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Freedom of Speech under Militant Democracy: The History of Struggle against Separatism and Communism in Ukraine

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Abstract: *The article is devoted to the experience of the application of a concept of militant democracy in modern Ukraine. This concept is relevant due to the prolonged domination of the communist totalitarian regime until 1991, and also in view of the encroachment on the principle of territorial integrity in 2014. It is argued that Ukraine, formally consolidating separate instruments of militant democracy at the level of the Constitution of Ukraine, almost did not apply such instruments until 2014. The active process of decommunization started in 2014, after the Revolution of Dignity; it was realised, in particular, in the declaration of lustration, as well as the banning of the two communist parties, but the most influential Communist Party remains officially not banned up till now. Also, the two parties, accused of infringement on territorial integrity, were banned in 2014. The issue of differentiation between aggressive words and aggressive actions of parties is analysed. It is argued that representatives of the parties, who during the twenty years of Ukrainian independence openly denied one of the key values of the constitutional order of Ukraine, its territorial integrity, became active participants of the temporary occupation.*

Keywords: *freedom of assembly, freedom of association, freedom of speech, militant democracy, political parties, public associations, separatist movements*

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1. Introduction

Today, democracy is a key European value. Democracy is mentioned in the Treaty on European Union as the universal value, together with the inviolable and inalienable rights of the human person, freedom, equality and the rule of law (Preamble to the Treaty). Democracy is also named in the Preamble to the Charter of Fundamental Rights of the European Union (2000), along with the principle of the rule of law, as well as the values of human dignity, freedom, equality, and solidarity. Effective political democracy, as well as common understanding and observance of human rights, maintain the fundamental freedoms in the best way (Preamble to the European Convention on Human Rights, ECHR).

There are hundreds of interpretations of democracy. For example, in accordance with the Copenhagen criteria, in the code of the requirements for countries wishing to join the European Union, democracy is characterized as a procedure where all citizens of the country are able to participate, on an equal basis, in the political decision making at every single governing level, from local municipalities up to the highest, national, level; they have free elections with a secret ballot; the right to establish political parties without any hindrance from the state; fair and equal access to a free press; free trade union organizations; freedom of personal opinion; and executive powers restricted by laws and allowing free access to judges independent of the executive government (European Commission, 2016). The European Court of Human Rights in its decisions states that the basis of democracy is such guaranteed rights as freedom of expression, assembly, and association, as well as the right to free elections.

The ways of democratization differ from country to country. There is no unique recipe for reforming the former totalitarian countries which pursue the goal of building real democracy on the basis of the rule of law. A number of countries have historically opted for the concept of militant democracy (Germany is considered to be the home of this concept), which is particularly relevant in the post-Soviet space, in particular, Ukraine. The key to the concept of militant democracy is the institution of the prohibition of political parties.

Militant democracy as a concept was introduced for the first time by Karl Loewenstein, a German scientist, who emigrated to the United States and taught at Yale, and who published the article ‘Militant democracy and fundamental rights’ in 1937 (Loewenstein, 1937). This idea was also endorsed by Karl Mannheim (1943).

In its decision to ban the Socialist Party in 1952, the Federal Constitutional Court (FCC) of Germany defined the term 'free democratic order', which was essentially the "birth" of "militant democracy" in the legal field (Bundesverfassungsgericht, 1952). But in the case of the Prohibition of the Communist Party in 1956, developing its preliminary decision, the Court directly referred to the doctrine of militant democracy (Bundesverfassungsgericht, 1956). The bulk of the opinion consisted of an exhaustive analysis of Marxism-Leninism and the history of German communism, including a survey of the German Communist Party's (KPD) structure, leadership, campaign literature, and overall political style. The Court found, as a matter of ideology and fact, that KPD directed all of its operations against the existing constitutional system. The opinion consumed 308 pages in the official reports, the longest by far of all the Court's opinions (Kommers, 2012, p. 290). Considering the abovementioned practice of the FCC of Germany, we can make a conclusion that the concept of militant democracy is closely linked with the theory and practice of banning political parties.

