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**The Soviet Regime in Ukraine
and Ukraine's Current Policy of Providing Criminal Law Protection
to Historical Memory**

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Contents:

Introduction

I. The Soviet Past of Ukraine and Its Modern Reinterpretation as a Legacy of the Totalitarian System That Needs To Be Reflected in Historical Memory

II. Why Does Historical Memory Need Criminal Law Protection?

III. Current Criminal Law Policy of Ukraine to Protect Historical Memory (Concerning Victims and Consequences of the Soviet Regime): A Study of the State of Legislation and Its Genesis

IV. Practice of Application of Criminal Law Against Offenders Having Committed Acts Against the Historical Memory of the Victims and Consequences of the Communist Totalitarian Regime

V. Countering the Propagation of Russiaist Ideology and its Symbols: a New Challenge for Criminal Law

Conclusions

Author information

Introduction

The issue of legal protection of the historical memory concerning the tragic events of the Ukrainian people during the period of our country's membership in the Soviet Union is of particular importance in the context of the reality of the last decade. It is possible to state with certainty that the aggressive actions of the Russian Federation, which is a factual and legal successor of the Soviet Union, against Ukraine have gradually led to an intensification of the process of Ukrainian identity formation. Against this background, attention to the understanding of the national past is increasing. There is also a break with Russian approaches to the interpretation of history, which are generated at the level of state policy. Controversial issues of the joint Soviet past were widely used by the Russian Federation during the hybrid war (2014–2022) that preceded the Russian-Ukrainian war as a sort of first stage. Today, the protection of the historical memory of the Soviet period of history can and should be seen as an important component of Ukraine's national security strategy. It should be the factor that affects the overall strength of the state and all its institutions.

Unfortunately, ignoring this issue in the first decades of Ukraine's independence created a ground that is used in the current war against Ukraine. This is why the struggle about the past is a struggle for the future – a future in which there will be a place for current events and which will also form one of the components of the historical memory of the Ukrainian nation.

The protection of historical memory is a problem that can be solved using various means, among which criminal law has a special place. It is well known that criminal law is a kind of surgical tool in the hands of those who form public policy. Its use is a method of last resort when other means are no longer effective. In Ukraine, this tool is used to counteract the propaganda of the Communist and Nazi totalitarian regimes. The relevant criminal law was enacted almost a decade ago and is relatively in demand in the practice of criminal justice authorities.

This shows the *significance* of the research topic and its importance for the continuing development of Ukraine's criminal law policy in the field of historical memory protection.

The problem under consideration is to identify the policy of Ukraine on providing criminal protection to the historical memory regarding the victims and consequences of the Soviet regime at the legislative and law enforcement levels, and to assess whether there are proper (complete and sufficient) grounds for a criminal law response to violations in the relevant area. The study of this issue is the basis for improving the legal protection of historical memory, considering the way the current Russian-Ukrainian war is developing.

Academic study of the research issue. Criminal offences against historical memory have been the subject of study by many researchers. In Ukraine in particular, this issue has been investigated by

Y. Beklemishcheva, A. Vasiliev, S. Laba, L. Mostepaniuk, S. Mohonchuk, A. Pavlovska, O. Pyrozhenko, M. Khavroniuk, H. Yaremko, and other scholars.

The structure of the study starts with the analysis of the preconditions for criminal law in the field of the protection of historical memory through a brief overview of Ukraine’s Soviet past as the legacy of a totalitarian system (Section I). The next section draws conclusions from the findings in Section I and discusses additional arguments why the phenomenon of historical memory is a unique social value requiring the highest level of legal protection. Section III highlights the current approaches to the formation of Ukraine’s criminal law policy on the protection of historical memory concerning the victims and consequences of the Soviet regime, showing their advantages and disadvantages. This is used as a basis for studying the practice of applying Ukrainian criminal law to persons who committed offences against the historical memory of the victims and the consequences of the Communist totalitarian regime (Section IV). The study concludes with an issue related to the new challenges faced by Ukraine and many other European countries, in particular the countering of the spread of Russiaist ideology and its symbols (Section V).

I. The Soviet Past of Ukraine and Its Modern Reinterpretation as a Legacy of the Totalitarian System That Needs To Be Reflected in Historical Memory

The modern, prosperous country of Finland which, against the backdrop of the First World War and the fall of the Russian Empire, declared itself independent on December 6, 1917, managed to uphold its independence and continued to develop it, is the opposite of Ukraine which, at the most appropriate moment in history, also declared its independence on January 22, 1918. However, it eventually failed to retain it, as the Bolshevik-Ukrainian War (1917–1921), which was fought for control of the lands of Ukraine, resulted in the victory of the Russian Communist government and the destruction of the Ukrainian independent state by military means¹. Already in 1922, Ukraine became a part of a single united state — the Union of Soviet Socialist Republics — the future totalitarian regime that would be ruling the Ukrainian lands for almost seventy years². It was only on August 24, 1991, that the long-awaited restoration of Ukraine’s independence took place, and on the ruins of the Soviet Union, Ukraine was able to start writing a new chapter of its history.

¹ The historical parallels between the first de facto Russian-Ukrainian war and the current war, which began against Ukraine in 2014 with the invasion of Crimea, are very illustrative. See: Збройний опір УНР проти російської агресії / Український інститут національної пам’яті.

URL: <https://uinp.gov.ua/informaciyni-materialy/viyskovym/zbroynnyu-opir-unr-proty-rosiyskoyi-agresiyi>.

