to the European Parliament's radar only in case 'a real instance of human rights violation' in connection to these laws should occur, e.g., 'when a punk band wearing a Red Star is imprisoned or something along these lines' (Interview 3). For the time being, the EU is interested in supporting those in Ukraine trying to bring about a positive change in the country and thus avoiding the alienation of these forces in the society (Interview 3; Interview 4). Nonetheless, the image of the EU as a normative power (Manners 2002) suggests that the currently adopted public silence on EU's partner country's decommunisation process is unlikely to suffice in the long term (cf. Howorth 2016: 31).

5. Conclusion

This exploratory paper has sought to detect and contextualise the EU's position on the Ukrainian decommunisation laws of 2015. It has established that the Union is far from having an official position on the Ukrainian decommunisation process, nor does the EU's existing policy framework on support to transitional justice really encompass the issues of historical, or retrospective justice of the kind, all the more when entangled with more immediate transitional justice concerns in complicated ways. The discourse emerging from the interviews is supportive rather than critical of Ukraine's decommunisation process. The scope of pertinent laws is generally considered to belong to the sphere of 'sovereign ownership' of states (Interview 2) and the EU's general backing of Ukraine considered paramount in the current political context in order to help the country 'climb out of the hole' (Interview 3).

Yet, there is considerable self-denial about the EU's emerging profile as an actor in the politics of history and memory. The Union's 'soft law' on the remembrance of World War II

and the communist legacy has certainly served as a stimulation of respective aspirations in Ukraine, being sympathetically cited in the preamble of the key piece of the decommunisation package, the legislation on the condemnation of the Communist and National Socialist (Nazi) Regimes, and Prohibition of Propaganda of Their Symbols. The problem is that the pertinent European soft law currently out there is more an expression of 'surrogate mourning' (Belavusau 2015: 558) than reflective of the rationale and ethics of a 'common European memory' thus advanced. A clarification of the Union's stance on issues of retrospective justice as part of the EU's wider transitional justice policy would help to elucidate the ethics of memory sought to be pursued by 'normative power Europe' in case of such complex and belated transitions as Ukraine's. A key element of such a stance could be the promotion of critical history and sustained support to self-reflexive, rather than rigidly national mnemomic security-oriented politics of memory, be they pursued in the EU's own member states or further 'circles of trust', such as the European Neighbourhood countries. After all, the Ukrainian decommunisation laws force us to provide practical answers to such fundamental questions as 'how free should speech be?' and 'how should free speech be?' (Garton Ash 2016, especially 79-114).[35]

Decommunisation is a politically relevant issue for an organisation which maintains that 'appropriate preservation of European history and Europe-wide recognition of all historical aspects of modern Europe will strengthen European integration' (EP resolution, April 2009). A cynic might draw a conclusion that the general aloofness of the EU on the subject of Ukraine's decommunisation laws is also reflective of the perceived distance of Ukraine even from the category of pre-EU accession countries. After all, the duty to come to terms with one's past in a particular way regarding the self-reflexive remembrance of Holocaust (which is hardly

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[35] See further http://freespeechdebate.com/the-project/ (accessed: 25 April 2017).

a notable feature of Ukrainian decommunisation package) has been an important requirement of the EU accession. As a MEP put it in an interview, 'one can enter the university only after having earned the high school diploma' (Interview 3). Emphasising the sovereign ownership of sorting out one's contested past in case of Ukraine could thus also be read as a cooling note about the proximity of Ukraine's EU membership aspirations.

The question '*should* the EU have a legal stance on issues of historical and retrospective justice?' as part of its foreign policy is, of course, an openly normative one. Yet, empirically speaking, it is also a no-brainer – the EU has already entered the field of the politics of truth and justice seeking also with an eye on the issues of historical or retrospective justice with its various invitations and 'duty calls' to remember the twentieth-century past in particular ways. What remains curious is its seeming uncertainty and anxiety about this self-adopted position as a 'mnemonic norm entrepreneur' of sorts. Timothy Snyder's (2009: 459) verdict – 'The European Union has a problem with history' – still holds. The jury remains out on whether or not the 'forced introduction' of Eastern European histories has really managed to break the 'logjam' of national histories and thus provided a solution to Europe's history problem (cf. ibid.).

Several implications of the initial mapping exercise conducted here can be drawn out for the various subfields of pertinent scholarship. For the IR norm constructivists studying the EU's normative power ambitions and norm projection/democracy promotion in its eastern neighbourhood, the EU's evasiveness on the Ukrainian decommunisation policies offers an interesting case study of a pragmatic power Europe in the contested field of legalising history and memory. Transitional justice scholarship could look further into the complex intertwining of transitional and retrospective truth and justice-seeking processes in cases of belated transitions, such as Ukraine's, and explore the possibilities to expand the EU's Policy

Framework on support to transitional justice accordingly, in the spirit of the subfield's practical orientation. Memory studies scholars could further explore Ukraine as a particularly evocative case of 'knotted intersections' of history, memory and politics in the contested European memoryscape of the Second World War and multiple totalitarian legacies (cf. Rothberg 2010).

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Interviews

- Interview with an EU member state diplomat based in Kyiv, via Skype, 24 March 2017 (Interview 1)
- Interview with an EEAS official, Brussels, 30 March 2017 (Interview 2)
- Interview with a MEP, member of the EP Delegation to the EU-Ukraine Parliamentary Association Committee, Brussels, 26 April 2017 (Interview 3)
- Interview with Toomas Hiio, Executive Board member of the Platform of European Memory and Conscience, via Skype, 28 April 2017 (Interview 4)
- Interview with a MEP, member of the EP Delegation to the EU-Ukraine Parliamentary Association Committee, Brussels, 2 May 2017 (Interview 5) (to be integrated later)