The concept of militant democracy has become quite popular today (Jesse, 1981; Jaschke, 1991; Sajo, 2004; 2006; Kirschner, 2014; Tyulkina, 2015; Flumann, 2015; Ellian & Rijpkema, 2018; Rijpkema, 2018). 'Militant democracy' is defined as the legal restriction of democratic freedoms in order to isolate democratic regimes from the threat of overthrowing by lawful means. Militant democracy, compared to its original version in the concept of Loewenstein, evolved by expanding the range of goals to which the logic of militant democracy was applied: from fascism in the interwar years to communism during the Cold War to certain forms of modern religious practices (Accetti & Zuckerman, 2017).

At the same time, this very concept in the established democracies in Europe is not going through the best of times. This is due to the new challenges, which this concept must answer in the form of left and right populism and radicalism (most clearly shown by several movements in Germany, France, Austria, as well as movements that encroach on territorial integrity (Spain)). In addition, many years have passed since this concept appeared, and it is greatly influenced by the practice of the ECtHR, which is rather captious when dealing with issues of human rights limitations, in particular with regard to freedom of speech, assembly, and association, in cases of the growth of means of militant democracy. Thus, the ECtHR has "sanctified" the ban of parties (in particular, in the cases of *Batasuna v. Spain* [2009], and *The Refah Party v. Turkey* [2003]) just several times, by developing fairly strict criteria for the legitimacy of the interference. Other decisions of the ECtHR were not in favour of militant democracy. Though it is possible to mention the judgement in the case *Gorzelik and others v. Poland* [2004], where the Court recognized the legitimacy of a national authority's

actions, which refused to register a public association, and which characterized itself as "the organization of the Silesian national minority".

The Court's conception of the relationship between political parties and fundamental democratic rights to freedom of expression, guaranteed in Article 10 of the Convention, and the free elections guaranteed by Article 3 of Protocol no. 1 to the Convention, is the reason for the "narrow" interpretation of the exceptions in Article 11, paragraph 2 (Harris *et al.*, 2016, p. 966), therefore, "only convincing and irrefutable arguments" can serve as a basis for restricting their freedom of association (*United Communist Party of Turkey and Others v. Turkey* [1998], para. 46).

As far as Ukraine is concerned, it is under the influence of several threats at once—anti-democratic movements because of the great historical experience of the communist totalitarian past, and also because of the violation of the territorial integrity by the Russian Federation with the use of Ukrainian political parties and public organizations. In this regard, Ukrainian experience may affect the general trends of militant democracy in Europe in terms of rethinking the role and content of this concept. At the same time, Ukraine must take into account European standards for the use of militant democracy more actively, especially in the context of Ukraine's obligations to implement the ECHR, recognizing the ECtHR jurisdiction, and the Association Agreement between the European Union and Ukraine, as well as the intention of becoming a full member of the EU and NATO, declared in the Constitution of Ukraine.

The authors use a method of comparative analysis of the laws and practices of different countries in the context of Ukrainian experience. The programme documents of Ukrainian political parties were investigated. The article is also based on the broad use of academic research, especially in the field of militant democracy. The authors focus on studying the ECtHR practice of banning political parties as well as the practice of the Ukrainian courts in this field. The historical method is used to examine militant democracy in retrospect, both in Ukraine and in foreign countries, as well as communist and separatist movements. Particular attention is paid to the practice of constitutional courts.

2. Militant democracy in Ukraine: conceptual remarks

Does democracy defend itself in Ukraine and, if so, in what way? In our opinion, the concept of the need to preserve, first of all, the national statehood, in contrast to the comprehensive protection of democracy, was the basis for a constitutional ideology. The existence of "constitutional fears" (according to the terminology of Andras Sajo) at the time of the adoption of the Constitution is evident, which is more connected with the fear of losing the independence of Ukraine and the emergence of conflicts on an ethnic basis, rather than the fear of not establishing democratic mechanisms. In particular, such conclusions can be made by looking at the impossibility of amending the constitutional text in terms of violations of issues of independence and territorial integrity. The constitutional order may potentially be amended in any part, with the exception of the parameters of independence, territorial integrity and the existing scope of human rights and freedoms (Art. 157 of the Constitution).