² Кульчицький С. В. СРСР, Союз Радянських Соціалістичних Республік / Енциклопедія історії України.

URL: <http://www.history.org.ua/?termin=SRSR>.

However, the mental disconnection from the Soviet past has turned out to be too difficult for Ukrainians. This proves once again that the ties of totalitarianism are strong and can influence the way people think and perceive the world. The social and economic decline in Ukraine, as well as in many other countries of the former Soviet Union, and the beginning of significant transformation processes, such as the launch of a free market economy, led to an aggravation of the social situation of citizens at the first stage of state-building. Considering the fact that former communists (or quasi-communists) used this to promote pro-Soviet ideas and mourn the Soviet past, their influence on public policy remained strong. Under such conditions, it is impossible to talk about the formation of a national historical memory that would adequately reflect all the atrocities of the totalitarian Soviet regime. Instead of condemning it, many Ukrainians continued to entertain nostalgia for the Soviet past in which they grew up, studied, and formed their worldview values.

Despite some progress on this issue during the term of President Viktor Yushchenko (2005–2010), the period since 2014 has been marked by the greatest dynamics of nation-building, identity formation and the creation of historical memory in general, and in particular of the Soviet totalitarian regime that acted on the territory of Ukraine during the 20th century. It quite naturally coincided with the beginning of the first stage of the Russian-Ukrainian war, during which elements of the joint Soviet past were used to spread collaborationism and justify aggression. By the way, it was during the years of 2014–2015 that the Communist Party of Ukraine was officially banned, due to the participation of its representatives in the hybrid war and the Russian Federation’s military actions against Ukraine.

Gradually, this process developed to the point that on December 13, 2022, the Law of Ukraine «On the Basic Principles of State Policy in the Field of Strengthening Ukrainian National and Civic Identity»³ was adopted. This piece of legislation considers the formation and implementation of state policy in the field of strengthening Ukrainian national and civic identity as a component of the national security of Ukraine and properly links Ukrainian national identity to a person’s strong awareness of belonging to the Ukrainian nation as an original community united, among other things, by historical memory.

The full-scale invasion of Ukraine by Russian troops that began on February 24, 2022, was a key trigger for such changes, not only at the political but also at the cultural level. The aggression of the enemy state, which is trying to push Ukrainians back into the past, along with the methods used to do so, has led many citizens to revise their opinion of the Soviet period of history. This statement is confirmed by the results of public surveys. In particular, in 2020, about one third of citizens ap-

³ Про основні засади державної політики у сфері утвердження української національної та громадянської ідентичності: Закон України / Верховна Рада України. URL: <https://zakon.rada.gov.ua/laws/show/2834-20#Text>.

proved the decision to condemn the Soviet Union as a totalitarian regime and a third disapproved⁴. By the beginning of 2023, the majority of Ukrainians in all regions (73 per cent) approved such a state decision, while at the same time evaluating positively the collapse of the Soviet Union⁵.

The politics of historical memory are an inextricable part of the socio-cultural and legislative landscape of the post-Communist world. In a region dominated for most of the 20th century by competing empires and totalitarian regimes, questions of remembrance and forgetting are at the heart of national debates⁶. It seems that the new phase of the war in Ukraine has seriously reduced the degree of these discussions, and the Ukrainian nation, perhaps for the first time in its history, has a unique chance to form a common vision of its Soviet past, different from what the Soviet authorities themselves once proposed and implemented, as well as from what is currently being developed by Russia, which demonstrates ambitions to restore the Soviet space by all possible means.

II. Why Does Historical Memory Need Criminal Law Protection?

Criminal law has never been known for its stability, especially in the case of states with an immature democracy taking their very first steps in the process of state-building and legal policy-making. Ukraine is one of these states, its legal development has been in constant transformation since the restoration of independence in 1991, first as a result of the transition from the Soviet legal model and later due to the start of the Russian-Ukrainian war.

In the field of criminal law policy, this was seen in the constant attempts to create the best possible system of prohibitions. As a result, the Criminal Code of Ukraine, adopted in 2001, was regularly updated with various amendments and additions. Among them, many criminalised new forms of seriously harmful behaviour. Unfortunately, such criminalization has not always been both socially and lawfully reasonable. Instead, the task of criminal law policymakers is to make sure that criminalization is not random, subjective, and inconsistent.

As it is known, to contribute to this task, experts have developed universal criteria that should guide the establishment of criminal liability (or vice versa, of exclusion)⁷. Only criminalization based

⁴ The sixth year of decommunization: the attitude of Ukrainians toward prohibition of symbols of the totalitarian past / Ilko Kucheriv «Democratic Initiatives» foundation (24 July 2020). URL: <https://dif.org.ua/en/article/the-sixth-year-of-decommunization-the-attitude-of-ukrainians-toward-prohibition-of-symbols-of-the-totalitarian-past>.

⁵ Засудження СРСР, дерусифікація, Майдан – як змінюється ставлення українців до політики національної пам’яті на тлі російської агресії / Фонд «Демократичні ініціативи» ім. Ілька Кучеріва (20 січня 2023 р.). URL: <https://dif.org.ua/article/zasudzhennya-srsr-derusifikatsiya-maydan-yak-zminyuetsya-stavlennya-ukraintsiv-do-politiki-natsionalnoi-pamyati-na-tli-rosiyskoi-agresii>.

⁶ History, memory and the politics of history / *Wilson Center*. URL: <https://www.wilsoncenter.org/collection/history-memory-and-politics-history>.