In contrast, the Constitution does not in any way determine the inviolability of democratic institutions and democracy itself as a principle and value of a constitutional system. Among the restrictions relating to the exercise of the right to join political parties, Part 1 of Article 37 of the Constitution of Ukraine does not specify in any way the purpose of protecting democratic values and principles (unlike many European constitutions and legal acts). Democracy is not mentioned as an object of protection in the application of restrictions in the implementation of fundamental rights and freedoms. Democracy is mentioned only once—in Article 1 of the Constitution of Ukraine, which states that Ukraine is a sovereign and independent, democratic, law-governed and social state. Instead, the constitutions of Germany, Greece, Croatia, Italy, Spain, Portugal, Poland, and other European countries state that political parties do not have the right to infringe on democratic principles; totalitarian or fascist parties are subject to prohibition. Nevertheless, Ukraine has suffered from totalitarianism no less than these countries, and their experience in preventing totalitarianism in the future would be useful for Ukraine, also in terms of the usefulness of borrowing certain constitutional provisions.

It is evident that the Constitution of Ukraine was developed as an ideologically "neutral" document. The Constitution of Ukraine (Part 2, Art. 15) states that no ideology can be recognized by the state as obligatory. In this connection, the rhetorical question arises—is the democratic ideology of the constitution itself obligatory?

The grounds for prohibition of political parties in Ukraine are defined in Article 37 of the Constitution of Ukraine. In particular,

> *creation and activities of political parties and public organizations whose programme objectives or actions are aimed at eliminating independence of Ukraine, forcible changing the constitutional order, violation of the sovereignty and territorial integrity of the state, undermining its security, unlawful seizure of state power, propaganda of war, violence, fomentation of interethnic, racial, religious hate, infringement on human rights and freedoms, public health, is forbidden* (Government of Ukraine, 1996a; 1996b).

At the same time, even existing restrictions on the realization of the right to association were not used at all for a long time, which led to the creation of rather radical political movements, both right-wing and left-wing, which challenged both democratic principles and the statehood. The official goals of the parties included "the seizure of power by the working people [...] the restoration of the union of fraternal peoples, their merger into a unified socialist union state", "the transformation of parliamentarism and local self-government into the system of Soviets as a form of dictatorship of the working people", "the class struggle of the proletariat in an alliance with the labour peasantry and a conscious part of the intelligentsia for taking political power" (Communist Party of Ukraine, n.d.).

And this eventually led to a significant slowdown of the development of democratic traditions, of the use of political pluralism by openly authoritarian forces, opposing democracy, and also national statehood.

In our opinion, democracy was recognized as a principle of constitutional order, but it has not become a constitutional value in terms of the theory of militant democracy until 2014, which will be discussed later in this article. Pluralism could become the main achievement of democratic transformations, not artificial pluralism, but the one that does not allow the existence of ideologies that claim to be completely monopolistic in the public consciousness through the prohibition of other movements.

Today we have a lack of clear understanding of the rules on which the party system should be developed, in particular, and democratic relations in the state, in general, should be based. We have formally bid farewell to the Soviet past in 1991, but at the same time have not set clear priorities for the protection of democratic achievements.

3. The procedure of banning of parties

In accordance with Part 1 of Article 27 of the Code of Administrative Proceedings of Ukraine, Kyiv District Administrative Court is the court which has the right to make decisions regarding the prohibition of a party, that is, a lower court (the Supreme Court of Ukraine had the relevant competence before 2005, when the Code of Administrative Proceedings of Ukraine was adopted).

In the future, the issue of conferring competence of consideration of such cases to the Constitutional Court of Ukraine should be considered, which require amendments to the Constitution. Recently more and more countries have established the jurisdiction of this category of cases belonging specifically to constitutional courts (Bulgaria, Armenia, Georgia, Moldova, Germany, Poland, Romania, Turkey, Hungary, etc.). Moreover, a local or regional court is not empowered to dissolve political parties in any country (Parkhomenko, 2013, pp. 273–274).

In particular, paragraph 7 of the Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures, adopted by the Venice Commission at its 41st Plenary Session (held on 10–11 December 1999 in Venice), CDL-INF (2000) 1, which describes the procedure of prohibition of the party, in particular mentions the Constitutional Court among the authorities authorized for this purpose: "The prohibition or dissolution of a political party should be decided by the *Constitutional Court* (no italics in the original) or other appropriate judicial body in a procedure offering all guarantees of due process, openness, and a fair trial". (Venice Commission, 2000)

We believe that taking into account the important role of political parties, defined in Part 2 of Article 36, as well as the high degree of estimating in categories used in the "interdictory" norm of Part 1 of Article 37, the Constitutional Court of Ukraine could become such a body. It is the body of constitutional jurisdiction that can provide a qualified description of the activities of political parties in terms of its compliance with the ideas of the establishment of democratic values. Incidentally, this is exactly the approach of German constitutional law, which confers this authority on the Federal Constitutional Court (Part 2 of Article 21 of the Fundamental Law of Germany).

4. The practice of banning of parties before 2014

Regarding the practice of applying the relevant "interdictory" provisions of the Constitution, we should note the following. The Communist Party of Ukraine (CPU), which officially declared itself heir to the Communist Party of the Soviet Union, and also proclaimed that the collapse of the Soviet empire and the creation of independent states was a big mistake, was among the potential threatening forces. Another important detail was the CPU flag—it was absolutely similar to the official flag of the USSR. Therefore, it is not surprising that the CPU actively supported the "referendum" in 2014 in the Crimea and Donbas.

We have witnessed episodic battles with the CPU. At the first stage, there was the Decree of the Presidium of the Verkhovna Rada of August 30, 1991, adopted immediately after the failed coup in Moscow, which banned the Communist Party. (Government of Ukraine, 1991b)

The decision to ban the Communist Party of Ukraine was adopted with reference to Part 2 of Article 7 of the Constitution of the Ukrainian SSR of 1978 (as amended by the Law no. 404-12 of November 24, 1990): "Creation and activities of parties, other public organizations, and movements aimed at changing the constitutional order and in any illegal form the territorial integrity of the state in a violent way is not allowed, as well as undermining its security, incitement to national and religious hatred". Thus, on August 26, 1991, the Presidium of the Verkhovna Rada of Ukraine issued the decree 'On the temporary suspension of the activities of the Communist Party of Ukraine' (Government of Ukraine, 1991a), and on August 30, the decree 'On the prohibition of the activities of the Communist Party of Ukraine' (Government of Ukraine, 1991b).

However, it did not prevent the Communist Party of Ukraine from re-registering itself in 1993 and acting at various levels of government during the years of independence. Its long-term existence was facilitated by the Decision of the Constitutional Court of December 27, 2001, no. 20-рп/2001, in which the Constitutional Court recognized the banning of the Communist Party of Ukraine unconstitutional for two reasons: firstly, the party could be banned only by a court, and secondly, according to the Court, the Communist Party, which existed in 1991, was not associated with the party that organized the coup (Constitutional Court of Ukraine, 2001).

The enormous support of the Communist Party of Ukraine and other left-wing forces (the Socialist Party, the Peasant Party and others) from 1991 to 2014

is also worth mentioning. The Communist Party was unable to overcome the protecting barrier of 5% for the first time during the 2014 elections.

The decision of the Supreme Court of Ukraine of November 5, 2004 can be another example of an attempt to use the institution of banning a political party (until 2005 the Supreme Court of Ukraine was empowered to consider such cases). The Ministry of Justice of Ukraine appealed to the Supreme Court of Ukraine with a motion to ban the political party "Ukrainian National Assembly", or "UNA" (which is today renamed to the "Right sector" party).

The Supreme Court refused the Ministry of Justice to sustain the claim, in particular, due to the lack of convictions of the courts regarding party members concerning incitement to national hatred and emphasized the importance of debate for the development of democracy and pluralism. It is possible to regard such conclusion of the Supreme Court in different ways. But the fact that the Court has not noticed any actions envisaged by Article 37 of the Constitution of Ukraine in the activities of the party "UNA", is in some way related to the need to take into account the state of the political system and the possibilities of the influence of the parties as key actors on the consciousness of citizens, and hence on the development of state and social processes (Barabash, 2009, p. 81).

For a long time, the topic of the banning of political parties was a kind of taboo in politics and was almost not violated for certain reasons. For example, an analysis of party programmes that put forward their electoral lists at the parliamentary elections in 2006 makes it possible to conclude that the competition of political positions, even those that question the key constitutional values, has long been dominant in our country (as for the latter, we understand the first of such principles of the constitutional order as human rights, territorial integrity, and independence, which are the most protected under Part 1 of Article 157 of the Constitution).