⁷ In this paper, the approaches outlined by M. Khavroniuk will be used: Dudorov, O., and Khavroniuk M. *Kryminalne pravo: navchalnyi posibnyk* (Textbook on Criminal Law). Kyiv: BAITE, 2014 (in Ukrainian).

on these criteria (the doctrine of criminalization) can be considered scientifically grounded and become the implementation of evidence-based criminal law policy.

This raises the question: does behaviour that offends social values related to the protection of historical memory need to be criminalised? It does. After all, the devaluation, desacralization, and deformation of the Ukrainian „culture of memory,“ as it rightly follows from the abovementioned law, is a factor that directly affects the national security interests of Ukraine, that is, national interests that are protected only at the level of criminal law, as their implementation provides for the state sovereignty of Ukraine and its progressive development⁸.

In this argument, an attack on the national security interests of Ukraine in the field of historical memory shows that there is a proper basis for criminalization that is reasonably associated with the ability to cause significant harm to the object of criminal law protection. Historical memory, as a component of the national security of the state, must be protected by using the resources of criminal law.

This approach is shared by many European countries, each of which chooses its own way of protecting historical memory using criminal law. Without going deeper into this aspect, it would be reasonable to draw attention to some examples.

In particular, the policy of Lithuania is stable and consistent in countering the propaganda of totalitarian and authoritarian regimes and their ideologies. Moreover, in the light of the Russian-Ukrainian war, this policy is transforming and becoming stricter. Commenting on the recent legislative changes in this area, one of the Lithuanian members of parliament notes that historians, when discussing the causes of the Russian-Ukrainian war, emphasise the poorly understood ideology of Communism and the red dictators, who were never convicted for their crimes. That is why it is necessary to achieve full clarity about the Communist past and get rid of the romanticization of totalitarian regimes, considering them an essential evil⁹. As we focus on the criminal law, it should be noted that the Criminal Code of Lithuania criminalises the public approval, denial, or justification of international crimes, crimes committed by the Soviet Union or Nazi Germany (Art. 170-2). The maximum penalty for committing these offences is two years' imprisonment¹⁰.

⁸ In addition, criminal law policymakers intending to criminalise a certain behaviour must first collect and assess information on the spread of this behaviour, make a forecast of the consequences of the introduction of a criminal prohibition, and develop a draft law on the criminalization of relevant conduct, taking into account the achievements of legal science.

⁹ Gegužės 1-ąją įsigalioja viešųjų erdvių desovietizacijos įstatymas / Lietuvos Respublikos Seimas (2023 m. balandžio 28 d.). URL: https://www.lrs.lt/sip/portal.show?p_r=35403&p_k=1&p_t=284659.

¹⁰ Lietuvos Respublikos baudžiamasis kodeksas / Infollex. URL: <https://www.infollex.lt/ta/66150:str170-2>.

Another relevant example is found in the criminal law of Hungary which, in a similar way, establishes criminal liability for the public denial of crimes committed by both the National Socialist and Communist regimes. Such acts are punishable by up to three years' imprisonment¹¹.

In Ukraine, the decision to criminalise some types of attacks on historical memory was first made in 2014. Later, the scope of criminalization was widened. However, unfortunately, despite the reasonableness of the regulatory intention, its implementation was not carried out perfectly. The following part of the study will deal with the issues showing the current state and stages of development of criminal legislation in this field.

III. Current Criminal Law Policy of Ukraine to Protect Historical Memory (Concerning Victims and Consequences of the Soviet Regime): A Study of the State of Legislation and Its Genesis

One of the first steps aimed at providing criminal legal protection of historical memory was the decision to criminalise the public denial or justification of the crimes of fascism, the propaganda of neo-Nazi ideology, and the production and/or distribution of materials justifying the crimes of fascists and their supporters (Article 436-1 of the Criminal Code of Ukraine)¹². This decision was adopted at the peak of the Revolution of Dignity and mainly reflected the pro-Russian political position of the then-ruling elite¹³. As a result, the concept of historical memory protected by criminal law was actually similar to the official position of the Russian regime.

The relevant criminal law provision was constructed in a way that artificially limited the scope of liability, reducing it to actions related only to the propaganda of Nazism as a hateful ideology. At the same time, an equally criminal ideology had been particular to the Soviet regime, especially in the period of Stalin's rule.

In view of the changes in government that took place after the Revolution of Dignity, a year later, Ukraine adopted the Law «On the Condemnation of Communist and National Socialist (Nazi) Totalitarian Regimes in Ukraine and the Prohibition of Propaganda of Their Symbols». The preamble to this law states that it was adopted with the view of restoring historical and social justice and pre-

¹¹ 2012. évi C. Törvény a Büntető Törvénykönyvről / Wolters Kluwer Hungary Kft.

URL: <https://www.facebook.com/wolterskluwerhu>.

¹² Про внесення зміни до Кримінального кодексу України щодо відповідальності за заперечення чи виправдання злочинів фашизму: Закон України / Верховна Рада України. URL: <https://zakon.rada.gov.ua/laws/show/735-18#n5>.

¹³ It should also take into account the previous attempts of the communists who were members of the parliament to impose a false and completely one-sided view of the events of the past, ignoring Soviet atrocities. Finally, this approach was put into practice (Осіб, що заперечують злочини фашизму і сталінізму, пропонують штрафувати / ЮрЛіга (17 вересня 2012 р.).

URL: https://jurliga.ligazakon.net/news/72412_osb-shcho-zaperechuyut-zlochiny-fashizmu--stalnzmu-proponuyut-shtrafuvati).

venting the repetition of both the crimes of the National Socialist (Nazi) and Communist totalitarian regimes.

This law amended Article 436-1 of the Criminal Code of Ukraine, too, establishing liability for the production and distribution of Communist and Nazi symbols, and propaganda of Communist and National-Socialist (Nazi) totalitarian regimes¹⁴. The content of this provision refers to acts defined in four alternative forms: 1) the production of symbols of the Communist and National-Socialist (Nazi) totalitarian regimes; 2) spreading these symbols; 3) their public usage; 4) public performance of the anthems of the Soviet Union (as well as its republics) or their parts¹⁵.

Attention should be given to the fact that this criminal law provision, which has remained in force until today, is similar to the prohibition in § 86 a of the German Criminal Code (*Strafgesetzbuch*)¹⁶. This norm criminalises the spreading, production, public use, and other acts concerning illegal symbols which include, among others, Nazi and Communist symbols.

Amendments to Article 436-1 of the Criminal Code of Ukraine have resulted in a better balance of the prohibition, which reflects a more just approach to the fateful events of the bygone 20th century and their memory in Ukrainian society. Criminal liability may be imposed regardless of the nature of the ideology propagated¹⁷. At the same time, this provision is not without several other flaws¹⁸ which, most importantly, have not yet been resolved.

After the full-scale invasion of Ukraine by Russian troops, the scope of criminal law protection of historical memory expanded with the adoption of the Law of Ukraine «On Amendments to Several Legislative Acts of Ukraine on Strengthening Criminal Liability for the Production and Distribution of Prohibited Information Products»¹⁹. This law updated the Criminal Code of Ukraine with Article 436-2, which provides criminal liability for justifying, recognising as lawful, or denying the armed

¹⁴ Про засудження комуністичного та націонал-соціалістичного (нацистського) тоталітарних режимів в Україні та заборону пропаганди їхньої символіки: Закон України / Верховна Рада України.
URL: <https://zakon.rada.gov.ua/laws/show/317-19#n73>.

¹⁵ Комарницький В. М., Письменський Є. О. Підстава кримінальної відповідальності за пропаганду комуністичного та націонал-соціалістичного (нацистського) тоталітарних режимів (загальна характеристика). *Вісник Луганського державного університету внутрішніх справ імені Е. О. Дідоренка*. 2015. № 3. С. 125 – 127 (С. 122 – 131). URL: <https://luhbulletin.dnuvs.ukr.education/index.php/main/issue/view/38/37>.

¹⁶ Verwenden von Kennzeichen verfassungswidriger und terroristischer Organisationen (§ 86a) / Strafgesetzbuch (StGB). URL: https://www.gesetze-im-internet.de/stgb/_86a.html.

¹⁷ Between 1917 and 1991, the Communist and National-Socialist (Nazi) totalitarian regimes conducted a policy of state terror on the territory of Ukraine, characterised by numerous human rights violations. These words begin the explanatory note to the draft law amending Article 436-1 of the Criminal Code of Ukraine (Про засудження комуністичного та націонал-соціалістичного (нацистського) тоталітарних режимів в Україні та заборону пропаганди їх символіки: проект Закон України (№ 2558 від 06.04.2015) / Верховна Рада України.
URL: https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_2?pf3516=2558&skl=9).

¹⁸ Письменський Є. О. Кримінально-правова охорона національної та історичної пам'яті: плутаний шлях законодавця. *Вісник Асоціації кримінального права України*. 2015. № 1 (4). С. 267 – 270 (С. 253 – 271).

¹⁹ Про внесення змін до деяких законодавчих актів України щодо посилення кримінальної відповідальності за виготовлення та поширення забороненої інформаційної продукції: Закон України / Верховна Рада України.
URL: <https://zakon.rada.gov.ua/laws/show/2110-20#n20>.

aggression of the Russian Federation against Ukraine (started in 2014), and glorifying its participants. As we can see, the new criminal law provision is aimed at protecting both contemporary national memory and historical memory, but only in the context of the events of the Russian-Ukrainian war. It seems obvious that this context should be expanded to cover other equally significant historical events of Soviet times, in particular the public denial or justification of the crimes of the totalitarian Communist regime that governed Ukraine when it was part of the Soviet Union. A similar approach, based on liability for propaganda of totalitarian ideology in general or of banned parties or organisations in particular, is applied in practice in various member states of the European Union, including the ones mentioned above.

All this said, it should be noted that propaganda of prohibited (hateful) ideologies and the justification of crimes committed by their representatives should form a separate ground for criminal liability. After all, such behaviour can provoke hatred between people, disgrace the historical memory of crucial events of the past, and create good conditions for committing serious crimes in future, including the crime of aggression. In Ukraine, this is particularly urgent in the case of honouring the memory of the numerous victims of the Soviet totalitarian regime, an attitude which is becoming increasingly non-compromising in Ukrainian society.