Thus, one of the key goals of the electoral programme of the Communist Party of Ukraine was the creation of the Union of Free Peoples and restoration of the sovereignty of the workers' soviets (in the original "all power to the Soviets—the Soviets of Workers!"). The programme of the Bloc of Nataliia Vitrenko "Public Opposition" (Progressive Socialist Party of Ukraine and Party "Russo-Ukrainian Union" (RUSS)) was also "exotic": protection of the East Slavic civilization and canonical Orthodoxy, desire to proclaim the authority of the soviets of workers' deputies, the federal structure of Ukraine, and autonomy of Transcarpathia and Galicia.

Considering the pre-election documents for the 2012 elections, it is no longer surprising why the idea of separatism and the desire to "reunite with fraternal Russia" so easily occupied the minds of many citizens. We can find the party "Russian Bloc" among the candidates for parliamentary seats, which freely participated in the elections race. The basis of the symbolism is the Russian tricolour, and the key slogan was "strategic priority is the rapprochement between friendly states, with which we have common traditions, history, culture, spirituality, and one country that extends from the Carpathians to the Kamchatka, from the Crimea to the Kola Peninsula" (Barabash, 2017).

One of the active supporters of the annexation of the Crimea, Sergey Aksyonov, headed the pro-Russian Party "Russian Unity", which actively promoted the idea of protecting "Russian and Russian-cultural citizens of Ukraine", and was given an opportunity to participate freely in the elections to the Supreme Council of the Autonomous Republic of Crimea in 2010, and as a result, having overcome the electoral barrier, was represented in the Council. It is worth noting that this political force was not created in an empty place: in fact, it became "heir" to the party "For the Unified Russ", which had similar radical goals.

However, despite all these facts, officially there were no initiatives by the authorized bodies to ban the party from 2005 to 2014. Moreover, whenever the mentioned political parties underwent compulsory registration procedures (or re-registration as a result of a name change) in the judicial bodies, which had to carry out a legal examination of the statute and, most importantly, of the programmes of those parties, there were no questions to the constituent documents of these organizations.

Has the existence of these parties in the political field of Ukraine and their respective representation at various levels of government affected the successful implementation of "the Kremlin" plans? This question is rather rhetorical but it is obvious that eradicating separatist movements and not allowing their representatives to participate in elections and electoral cycles before 2014 would have greatly complicated the implementation of the political component of the mentioned occupation operations. It is enough to look at the biographies and political affiliations of the leaders of the so-called "Crimean Spring" and the Donbas pseudo-republics in order to realize the truthfulness of the point above.

5. The practice of banning of parties after 2014

Today we have a completely different political and legal situation: in the East, there is a real war, and on the political "front", the campaign for de-communization has begun and is being actively promoted. In fact, these two reasons caused all five decisions on banning of political parties.

It is also worth mentioning that after the Revolution of Dignity, the Law 'On the purification of power' was initially adopted (2014). The "lustration" law closed the road to power for those who held high positions in the former Communist Party and the Young Communist League. However, we think that the ban on the support of the former Communist Party leaders seems like a late reaction since their average age is approaching 70 years. Subsequently, the new parliament passed another law, 'On the conviction of communist and national-socialist (Nazi) totalitarian regimes in Ukraine and the prohibition of promotion of their symbols' (2015), which directly affected the expansion of grounds for banning political parties (Berchenko, 2017).

Here are some practical examples of banning of parties. On April 9, 2014, the Ministry of Justice addressed the Kyiv District Administrative Court of with a lawsuit against the political parties "Russian Unity" and "Russian Bloc" (on banning political parties). The court fully satisfied the lawsuit of the Ministry on April 30 and banned the activities of the political party "Russian Unity" (Kyiv District Administrative Court, 2014a). And on May 13, 2014, the court completely approved the lawsuit and banned the activities of the political party "Russian Bloc" (Kyiv District Administrative Court, 2014b). The Kyiv Appellate Administrative Court rejected the arguments of the appeal, thus confirming the decision on the party "Russian Bloc" (Kyiv Appellate Administrative Court, 2014). This decision was supported by the Supreme Administrative Court by a judgement of August 2, 2017, no. K/800/35940/14 on the grounds of encroachment on territorial integrity (corresponding calls, support of separation and voting for a referendum) (Supreme Administrative Court of Ukraine, 2017).