IV. Practice of Application of Criminal Law Against Offenders Having Committed Acts Against the Historical Memory of the Victims and Consequences of the Communist Totalitarian Regime

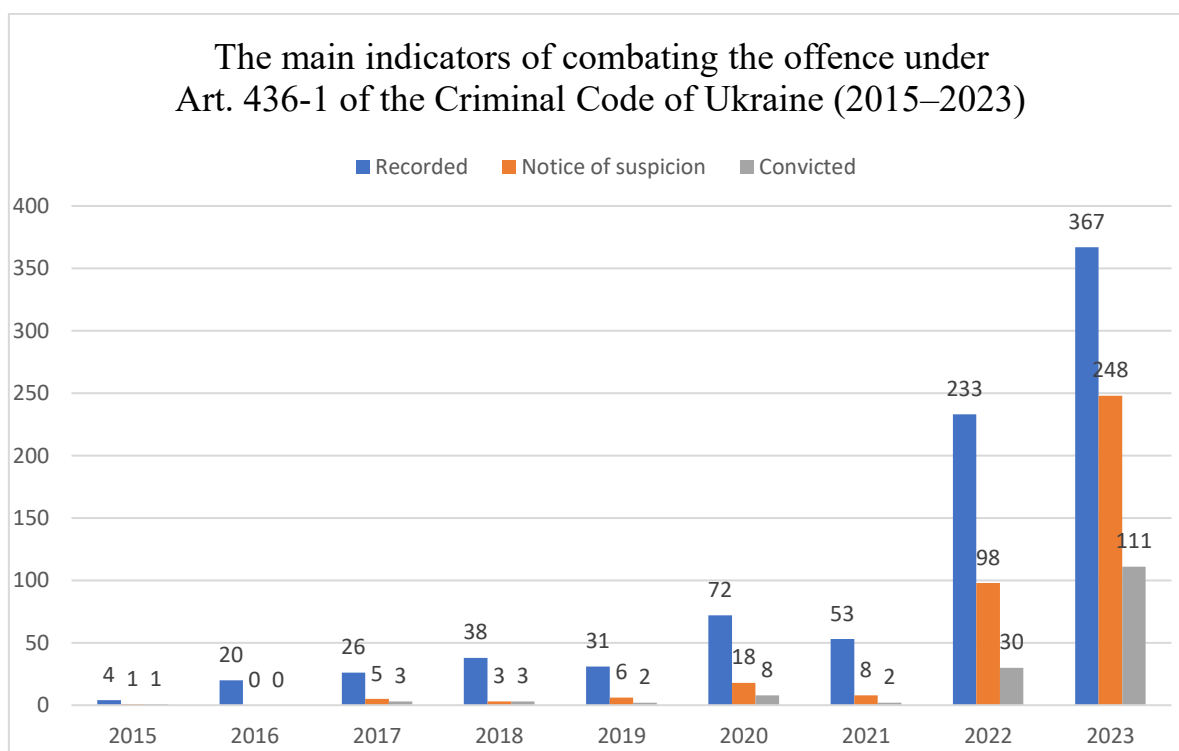
The criminal law provision under Article 436-1 of the Criminal Code of Ukraine which is aimed at the protection of the historical memory of the victims and consequences of the Communist totalitarian regime, is applied in law enforcement agencies on a quite limited scale. Its importance in the field of law enforcement can be seen in criminal statistics which record basic data on the number of registered criminal offences, the number of suspicions of committing a criminal offence, and the number of convicted persons²⁰.

These data show that every year since 2015, the number of criminal offences under Article 436-1 of the Criminal Code of Ukraine increased until 2022, when there was a real splash. There is no doubt that this situation is due to the beginning of the second phase of the Russian-Ukrainian war on February 24, 2022. In addition, this confirms once again that the war is not only about the right to an independent existence, independence, or territorial integrity but also about historical memory. For

²⁰ Unified Report on Criminal Offences of the Office of the Prosecutor General (Form 1); Report of the State Judicial Administration of Ukraine on Persons Prosecuted and Types of Criminal Punishment (Form 6).

many years, the Russian regime has been doing everything possible to deform this memory, distort historical facts, and make people believe that the Soviet period of coexistence does not deserve condemnation. The relevant influence was spread by all available tools to the citizens of Ukraine, many of whom tolerated the Soviet past and even missed it.

A similar rise can be observed in the case of persons suspected of committing a crime under Article 436-1 of the Criminal Code of Ukraine, as well as persons convicted of committing it. In particular, it is worth paying special attention to the past year of 2023 (a full calendar year during which the high-intensity war lasted). In that year, out of 100 per cent of all recorded acts, persons were suspected of committing the crime in 68% of the cases, and in 30% of the total number of recorded crimes under Art. 436-1 of the Criminal Code of Ukraine, these persons were convicted by a court of law. Remarkably, since the establishment of criminal liability for propaganda of Communist and National-Socialist symbols, not a single acquittal (0%) has been passed, given that in general, 0.3% of all criminal offences have been recorded as such.



Next, using the resources of the United State Register of Court Decisions, an attempt will be made to analyse the sentences under Article 436-1 of the Criminal Code which were delivered after the full-scale invasion of Ukraine by Russian troops (2022-2024), considering that it was during that period when the numbers of this crime sharply increased.

Firstly, the absolute majority of sentences convicting perpetrators of a crime under Article 436-1 of the Criminal Code relate to the propaganda of the Communist totalitarian regime. In particular, out of the sixteen sentences reviewed, which were delivered in 2024 (January–March), none con-

cerned propaganda of the Nazi totalitarian regime. Such data firmly disprove the Russian authorities' claims that they are fighting a «neo-Nazi regime» or «Nazis» in Ukraine, whom they blame to control the Ukrainian government. According to Timothy Snyder, Russian propaganda uses a special definition of the word «Nazi»: «A Nazi is a Ukrainian who refuses to recognise himself as a Russian»²¹.

Secondly, the absolute majority of sentences convicting individuals for propaganda of the Communist totalitarian regime are of the same type and involve the sharing and publication of the symbols of this regime on social media. In particular, out of sixteen available and published sentences under Article 436-1 of the Criminal Code, delivered between January and March 2024, fourteen, or 87%, have this factual basis in common. The only differences concern the social medium, the type of symbols, and the number of shares.

The following example may illustrate the factual circumstances of such crimes. A person was convicted of spreading Communist symbols (part 1 of Art. 436-1 of the Criminal Code of Ukraine) because he clicked on the «like» and «share» functions on his page with free access to viewing by other users, in the «Feed» section of the Russian social network «Odnoklassniki» where he posted, among others, an image of the emblem of the Soviet Union in combination with the Soviet five-pointed star and the hammer and sickle, an image of the territory of the Soviet Union with the following text in Russian: «We were born in the USSR! If you were born in the USSR, give us a 'LIKE'!!!», an image of the emblem of the Soviet Union with the words in Russian: «I am not ashamed that I was born in the Soviet Union; I do not condemn the Soviet seventy years; on the contrary, I have always been very proud of the fact that light has appeared in the great state», images of the Soviet party leaders with the Soviet emblems, and images of Soviet Union banknotes with the five-pointed star, hammer and sickle symbols²².

Other actions, which represent a minority of the cases studied, are reflected in the following behaviour: posting leaflets with the image of a crossed hammer and sickle²³; creating an advertisement on a website for the sale of a flag with the words «Transitional flag for high achievement in the socialist competition» on one side, on the red background, with the USSR emblem, which reproduces the combination of hammer and sickle and five-pointed star; and Vladimir Lenin's portrait and slogans, with two colour photographs showing the relevant symbols²⁴.

²¹ Snyder T. Russia's genocide handbook / *Thinking about* (April 08, 2022).

URL: <https://snyder.substack.com/p/russias-genocide-handbook?s=r>.

²² Vyrok Zarichnenskoho raionnoho sudu Rivnenskoï oblasti vid 18 bereznia 2024 r. u spravi № 561/403/24 [Sentence of the Zarichna District Court of Rivne region]. *Yedynyi derzhavnyi reiestr sudovykh rishen*.

URL: <https://reyestr.court.gov.ua/Review/117731015> [in Ukrainian].

²³ Vyrok Solom'ianskoho raionnoho sudu m. Kyieva vid 14 liutoho 2024 r. u spravi № 760/19637/22 [Sentence of the Solomianskyi District Court of Kyiv]. *Yedynyi derzhavnyi reiestr sudovykh rishen*.

URL: <https://reyestr.court.gov.ua/Review/117002048> [in Ukrainian].

²⁴ Vyrok Buskoho raionnoho sudu Lvivskoi oblasti vid 10 sichnia 2024 r. u spravi № 943/2025/21 [Sentence of the Busk District Court of Lviv Region]. *Yedynyi derzhavnyi reiestr sudovykh rishen*.

Thirdly, it is worth noting that committing a crime under Article 436-1 of the Criminal Code in some cases precedes other similar crimes related to the violation of historical and national memory, such as under Article 436-2 of the Criminal Code («Justification, recognition as lawful, or denial of the armed aggression of the Russian Federation against Ukraine, glorification of its participants»). As an example, in one of the cases, the convicted person first, in 2021 and early 2022, systematically committed propaganda of the Communist totalitarian regime, in particular published prohibited symbols of the Communist totalitarian regime in the form of an image of the state flag of the USSR, attributes that reproduce the combination of a hammer and sickle, a five-pointed star etc, on the Odnoklassniki social network. After the Russian invasion of Ukraine, he continued his criminal activities, committing acts related to justifying, recognising the lawfulness, and denying the armed aggression of the Russian Federation. He also used social media to share a series of publications on his page that justified or denied Russian aggression against Ukraine and glorified the aggressor²⁵.

In other words, as we can see, the spread of Communist totalitarian ideology or relevant symbols can be combined with other crimes against national security, in particular collaboration or related crimes against international peace, one of which was shown in the example. In this case, the propaganda of Communist totalitarian ideology is some kind of precondition for further criminal loyalty to the enemy.

Fourthly, unfortunately, the practice of applying Article 436-1 of the Criminal Code is not faultless. Its study shows that in some cases, criminal liability for propaganda of the Communist totalitarian regime occurs in the absence of an *actus reus* (this problem deserves separate consideration), or the established act bears signs of insignificance (part 2 of Article 11 of the Criminal Code of Ukraine). The situation of insignificance can be illustrated by the following example. A person was convicted of committing an offence under part 1 of Article 436-1 of the Criminal Code for sharing the symbols of the Communist totalitarian regime in the form of images of Leonid Brezhnev, the state emblem of the USSR, and the state flag of the USSR by pressing the „Like“ button and using them on his public page on the social network Odnoklassniki²⁶. It is doubtful whether such acts amount to the proper level of social harmfulness typical of any crime, unless they are committed systematically over a relatively long period.

Immediately after the introduction of criminal liability for the use of Communist and Nazi symbols in 2015, the following warning was made by me: the necessity of criminalising the public use of

URL: <https://reyestr.court.gov.ua/Review/116226468> [in Ukrainian].

²⁵ Vyrok Novovodolazkoho raionnoho sudu Kharkivskoi oblasti vid 01 bereznia 2024 r. u spravi № 631/1166/23 [Sentence of the Novovodolazhsky District Court of Kharkiv Region]. *Yedynyi derzhavnyi reiestr sudovykh rishen*.

URL: <https://reyestr.court.gov.ua/Review/117384519> [in Ukrainian].