The Kyiv District Administrative Court suspended the activities of the two communist parties—the Communist Party of Ukraine (renewed) (Kyiv District Administrative Court, 2015b) and the Communist Party of Workers and Peasants (Kyiv District Administrative Court, 2015c). The reason for their banning was the abovementioned anti-communist law of 2015.

The trial, which was initially connected with the prohibition of the activities of the Communist Party of Ukraine, was very lengthy. The reasons for the

initiation of the trial were similar to those used in the banning of the parties "Russian Bloc" and "Russian Unity" (encroachment on territorial integrity). The proceedings were opened by a judgement of the Kyiv District Administrative Court of July 11, 2014. At the same time, this case has not been considered on its merits until now. The judge-speaker, as well as all the other judges of the Kyiv District Administrative Court, recused themselves on the grounds of the search, conducted by the Kyiv Prosecutor's Office and the police in the court building on February 16–17, 2015, removal of documents, materials of court cases, computer equipment (Kyiv District Administrative Court, 2015e). The case was transferred to another court—the Kyiv Regional Administrative Court after the judgement of February 18, 2015, no. 826/9751/14 (Kyiv Regional Administrative Court, 2015a). The Kyiv Regional Administrative Court has not yet started to consider the case on its merits, by repeatedly postponing the court sessions, including in connection with the replacement of the panel of judges, and also suspending the case proceedings due to an appeal against the decision to transfer the case to this court. The proceedings have now restarted (Kyiv Regional Administrative Court, 2019). But, obviously, time has been lost, and the evidence of encroachment on the territorial integrity by the Communist Party of Ukraine has not been confirmed by an official judicial decision for almost five years. Similarly, the official ban on the Communist Party of Ukraine does not exist.

Simultaneously, another case regarding the Communist Party of Ukraine is being considered—the judgement of the Kyiv District Administrative Court of July 31, 2015, initiated proceedings on the new administrative case on the termination of activity of the Communist Party of Ukraine on the basis of the anti-communist law of 2015. On December 16, 2015, the action was satisfied (Kyiv District Administrative Court, 2015d). Claims concerning constituent documents (programme and statute), names and symbols of the party became grounds for the action.

However, this decision was appealed, and in the end, the proceedings were suspended by the Judgement no. 826/15408/15 of September 20, 2017 of the Kyiv Appellate Administrative Court (2017), in connection with the constitutional proceedings of the Constitutional Court of Ukraine regarding the constitutionality of the anti-communist law, on the basis of which the Communist Party of Ukraine was banned by the court of the first instance. Significantly, the Supreme Court upheld the abovementioned judgement by a Ruling of November 21, 2018, no. 826/15408/15 (Supreme Court of Ukraine, 2018). In connection with the creation of the Sixth Appellate Administrative Court by the Judgement of January 16, 2019, no. 826/15408/15, this court started proceedings in this case (Sixth Appellate Administrative Court, 2019).

The Communist Party of Ukraine exists in a paradoxical legal regime: any activity of it qualifies as illegal propaganda of the communist regime (which in general does not raise questions), but it is not officially banned by the court. So, the Central Election Commission refused on February 2, 2019, to register Petro Symonenko (chairman of the Communist Party of Ukraine) as a presidential candidate nominated by the Communist Party of Ukraine since the charter, name, and symbols of the party do not comply with the anti-communist law (Central Election Commission of Ukraine, 2019). The judicial procedure of banning, however, can now continue, because in its Decision of July 16, 2019, no. 9-p/2019, the Constitutional Court declared the Law 'On the conviction of communist and national-socialist (Nazi) totalitarian regimes in Ukraine and the prohibition of the promotion of their symbols' (2015) constitutional.

To be honest, we could not compare the decision of our administrative court (which has not even come into force) with such a well-known decision of the Constitutional Court of Germany on banning of the Communist Party in 1956 (Bundesverfassungsgericht, 1956), because it is more formal than doctrinal (especially if you look at the more than 200 pages of in-depth analysis of the ideology of communism, Marxism and programme provisions in the decision of the German body of constitutional justice).