²⁶ Vyrok Rivnenskoho miskoho sudu vid 08 bereznia 2024 r. u spravi № 569/4103/24 [Sentence of the Rivne City Court]. *Yedynyi derzhavnyi reiestr sudovykh rishen*. URL: <https://reyestr.court.gov.ua/Review/117574512> [in Ukrainian].

such symbols is questionable. The nature and degree of public danger do not seem to be sufficient for this kind of behaviour to be criminalised. At least, such conduct can be considered criminal only with the use of media. In addition, unfortunately, Ukrainian law enforcement agencies do not always have a proper understanding of the provision on the insignificance of an act (part 2 of Article 11 of the Criminal Code), which may lead to the criminal prosecution of persons who could not and did not cause any significant harm²⁷. The study of the practice of applying this criminal law provision has confirmed that the concerns expressed at the time were not groundless.

Fifthly, the analysis of the scope of criminal liability faced by persons convicted of an offence under Article 436-1 of the Criminal Code cannot be left without consideration²⁸. The practice of its application in the context of this issue demonstrates an interesting trend. Out of the sixteen sentences delivered in 2024 as of April 1, only one provided for imprisonment with real execution. However, this punishment was imposed in combination with more serious crimes. In the remaining sentences, a person was sentenced to a punishment less severe than the sanction under Article 69 of the Criminal Code (two sentences), or the person was released from serving a sentence with the possibility of probation (thirteen sentences). In more than half of the cases (nine sentences), plea agreements were concluded.

Currently, part 1 of Article 436-1 of the Criminal Code of Ukraine is classified as a minor offence with a maximum penalty of five years' imprisonment. Even a fragmentary study of the current (this year's) practice shows that the level of its gravity is too high. Court practice does not tolerate it at all, imposing punishment that is not directly related to imprisonment or does not lead to its real serving (probation). That is why the illegal actions currently covered by part 1 of Article 436-1 of the Criminal Code related to the propaganda of Communists, Nazis, and, possibly, other symbols should be considered a minor crime. This type of criminal activity under the Criminal Code does not provide for punishment involving imprisonment.

V. Countering the Propagation of Russiaist Ideology and its Symbols: a New Challenge for Criminal Law

As has been established, the current Russian-Ukrainian war has significantly raised the issue of the legal protection of historical memory in Ukraine. Ukrainian society is transforming into a single po-

²⁷ Письменський Є. О. Кримінально-правова охорона національної та історичної пам'яті: плутаний шлях законодавця. *Вісник Асоціації кримінального права України*. 2015. № 1 (4). С. 268 (С. 253 – 271).

²⁸ The sanction of Part 1 of Article 436-1 of the Criminal Code of Ukraine (the basic offence without aggravating circumstances) provides for punishment in the form of restriction of liberty for up to five years or imprisonment for the same term, with or without confiscation of property.

litical nation that already has a more definite attitude towards the Soviet totalitarian past. This attitude is becoming more and more negative because, against the context of Russian aggression which has been going on for three years without end, there is a real opportunity to observe the methods by which Russian supporters of the Soviet past are trying to restore it on the territory of a democratic state whose people peacefully lived together until 2014.

The present-day Russian ideology, which has become dominant under the rule of dictator Vladimir Putin, is indeed based on the ideology of the former Soviet regime and largely reproduces it. Indeed, the Russian authorities are increasingly using similar methods of governing the country, acting autocratically and using the tactics of repression and terror tested by the Bolsheviks. In V. Viatrovych's opinion, if Russia had fully decommunized in time, the state would have lost its imperial ambitions, which would most likely have made the Russian-Ukrainian war impossible²⁹.

V. Putin himself stated his desire to restore the former Soviet empire, or something like that, in his public speeches regarding the collapse of the Soviet Union which, in his opinion, had been the greatest geopolitical tragedy of the 20th century³⁰. On February 24, 2022, by carrying out an unprovoked armed attack on the territory of an independent state, he tried to put his plans into practice to force an updated ideology of the old type, called Russiaism, on Ukrainians. This is the latest version of «Russian fascism», which can also be called Putinism, i.e., modern [Russian] fascism-totalitarianism, which represents state theory and practice³¹.

On May 2, 2023, the Ukrainian Parliament adopted the Statement of the Verkhovna Rada of Ukraine «On the use of the ideology of Russiaism by the political regime of the Russian Federation, condemnation of the principles and practices of Russiaism as totalitarian and human-hating», which defines the characteristics and consequences of Russiaism and offers the following understanding of it: a new kind of totalitarian ideology and practices that underlie the regime formed in the Russian Federation under the leadership of V. Putin and are based on the traditions of Russian chauvinism and imperialism, the practices of the Communist regime of the Soviet Union, and National-Socialism (Nazism)³². Experts, journalists, and academics use similar approaches in their studies³³.

²⁹ За збереженням советського стоїть бажання відновити советське (інтерв'ю) / *Високий замок* (16 вересня 2020 р.). URL: <https://wz.lviv.ua/interview/420505-za-zberezhenniam-sovietskooho-stoit-bazhannia-vidnovyty-sovietske>.

³⁰ Розпад СРСР став для Путіна найважливішою подією в житті / *Дзеркало тижня* (21 липня 2017 р.). URL: https://zn.ua/ukr/WORLD/rozpad-srsr-stav-dlya-putina-nayvazhlivishoyu-podiyeyu-v-zhitti-249210_.html.

³¹ Що таке рашизм? / *Український інститут національної пам'яті*. URL: <https://uinp.gov.ua/informaciyni-materialy/rosiysko-ukrayinska-viyna-istorychnyy-kontekst/istorykunya-larysa-yakubova-shcho-take-rashyzm>.

³² Про Заяву Верховної Ради України «Про використання політичним режимом російської федерації ідеології рашизму, засудження засад і практик рашизму як тоталітарних і людиноненависницьких»: Постанова / Верховна Рада України. URL: <https://zakon.rada.gov.ua/laws/show/3078-IX#Text>.

³³ Snyder T. The War in Ukraine Has Unleashed a New Word / *The New York Times* (April 22, 2022). URL: <https://www.nytimes.com/2022/04/22/magazine/ruscism-ukraine-russia-war.html>; Енн Еплбаум: Путін пропонує лише продовження війни / *BBC News Україна* (7 вересня 2022 р.). URL: <https://www.bbc.com/ukrainian/features-62796829>; Лавришин Ю. Рашизм як явище. Від мему до наукового та юридичного терміна / *Детектор медіа* (28 травня 2023

These approaches quite reasonably reflect the similarities between Communism, Nazism, and Russiaism, which are equally hateful ideologies. The crimes committed in the 20th century and those being committed now in the 21st, based on the relevant ideology, are linked. Ukrainians have suffered and continue to suffer under each of these totalitarian regimes. For the sake of Russiaism, the Russians are committing without cessation the most terrible international crimes.

It follows that there is a need to unify the approaches of criminal law policymakers to provide criminal law protection of historical and national memory, as well as to prevent the most serious crimes of present times. These actors should consider countering the propaganda of Russiaist ideology, treating it in the same way as Nazi and Communist ideology. In particular, criminal liability should be a consequence not only of the public denial of the crimes of the National Socialist and Communist regimes but also of the Russiaist regime. The same is true for committing several actions such as the production, spreading, public use, etc. in relation to symbols that reflect Russiaism, for example, the Latin letter «Z» which in Russia, like the swastika in Nazi Germany, has become a sign of support for the military attack on Ukraine. As the researchers rightly point out, it is now a well-established fact that the Russian symbol «Z» is a sign of war. It is a symbol of genocide, death, cruelty, and aggression. This letter is displayed on the occupiers' military equipment, public transport, and buildings, shaved on their heads, etc.³⁴.

In summary, the forward-looking development of criminal legislation in Ukraine regarding the proper protection of historical and national memory is to amend it as follows:

1. The responsibility for justifying and recognising as lawful the armed aggression of the Russian Federation against Ukraine and the glorification of its participants, provided for in Article 436-2 of the Criminal Code of Ukraine, should be transformed into a responsibility for justifying and denying the crimes of the National-Socialist, Communist, and Russiaist totalitarian regimes. This means that the scope of this criminal law clause should be widened to include anyone who propagates hateful ideologies, regardless of their nature, historical period, or other features.

2. The liability for actions related to the spread or use of Communist or Nazi symbols provided for in Article 436-1 of the Criminal Code of Ukraine should be transformed into a liability for actions related to the spread or use of any symbols reflecting the core of the following ideologies: Communist, Nazi, and Russiaist. However, the relevant behaviour should be a minor crime, not a criminal offence, given the relatively low level of social harm. The results of the analysis of law enforcement practice confirm this conclusion.

p.). URL: <https://ms.detector.media/trendi/post/32063/2023-05-28-rashyzm-yak-yavyshche-vid-memu-do-naukovogo-ta-yurydychnogo-termyna/>.

³⁴ Черкасець О. Історія «Z» – світлий символ рашисти перетворили на знак смерті / *Україна молода* (11 травня 2022 р.). URL: <https://umoloda.kyiv.ua/number/0/196/166241>.

Conclusions

1. After the restoration of independence in 1991, Ukrainian society gradually changed its attitude towards the Soviet period of history from positive to negative. These changes were given a significant impact by the war that the Russian Federation started against Ukraine in 2014, which is full of Soviet meanings.

2. For modern Ukraine, historical memory in general, and especially that of the Soviet past, becomes particularly important in the context of the process of building a Ukrainian political nation, and this process is complicated by the war. In this regard, providing criminal legal protection of historical memory is the task of the Ukrainian Government, which it performed in 2015 by introducing liability for committing illegal actions about Communist and Nazi symbols (Article 436-1 of the Criminal Code of Ukraine). At the same time, the relevant criminal law provision is characterised by several obvious flaws, the correction of which is long overdue for its more effective enforcement.

3. Taking into account the experience of some East European countries, there is a need to widen the scope of criminal law protection of historical memory by establishing liability for propaganda of prohibited (hateful) ideologies and justification of crimes committed by their carriers.

4. A study of the practice of countering attacks on historical memory in Ukraine has shown that actions against communist symbols are mostly recorded. Most of these acts are of the same type and take place on the internet. After the beginning of the second phase of the war (February 24, 2022), a practice has been developing where the crime under part 1 of Article 436-1 of the Criminal Code of Ukraine is prosecuted in combination with another crime against historical (and national) memory under Article 436-2 of the Criminal Code, on liability for denying the Russian aggression, etc. In addition, the punishment provided for in Article 436-1 of the Criminal Code is not appropriate to the actual level of public danger as established by judges.

5. The criminal law reaction should include not only the public denial of the crimes of the National Socialist and/or Communist regimes but also of the Russiaist regime. The same reaction is required for behaviour involving the production, spread, public use, etc. of symbols reflecting Russiaism.

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