We could at least expect from Ukrainian judiciary a superficial constitutional and legal analysis of the programme slogans of the Communist Party of Ukraine in terms of their correlation with the propagation of the communist totalitarian regime. Instead, the metropolitan administrative court confined itself to referring only to the conclusion of the Commission to the Ministry of Justice concerning the fact that the programme and the charter of the party were oriented towards such propaganda. One can implicitly guess that the administrative court does not mind the existence of the far-left wing in the political field of Ukraine:

> *The Court draws attention to the fact that the Law of Ukraine 'On the conviction of communist and national-socialist (Nazi) totalitarian regimes in Ukraine and the prohibition of promotion of their symbols' does not prohibit activities of any political party, but only requires adjustment of the behaviour of persons, subject to the imposed restrictions, by bringing activities in line with established requirements.* (Kyiv District Administrative Court, 2015d)

We think that it is necessary to be clearer both in theory and in judicial practice with the understanding of which constituent parts of the communist ideology and the communist past pose a threat to modern democracy (and, if so, in what forms).

One can emphasize the fact that there is a real war in the east of our country, and therefore freedom of expression should be subject to restrictions. However, it is possible to give examples from the practice of foreign countries, which are in not easier conditions, but still retain the "cold mind" on the issue of guaranteeing fundamental rights and freedoms.

Of course, it is possible to use the Turkish experience and ban all the more or less suspicious movements and do not allow them to participate in elections (by the way, the Constitutional Court of Turkey has already set a certain record, banning 28 parties during its existence) (Algan, 2011, p. 810). But will this give an opportunity to develop the country exactly in a democratic way? This question is rather rhetorical. However, inactivity in this case is also not permissible. Therefore, it is necessary to act, but with sufficient caution.

It is appropriate to mention here the recommendation of the experts of the Venice Commission that the authorities may resort to such a fundamental means as the prohibition of the party, provided that the authorities have "sufficient evidence that the political party in question is advocating violence (including such specific demonstrations of it as racism, xenophobia, and intolerance), or is clearly involved in terrorist or other subversive activities" (Venice Commission, 2000, para. 15). Of course, we must also take into account the legal positions of the European Court of Human Rights, in particular the statements made in the case *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria* [2001]: "The Court reiterates, however, that the fact that a group of persons calls for autonomy or even requests secession of part of the country's territory—thus demanding fundamental constitutional and territorial changes—cannot automatically justify a prohibition of its assemblies" .

However, one should not forget that the radical separatist ideas, born in the minds of several metropolitan politicians, already have their armed supporters in the east of the country. Therefore, it is very dangerous to wait until these politicians could possibly resort to undemocratic means of promoting their ideas, which would be potentially harmful to the statehood. War-ATO (Anti-Terrorist Operation) is a special condition for the existence of democratic institutions in the state. That is why the European approach to the prohibition of actions, and not views, is particularly important in Ukraine and, in our opinion, must necessarily be taken into account.

The caution of the Ukrainian judicial system concerning disputes involving the Communist Party of Ukraine can partly be explained by the concern about the "European" perspective of such a case, since it is obvious that being officially

banned, the Communist Party of Ukraine will apply to the ECtHR, which has developed fairly strict criteria for the legitimacy of interference. At the same time, Ukrainian practice shows that without the concept of militant democracy, it is almost impossible to answer the challenges Ukraine faced. The attitude to the calls for even peaceful changes of inviolable values (first of all, territorial integrity) in the Ukrainian version is especially sharp. Taking into account the war in the East and temporary occupation of the Crimea, "peacefulness" becomes rather illusory, as does "affiliation" (which causes well-grounded suspicions) of many associations of citizens with an aggressor state.[1]

6. The practice of banning of public organizations

The practice of banning of public organizations is no less eloquent than the practice of banning of political parties in Ukraine. There was almost no such practice before 2014, and it was limited to the single case where there were calls for incitement of religious hatred and hostility, propaganda of the ideology of the Islamic fundamentalist movement of the Wahhabis by the Public Organization "Direct Way" (Odessa Regional Administrative Court, 2012; Odessa Appellate Administrative Court, 2012).

Since 2014, encroachment on territorial integrity (along with calls for actions to change the constitutional order by force, as well as a violation of the ban on the creation of paramilitary groups, militia) became the basis for the banning of 11 public organizations. It is noteworthy that some of them only called for the autonomy of certain areas without committing any violent actions or calls for them (for example, Patriotic Movement "Unity of Sumy", Sumy District Administrative Court, 2016). However, in most cases, criminal proceedings against the leaders or members of such organizations were initiated, or sentences for criminal offenses were issued.

[1] Incidentally, the issue of the influence of foreign states through public organizations and political parties should not be underestimated.

7. Conclusions

The Constitution of Ukraine, despite its legitimate influence on the processes of state construction, and the effect of the consolidation of political elites nevertheless was a product of its era of uncertainty and various phobias.

The political elite of Ukraine had to make a civilized choice between Asia and Europe in 1996. In spite of this, most likely there was a preservation of existing "painful problems" of that time. However, the Revolution of Dignity has shown that the choice will still have to be made and the result of such a choice is quite obvious.

It is likely that the judges of the Constitutional Court of Ukraine with a progressive way of thinking could use their decisions to change the axiological vector of the constitutional system. However, it would be mere wishful thinking. Consequently, we cannot do anything about it without a comprehensive reform of the basic sections of the Constitution. Otherwise, the values shared by society and which are based on the choice of its future will not have anything in common with the axiological basis of its constituent act—the Constitution.

That is why the attempts to use militant democracy in Ukrainian law are so controversial. It is outrageous that many researchers of the constitutional system, for absolutely unknown reasons, do not notice the significant differences between their approaches, which are often based on the extrapolation of liberal-constitutional ideas to Ukrainian land, and a completely unclear ideology of state construction, incorporated in the text of the Constitution, and the practice of realization of constitutional provisions.

At the same time, it is also difficult to comprehend whether the leading political forces understand the idea of sovereign statehood and free and democratic system as the important constitutional values, as well as what the state institutions, which should control the activity of citizens' associations, protect in reality. From the constitutional and legal point of view, there is a serious problem that the effective mechanisms of self-defence of democracy have not been put into effect, and thus the free development of the political system has become a chaotic movement with indispensable social rhetoric and a periodic radicalization of slogans.

We must make great efforts to ensure that our people are convinced that European values are more vital for the survival of our country than the desire of some groups to maintain the system of "communist-Asian" values. We should also

agree with the statement of Professor Richard Sakwa from the University of Kent on democratic processes in the post-Soviet space. "The path to democracy is not straightforward, it must take into account the direction of the marshes of the old command economy and its remnants, strongly crossed terrain with national-ethnic affirmations and distorted remains of the former hegemony parties" (Sakwa, 2006, p. 125).

The European concept of militant democracy should become a basic concept for a future constitution, and under the current conditions, a key paradigm for the activity of the legislature and the judiciary. Of course, the basic things related to the legitimacy and the need for interference into human rights must be respected. In this aspect, Ukrainian legislation and jurisprudence are far from ideal. At the same time, it will be fair to assume that the European Court of Human Rights and other European institutions (the Council of Europe, the Venice Commission) will not ignore the political situation in Ukraine in an aspect of political security. First of all, we are talking about the reality of a threat to basic values (democracy, human rights, territorial integrity), as well as the impact of "peaceful" calls on a potential danger of the realization of threats.

In Ukraine, the protection of territorial integrity faces a dual threat: internal, in the form of a separatist movement, and external, in the form of a violent annexation of territory (Roznai, 2017, p. 131). In general, democracies use the most unconventional constitutional weapons to fight secession, forbidding separatist political parties to participate in elections (Weill, 2018, p. 905). That is why we should not be ashamed of the fact that our main constitutional value is territorial integrity, which needs to be protected with instruments of militant democracy. At the same time, one should not forget that Ukrainian society is still very sensitive to the words of politicians, and therefore the propaganda and agitation of any separatist views can have very serious consequences for the whole country.

There is another disappointing conclusion. Having perceived at the beginning of independence the European legal standard that the party as a subject of the political process has the right to freedom of action until its representatives move from aggressive words to aggressive actions (although from a formal point of view, the Constitution set much more restrictive limitations from the very beginning), we got a situation where such tolerance could not be a protection from the extremely rapid spread of separatist sentiment in Ukraine, which was weakened by revolutionary events, and the representatives of the parties, who during the twenty years of Ukrainian independence openly denied one of the key values of the constitutional order of Ukraine—the territorial integrity—and

had appropriate representation at various levels of government, have become the leaders of this movement.

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